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Family Law Legislation Amendment (Superannuation) Bill 2000

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Family Law Legislation Amendment (Superannuation) Bill 2000

Date Introduced: 13 April 2000

House: House of Representatives

Portfolio: Attorney-General

Commencement: The substantive provisions commence on the first anniversary of the date of Royal Assent

Purpose

To amend the *Family Law Act 1975* and other legislation to enable superannuation interests to be divided on marriage breakdown either by agreement or court order.

Background

Divorce and matrimonial property

The *Family Law Act 1975* (the Principal Act) creates a statutory regime governing matters such as divorce, residence and contact,[1] spousal and child maintenance, and the distribution of property following separation or divorce.

Decisions about a couple's property and spousal maintenance may be made in a number of ways. Couples may make their own informal arrangements, register a written agreement with the Family Court under section 86 of the Principal Act, make a final settlement relating to property and spousal maintenance under section 87 or apply for consent orders under section 79. They may also ask the Family Court to make property or spousal maintenance orders under sections 79 and 72 respectively of the Act.[2] Under section 79, the Family Court has the power to make such property orders as it considers just and equitable.

However, as a recent family law text states:

> Section 79 of the Family Law Act (together with s 75(2)) makes an important distinction between three sources of wealth, all of which may be considered in

> deciding the manner in which the property of the parties should be divided, but only one of which may be the subject of orders. The three sources of wealth are:
>
> - income
> - property
> - financial resources.
>
> These may be considered under section 79 … However, only "property" may be the subject of an order under section 79 …
>
> … The legal distinction between property and financial resources becomes of great importance where the value of the property is low but there are substantial resources which cannot be made the subject of court orders. In such cases, the amount which may be claimed by one party will be limited to the existing property unless other means can be found to enlarge the pool of assets available for distribution … An alternative approach is to seek an adjournment of proceedings if property is likely to fall into possession at a later date. [3]

In many cases, the superannuation interests of a party to a marriage may be an important asset but are not characterised by the Family Court as property on the grounds that they have not yet legally vested in the holder of the superannuation policy.[4] Generally speaking, a superannuation fund is a trust. The trustee of the fund is the legal owner of the fund's assets and administers the fund according to the terms of the trust deed. Fogarty J said in *In Marriage of Crapp (No 2)*:

> It appears to me that generally an interest in a superannuation fund or the like is not "property" as defined in s 4 of the Family Law Act or not at all. It is normally a contingent interest only; until he [the holder of the superannuation policy] actually receives it in his hands he has no control over it; he is unable to alienate it in the meantime and in the event of his death prior to retirement the right does not form part of his estate.[5]

Dealing with superannuation in family law matters

Approaches adopted by the Family Court

Where parties cannot agree about how to divide their assets, it may fall to the Family Court to make orders. The Court has adopted a number of approaches to superannuation and its valuation but has no decided policy on which approach is preferred.[6] Its approaches were summarised by Purvis J in *Webber and Webber* as follows:

- 'a needs approach'. Under this approach if the Court is satisfied that the future retirement of a party (usually the wife) is adequately provided for, the existence of the husband's superannuation will not be considered in making a property order.

- 'a take into account approach'. Under this approach a superannuation entitlement is 'a factor to be taken into account in an unspecified manner and in a general sense.'[7]

- 'a realisable value approach'. Under this approach a mathematical formula is employed to calculate a party's interest in a superannuation entitlement with reference to the period of cohabitation over which the superannuation contributions were made, the amount available at the dates of separation and hearing, 'and applying to such entitlement a contribution percentage similar to the percentage relevant to the realisable assets of the parties.'[8]

- a deferral approach. Under this approach the same sort of mathematical formula is applied but the Court either defers making an order until the superannuation entitlement vests or adjourns the proceedings until that time.

- a discounted prospective benefits approach. This approach also employs a mathematical formula based on a likely payout figure on retirement discounted by present value and factors such as possible death, early retirement or loss of employment.[9]

Other difficulties

In addition to the uncertainty these different approaches have generated, other significant problems may be encountered when superannuation is dealt with in the context of divorce. First, there are limits to the usefulness of particular approaches adopted by the judges. For example, the 'needs' approach requires sufficient present property to satisfy the needs of the non-member spouse. The deferral approach is impracticable if the superannuation entitlement is unlikely to vest for some time.[10]

Second, many different types of superannuation scheme exist. The two major types are accumulation schemes and defined benefits schemes—although some accumulation schemes exhibit some of the features of defined benefits schemes.[11]

In an accumulation scheme 'the benefit is directly related to the level of contributions and the investment performance of the fund'.[12] In a defined benefit scheme members have a 'specified level of benefit (either a lump sum, a pension or a combination of both) based upon years of service with an employer and salary levels prior to retirement, as well as contributions and investment earnings'. Public servants are often members of defined benefit schemes.

How superannuation might be taken into account will depend on what sort of superannuation scheme is involved and whether the superannuation interest is in the accumulation or benefits phase.

Other difficulties were summarised in a 1998 Position Paper released by the Government and include:

- determining the value of superannuation interests—especially in defined benefit schemes where the value of the final benefit depends on events (like retirement age) which may take place after the parties separate

- provisions in the *Superannuation Industry (Supervision) Act 1993* which prohibit the transfer of superannuation interests between spouses[13]

- restrictions on the powers of the Family Court to make orders affecting third parties—such as the trustees of a superannuation fund.

The existing powers of the Family Court and possible constitutional restrictions on the power of the Commonwealth to deal effectively with the superannuation interests of divorcing or separating couples have been the subject of much discussion and some disagreement.[14]

The Constitution

Reform of family law in the context of superannuation impacts on the rights of third parties (ie the trustees of superannuation funds). The power of the Family Court to affect third party interests arises in a number of contexts. Superannuation is one. Others occur where a spouse has interests in a company or where a spouse seeking property orders is competing against a third party creditor. In these contexts, the questions which have arisen are:

- first, whether the Family Court is empowered to affect third party rights in any particular case (a matter of statutory interpretation)

- second, whether the Family Court can be empowered to do so (a matter of constitutional law).

The traditional view of the powers conferred on the Family Court was expressed by Gibbs J in *Ascot Investments Pty Ltd v. Harper.*[15] This was a case where the Family Court ordered a husband to transfer his interest in shares held in a private family company (Ascot Investments Pty Ltd) to his wife. The wife applied for and was granted an order by the full Family Court that the company register the transfer. The company appealed to the High Court.

Gibbs J held that there was no clear and unambiguous power conferred on the Family Court under the relevant sections of the Principal Act[16] to:

> … defeat or prejudice the rights, or nullify the powers of third parties, or to require them to perform duties which they were not previously liable to perform.

He added:

> If the sections had been intended to prejudice the interests of third parties in this way, it would have been necessary to consider their constitutional validity.

Gibbs' rider poses the second question—whether it is constitutionally permissible to give the Court power to affect third party interests.

The powers of the Commonwealth Parliament are enumerated in the Commonwealth Constitution. In the constitutional division of power between the Commonwealth and the States, the States have the undefined residue of powers. The most important of the Commonwealth's constitutional powers for the purposes of the Principal Act are the marriage power [section 51(xxi)] and the matrimonial causes power [section 51(xxii)].

The test for validity of legislation relying on the marriage power relates to the connection of its subject matter with the marital relationship. At times the required connection has been described by the High Court as 'close'[17] and at other times as 'sufficient'.[18]

The question of constitutional power may be further complicated depending on how proposed legislation seeks to deal with superannuation interests and superannuation trustees. The Bill enables the superannuation interest to be divided but leaves the details to regulations. This step is said to rely on the marriage and matrimonial causes powers.[19] The legislation also permits new interests created after the division to be dealt with by the parties (by agreement) or by the court. Because this second step is further removed from the marital relationship, it may need to find support in other constitutional heads of power. Two possibilities are the corporations power [section 51(xx)] and the aged pensions power [section 51(xxiii)].[20] Another is the taxation power [section 51(ii)].

Divorce and superannuation

The need to resolve present difficulties in the way superannuation is dealt with under the Principal Act is evident given the value of superannuation assets, the retirement incomes policies of successive governments, Australia's ageing population and the number of divorces which are granted each year. There are also equity issues that need to be addressed in any reform of the law relating to divorce and superannuation.

The value of superannuation policies in Australia

An increasing number of Australian employees now have superannuation policies. The relative value of those policies is increasing and is projected to continue increasing.[21] In 1986, a report published by the Australian Institute of Family Studies (AIFS) revealed that of the men and women surveyed, in about 55 per cent of cases at least one spouse had superannuation.[22] By 1997, 81 per cent of the men and women sampled by the AIFS reported that at least one spouse had superannuation.[23] By 1999, 91 per cent of Australian employees had a superannuation account.[24] AIFS estimates that the percentage of a couple's total net assets represented by superannuation increased from about 14 per cent in the late 1980s to about 25 per cent in the late 1990s.[25]

As AIFS has pointed out, the growth in superannuation assets is a consequence of the policies of successive governments including favourable tax treatment for superannuation, compulsory superannuation membership (as a way of reducing dependency on state welfare benefits) and the introduction of superannuation guarantee legislation.[26]

An ageing population

Policies promoting self-funded retirement in Australia are unlikely to be reversed given Australia's ageing population. The proportion of the population aged 65 years and over is expected to continue growing due to declining fertility and increased life expectancy. In 1901 there were 151,000 people in Australia aged 65 years and over (4 per cent of the population). In 1998 the number was 2.3 million people (12 per cent of the population). It is projected that by 2051 the number will have increased to between 6 million and 6.3 million (24-26 per cent of the projected population).[27]

The number of divorces in Australia

An effective and equitable scheme for dealing with superannuation interests is also important given the number of divorces granted. In 1998, there were 51,370 divorces in Australia. A recent Australian Bureau of Statistics study of marriages from 1977 to 1994 concluded that about 43 per cent of all marriages end in divorce, 8 per cent within five years of marriage, 19 per cent within ten years, 32 per cent within 20 years and 39 per cent within thirty years. [28]

Equity

Superannuation is an important asset for couples. However, it is generally men rather than women who belong to superannuation funds. Where women belong to superannuation funds their superannuation entitlements are generally worth less than those of men. As the AIFS has pointed out, this is because women spend less time than men in paid employment, on average their salary when in paid employment is less than that of men, and they are more likely than men to be in employment (such as part-time or casual work) which is not covered by employer superannuation schemes.[29]

> These disparities are concealed (at least for married women) so long as women can look to men for support in their retirement. Retired women will be able to share in their husband's superannuation benefits, assuming that these are equitably shared by the retired couple … [However] divorce brings the disparities between men's and women's access to superannuation to the surface in an acute form. Not only does this leave women facing a poorly-resourced retirement, but it also deprives them of assets to which, arguably, they have contributed during the marriage by supporting the husband in his full-time work or by forgoing the income contributed to the scheme, or both. There are therefore both needs-based and justice-based arguments for redressing the gendered inequality in the distribution of superannuation benefits following divorce.[30]

Additionally, where superannuation is considered by the court in property adjustment, men as well as women may be disadvantaged. As the Attorney-General pointed out in his Second Reading Speech, where superannuation interests are taken into account and other property is divided accordingly:

> … this is not an ideal solution because it often means that current property—usually the family home—has to be traded away in exchange for superannuation that may not

> be able to be accessed for many years. In many cases, this may leave one person with a house, but no retirement income, and the other person with no accommodation, but significant retirement income that may not be accessible for many years.[31]

Australian Institute of Family Studies research—Superannuation and Divorce in Australia

In May 1999 the Australian Institute of Family Studies published a Working Paper entitled *Superannuation and Divorce in Australia*.[32] The paper summarises the results of a 1997 random national telephone survey of 650 divorced Australians. The findings (some of which have already been mentioned) include:

- the proportion of couples at least one of whom has superannuation is now 81 per cent
- superannuation entitlements are still unevenly distributed on the basis of gender with men more likely to have superannuation than women
- both men and women are ill-informed about their spouse's superannuation
- the average value of women's superannuation on divorce was $5,590 compared with $26,152 for men
- on average superannuation accounts for 25 per cent of a couple's asset wealth but 'the relative importance of the superannuation varies significantly according to the parties' total asset wealth so that the smaller the total asset pool, the greater the relative significance of superannuation'[33]
- superannuation is taken into account in 46 per cent of divorce cases
- if a 50:50 superannuation split on divorce were to be introduced this would 'produce a shift of assets towards the wife, but … this shift would be greater for women from low asset than high asset marriages. However, … this may not improve the financial situation of women from low asset marriages immediately after divorce. This assumes that the law of distribution of property on divorce remains unchanged in every other respect.'[34]

Inquiries, reports and proposed legislation

For over a decade, government and parliamentary inquiries have examined superannuation in the context of marital breakdown.

In 1987 the Joint Select Committee on the Family Law Act released a report on *Family Law in Australia*. Its chapter on the financial consequences of divorce looked briefly at superannuation and commented that '… superannuation entitlements are causing some difficulty in property proceedings under s.79 of the Family Law Act.'[35] The Committee recommended that:

> … the Family Law Act be amended to give a discretionary power to the court to defer the making of a final order in property proceedings until superannuation benefits have been received, and where necessary to make an interim order.[36]

The Australian Law Reform Commission (ALRC) considered the issue in its 1987 report, *Matrimonial Property*. After examining a number of options, the ALRC concluded that the notional value of superannuation should be included in the value of marital property unless this would lead to inequity. The ALRC also recommended that the court's power to adjourn property proceedings should be retained.[37]

In March 1992, a discussion paper on superannuation was produced by the Attorney-General's Department. It proposed that in the event of a marital breakdown the vested portion of a person's superannuation entitlements should be re-allocated between the parties.[38]

In 1992, the Family Law Council published a paper on superannuation in which it recommended that superannuation would be divided between the parties on divorce or separation in proportion to the time of cohabitation—unless injustice would result.[39]

Further recommendations were made by the ALRC in 1992 when it reported on *Collective Investments: Superannuation*.[40] In relation to accumulation schemes, the ALRC recommended that the Principal Act should be amended so a court could direct the responsible entity to divide the account of the contributing spouse and roll the amount (if any) awarded to the non-contributing spouse into an approved deposit fund (ADF). It concluded that the account should be divided equally (in relation to the funds accumulated during cohabitation) unless otherwise ordered by the court. In relation to defined benefits schemes, the ALRC recommended that the court should be empowered to order the responsible entity to pay an amount into an ADF. The amount would be determined according to a prescribed formula. The ALRC also recommended that subject to court approval the parties should be able to vary the shares by agreement.

In November 1992, the Joint Select Committee on Certain Aspects of the Family Law Act recommended that, within the limits of constitutional power, the Principal Act should be amended to include superannuation entitlements as property with the notional realisable value of the superannuation entitlement being the value taken into account at the time of the court hearing. The Committee also recommended that the Principal Act be amended to enable the Family Court to order that a superannuation entitlement be split with the divided funds being portable. The Committee concluded that the superannuation entitlement should be divided between the parties according to the length of their marriage or cohabitation and total period of contribution to the fund.[41]

As part of its response to the Joint Select Committee's report the then Government foreshadowed that its approach would be to regard superannuation as a discrete asset, rather than as matrimonial property, which would be divided equitably between the parties following marital breakdown according to the period of cohabitation and the period of contribution to the fund. The Government also set up a working group on superannuation to advise it further.[42]

In November 1995, the Senate Select Committee on Superannuation expressed its concern about the 'serious delay that has occurred in the resolution of the treatment of superannuation assets in the event of marriage breakdown …'.[43] It recommended that the matter be dealt with as a priority.[44]

On 1 December 1995, the Keating Government introduced the Family Law Reform Bill (No.2) 1995. This Bill dealt with property adjustment and pre-nuptial agreements but not superannuation.[45] In his Second Reading Speech on the Bill, Senator Bolkus said:

> … this bill does not address the treatment of superannuation as matrimonial property, other than to preserve the current position, whereby superannuation will be dealt with as property where possible and will otherwise be treated as a financial resource. A working group established by the government to examine options for the treatment of superannuation as matrimonial property is continuing its consideration of this extremely complex and increasingly significant matter. It is expected to report shortly.[46]

In 1996 there was a General Election. In October 1996, the Attorney-General in the Howard Government addressed the National Press Club on the subject of family law. In relation to superannuation he said:

> … I propose that superannuation should, to a greater extent than at present, be treated in the same way as property in respect of the way in which the court can make an order. If appropriate, splitting a superannuation interest between the parties ought to be possible.
>
> Superannuation could thus be dealt with on a basis closer to that applicable to other property.
>
> However, we need to recognise that superannuation is not in practice the same as other property, in that it generally will only become available some time in the future.
>
> Consequently, all the general principles applicable to the division of property, such as present needs, may not be as pressingly relevant to superannuation.
>
> Estranged spouses should, of course, be able to enter into agreements under which superannuation entitlements can be split as they agree.[47]

In May 1998 the Treasurer and the Attorney-General released a Position Paper entitled *Superannuation and Family Law*. The Government summarised its preferred position in the following way:

> The focus of reform will be on the parties taking responsibility for agreeing on their own arrangements for dealing with superannuation. If they are unable to agree, however, the Court will apply a presumption that superannuation interests referable to the period of cohabitation by the parties are to be divided equally.[48] This is because a superannuation interest in the name of one spouse is usually built up during a marriage through the joint efforts of both spouses. Superannuation contributions made by one party mean that the household has foregone current use of money so as to save for future retirement. If the parties had not separated they would have had a reasonable expectation that they would equally share in the superannuation interest at retirement.[49]

The Position Paper went on to say that division of superannuation interests would depend on whether the scheme involved was an accumulation scheme or a defined benefit scheme.

In the case of accumulation schemes, the Position Paper stated:

> If the parties or Court decide to divide a superannuation interest, the member's account will be reduced by the non-contributing spouse's share. If the rules of the fund permit and if the trustees agree, the non-contributing spouse may choose to become a new member of the fund and hold his or her interest in the fund. Alternatively, the non-contributing spouse will have the option to transfer his or her new account to another superannuation fund or Retirement Savings Account.[50]

In the case of defined benefit schemes, the Position Paper identified two possibilities:

> … the member's interest might be notionally divided at or soon after separation or, alternatively, the member's membership records might be 'flagged' so that the non-contributing spouse's interest can be calculated and paid once the member satisfies a condition of release.[51]

In March 1999 the Government released a Discussion Paper called *Property and Family Law: Options for Change*. The two options proposed by the paper were (a) retention of the existing property regime combined with a rebuttable presumption that property should be shared equally between the parties; (b) introduction of a community property regime in which property accumulated by the parties during marriage would be divided equally between them.

Each of these options referred to superannuation.[52] Under option (a) the court would have dealt with superannuation as an asset available for distribution using the same principles as other property. The division would have been a matter of judicial discretion rather than involving the application of a formula. Under option (b) superannuation in its benefit phase referrable to the period of cohabitation would have been included as property. Superannuation in the accumulation phase would be dealt with under the proposals contained in the Position Paper with the additional requirements that only the value of superannuation accumulated during cohabitation would be available for division and that the division would be based on a formula.

In October 1999, the Attorney-General announced that the Government would not proceed with either property option outlined in the Discussion Paper as neither option had received sufficient support. Instead, he foreshadowed other reforms to matrimonial property law.[53] These included legislating for binding financial agreements, property arbitration, superannuation, the placement of section 75(2) factors into section 79(4) of the Principal Act and third party jurisdiction.[54] The Government's proposals for superannuation reform are contained in this Bill. The Family Law Amendment Bill 1999 which is currently before the Senate deals with financial agreements and property arbitration.

Main Provisions

Item 4 of Schedule 1 of the Bill will insert a new Part VIIIB, titled 'Superannuation interests', into the Principal Act. The proposed part is to overrule other Commonwealth, State and Territory laws and trust deeds and other instruments and anything done in accordance with the proposed Part cannot result in a breach of such a law, deed or instrument (**proposed section 90MB**). (Superannuation funds are established by trust deeds which specify the powers of trustees and the purposes for which funds may be used.)

Proposed section 90MD contains a number of definitions, including those for:

Eligible superannuation plan: a superannuation fund or an approved deposit fund as defined in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) (which contains a wide definition of the terms) or an account under the *Small Superannuation Accounts Act 1995* (which provides a central depository for a number of small fund balances in a member's name).

Superannuation interest: an interest a person has in an eligible superannuation plan other than an interest that is conditional on the death of another person.

Unsplittable interest: an interest prescribed by regulation.

Unflaggable interest: an interest prescribed by regulation.

Splitting by Agreement

A financial agreement under proposed Part VIIIA of the Principal Act may deal with a superannuation interest as if it were property. This will apply even if the interest does not exist at the time of the making of the agreement. However, the superannuation agreement, as that part of the financial agreement dealing with superannuation will be known, will not be enforceable under proposed Part VIIIA. If the superannuation interest does not exist at the time the agreement is made, it will be deemed to be acquired at the time the interest comes into existence (**proposed section 90MH**).

The division of a superannuation interest between the parties is dealt with in **proposed sections 90MI and 90MJ**. A superannuation interest may be divided under either a superannuation agreement or a flag lifting agreement (see below) and will have effect on the fourth working day after the relevant documents are served on the trustee of the fund. Where there is an interest identified under a superannuation or flag lifting agreement, the agreement is in force, the interest is not an unsplittable interest and:

- the actuarial method is to apply and a percentage is identified (the actuarial method is to be calculated in accordance with the regulations) or

- the transfer amount method is to apply and an amount is identified (the transfer amount method is also to be calculated in accordance with the regulations) or
- the fixed percentage method is to be used and a percentage is identified

the amount so calculated is payable to the non-member spouse.

This will continue to apply to a superannuation interest even if the agreement ceases to be in force unless a court has ruled that it ceases to have effect under **proposed section 90MV**.

Payment flagging applies if:

- a superannuation interest is identified in a superannuation agreement
- the agreement provides that the interest is subject to payment flagging
- the agreement is in force at the operative time (the time when relevant documents are served on a trustee of a fund), and
- the interest is not an unflaggable interest.

A payment flag will continue to have effect until either:

- it is terminated under **proposed section 90MM** (this section provides that if a financial agreement is set aside under **proposed paragraph 90K(1)(e)** the court may also set aside a payment flag. The circumstances under which an agreement may be set aside under proposed section 90K of the Family Law Amendment Bill 1999 include fraud, the agreement being unenforceable and a change in circumstances that has made it impracticable for all or part of the agreement to be carried out), or
- there has been a flag lifting agreement under **proposed section 90MI** (see below).

If a payment flag is in operation, a trustee of a fund is not to make any payment in respect of a splittable payment (splittable payment is defined in **proposed section 90ME** to be a payment made to a spouse or their representative or a reversionary beneficiary. Regulations may declare certain payments not to be splittable payments). If the spouse dies while a payment flag is operating, the flag will continue to operate and the legal personal representative of the deceased will have all the rights of the deceased (**proposed section 90ML**).

Proposed section 90MN deals with flag lifting agreements. Such agreements may provide for the flag to be lifted either with or without a payment split (a payment split must be in accordance with the methods described above). For such an agreement to have effect it must:

- be signed by both spouses

- contain a statement for each spouse that they have been provided with independent legal advice from a legal practitioner on the effect of the agreement
- contain a certificate from the legal advisers that advice has been provided, and

each spouse must be provided with a copy of the agreement.

A flag lifting agreement may be set aside by a court if satisfied that that the grounds contained in proposed section 90K apply (this will also set aside the related financial agreement) and if a financial agreement is set aside this will also overrule any related flag lifting agreement.

The Bill also contains a number of miscellaneous matters relating to splitting under agreements, including:

Section 79 of the Principal Act deals with Court orders relating to property. **Proposed section 90MO** provides that an order under section 79 cannot deal with a superannuation interest if:

- it is covered by a superannuation agreement
- the trustee has been served with a waiver notice under proposed section 90MZA (see below), or
- a payment flag is operating in respect of the interest.

However, the Court will still be able to take a superannuation interest into account in determining the order made under section 79.

Proposed section 90MP deals with 'breakdown declarations' where proposed section 90MQ applies. Such a declaration must state that:

- the parties are married
- they are separated and have lived separately and apart for a continuous period of at least 12 months before the making of the declaration, and that
- in the opinion of the party or parties making the declaration that there is no reasonable likelihood of cohabitation being resumed.

If proposed section 90MQ does not apply, the declaration must state that the parties are married but separated at the time the declaration is made.

Proposed section 90MQ is titled 'Superannuation interests in excess of ETP [eligible termination payments] threshold' and provides that it is to apply to a declaration where the ETP threshold is exceeded unless the regulations provide otherwise (as payments under the ETP threshold receive concessional tax treatment the section is intended to relate to anti-avoidance and aims to prevent spouses arranging a sham separation to split a

superannuation interest and so receive concessional treatment which otherwise would not apply. If the conditions which must be stated in the declaration can be satisfied, the question of whether the arrangement has been entered into to achieve a tax benefit will be determined under taxation law).

Splitting or Flagging by Court order

Proposed Division 3 deals with such orders. **Proposed section 90MS** provides that in proceedings relating to property under section 79 a court may also make an order in relation to a superannuation interest. Such an order may only be made in accordance with proposed Part VIIIB.

Splitting orders are dealt with in **proposed section 90MT** which provides that the court may order that when a splittable payment becomes payable:

- the non-member spouse is entitled to an amount fixed according to the regulations and the interest of the member is to be reduced accordingly, and
- such other orders as are necessary for the enforcement of the above.

In making such an order, the court must determine the overall value of the interest and allocate the base amount to the non-member spouse. The base amount is not to exceed the value of the interest (the base amount and the value of the interest are to be determined according to the regulations).

Flagging orders are dealt with in **proposed section 90MU**. Such an order made in respect of a superannuation interest, other than an unflaggable interest, may:

- direct the trustee not to make a splittable payment without the leave of the court, and
- require the trustee to notify the court when a splittable payment becomes payable.

In making such an order the court is to have regard to the likelihood of a splittable payment becoming payable and such other matters as it considers relevant.

Payment Splitting - General

A court may direct that a splitting payment order ceases to have effect if the relevant agreement ceases to have effect and the non-member spouse has not served a waiver on the trustee (**proposed section 90MV**).

Where there are two or more splits to be made in respect of a superannuation interest they are to have effect in the same order as the order's operative dates (**proposed section 90MX**).

Fees may be payable to trustees in relation to a payment split. The fees and who is to pay them are to be determined according to the regulations. If the fees remain unpaid at the operative time for the split, the trustee may deduct the fees and any interest payable from the interest of the person liable to pay the fee (**proposed section 90MY**). (Note: it appears that the fees do not extend to enquires – see proposed section 90MZB below - or flagging arrangements.)

Proposed section 90MZ provides that payments from a regulated superannuation fund, a RSA or a constitutionally protected fund (generally government funds) under a splitting order may be subject to regulations made under the relevant Act governing such schemes. The proposed section is titled 'Superannuation preservation requirements' and the regulations may require interests to be preserved on similar conditions that apply to other superannuation entitlements (ie that they are not payable until retirement at or after the minimum preservation age, permanently ceasing to be in the workforce or on certain medical grounds).

Proposed section 90MZA deals with waiving of rights under payment splits. If a non-member spouse serves such a notice on a trustee then in respect of payments made after the date specified in the waiver:

- the non-member spouse is not entitled to any payment, and
- the entitlement of the other person continues to be reduced by the amount that it would have been reduced by had the waiver not been made. (N.B. As the payment to the other person is not increased by the amount that ceases to be payable to the non-member spouse it is unclear what happens to the amount that would otherwise have been payable to the non-member spouse. Presumably as no-one is entitled to the amount it will remain within the superannuation fund.)

The notice must be accompanied by a statement that the non-member spouse has been provided with independent financial advice supplied by a prescribed financial adviser and a certificate signed by the adviser to that effect.

An eligible person, ie a member of a fund, a spouse of a member or a person who intends to enter into a superannuation agreement with the member, may make an application to a fund for information about the superannuation interests of the member. The request must be accompanied by a declaration that the information is required to assist in the negotiation of a superannuation agreement or to assist in the operation of the proposed Part. It will be an offence, with a maximum penalty of 50 penalty units for a natural person and 250 penalty units for a corporation (a penalty unit is currently $110), for a trustee to fail to provide information in accordance with the regulations. (The proposed section does not provide for a fund to charge a fee for the provision of the information nor does it provide that it is a defence for the fund to refuse to provide the information unless a fee is paid. As proposed section 90MY provides for the charging of fees in other circumstances it can be argued that the absence of a provision for the charging of fees for information is

deliberate. In the absence of fees, the cost of such inquiries would ultimately be met by other members of the fund.)(**proposed section 90MZB**)

Proposed Division 5 deals with miscellaneous matters including:

- orders made under the proposed Part may bind a trustee of a fund only if that person has been accorded procedural fairness (**proposed section 90MZD**)
- a trustee will not be liable for any loss or damage suffered by a person because of things done in good faith in reliance on a document or order served on the trustee under the proposed Part (**proposed section 90MZE**)
- it will be an offence, with a maximum penalty of 12 months imprisonment, for a person to make a statement in a declaration relating to a material particular that the person knows is false or misleading if that declaration is served on a trustee (**proposed section 90MZG**)
- the SIS Act and the *Superannuation (Resolution of Complaints) Act 1993* will be amended to allow regulations to be made to alter the definitions of who is a member for the purposes of the Acts, and who is a beneficiary for the purposes of the latter Act, and also to allow regulations to be made specifying how the Acts are to apply to the various members/beneficiaries (**items 6 and 8 of Schedule 1**). Changes to the operation of the latter Act will allow non-member spouse complaints against trustees to be dealt with by the Superannuation Complaints Tribunal.

Concluding Comments

As noted in the Main Provisions section, in the absence of an agreement on how a superannuation interest is to be split the regulations will provide for the methods in which the interest can be split. On 13 October 2000 the Attorney-General released consultation draft regulations for public comment, noting that the Senate Select Committee on Superannuation and Financial Services would be holding a public inquiry on the Bill and that it would prefer to receive submissions by 24 October 2000.[55]

The draft regulations reflect the complexity of the division of a superannuation interest in which the ultimate value is not known. The draft regulations contain a number of formulas on which distributions are to be based and which are likely to require professional analysis to understand their long term implications.

As expected, the greatest difficulty relates to the computation of determining the present value of an interest in a defined benefits scheme, which occupies approximately 22 of the 58 pages of the draft regulations. The proposed rules for defined benefit funds contain a number of assumptions, such as an assumed retirement age, final average salary (although

the regulations provide for this information to be provided by the trustee of the relevant fund it is not clear how this could be known to the trustee) and the actual and potential term of membership of the spouse. The basis for these assumptions may be subject to dispute by some organisations, as may the potential results if these assumptions are applied in a number of different circumstances. It would not be surprising if the Committee receives differing actuarial advice on the effect of various assumptions.

The complexity of the draft regulations also raises doubts as to the requirements in the Bill for legal advice to be sufficient for a person to waive certain rights, eg in a flag lifting agreement, as not all, if many, lawyers are sufficiently trained to understand and deal with complex actuarial calculations. It may also be noted that proposed section 90MZA requires financial advice to be obtained before rights can be waived under a payment split.

Another matter to be considered is the cost for funds of complying with the requirements of the Bill and whether they will all be borne by the superannuation interest/s affected or by the fund generally. As noted above, the Bill does not explicitly allow additional fees to be charged for a range of activities (while the regulations provide for a fee to be payable for the provision of information in regard to a request under proposed section 90MZB which relates to the provision of information prior to a payment split this is authorised under proposed section 90MY which provides for payments in relation to a payment split. Such a split may not occur after an inquiry so that there is no link between the fee and a payment split, leaving some doubt as to the validity of such a fee). Again, it will be of interest to see if any of the funds, particularly those dealing largely with defined benefit funds, raise this issue before the Committee.

Should there be a reconciliation between the member and their former spouse after an interest has been split it is likely that their separated superannuation will have to remain in different accounts thus incurring fees and charges for each account, where relevant, and a lower final combined benefit. However, if there is a flagging order, rather than a split in the interest, it would be possible for the non-member spouse to lift the flagging order. This may be an argument in favour of flagging an interest rather than ordering a split where there is a chance of reconciliation.

Endnotes

1 Previously called custody and access.

2 In the case of both property and spousal maintenance orders the court takes into account the factors referred to in subsection 75(2).

3 S Parker, P Parkinson & J Behrens, *Australian Family Law in Context. Commentary and Materials*, LBC Information Services, Sydney, 1999, p. 596.

4 For a view that superannuation interests can be characterised as property see A Dickey, *Family Law*, LBC Information Services, Sydney, 1997.

5 [1979] FLC ¶90-615 at p. 78,169.

6 *In the Marriage of Prestwich* [1984] FLC ¶91-569 at 79,601.

7 CCH, *Australian Family Law Guide*, 2nd Edition, CCH Australia Ltd, North Ryde, 1999, p. 192.

8 ibid.

9 (1985) FLC 91-648 at pp.80,224–80,225 as quoted in CCH, ibid.

10 *Superannuation and Family Law. A Position Paper*, May 1998; CCH, op.cit.

11 Position Paper, op.cit.

12 ibid.

13 ibid.

14 See, for example, Bourke, S 'Property and superannuation. An update', 9th National Family Law Conference, 3-7 July 2000, *Conference Handbook*, pp.1-31; 'Problems loom for divorce super solution', *Australian Financial Review*, 20 June 2000; H Gordon-Clark, 'Ascot revisited. Superannuation and constitutional power', *Law Institute Journal*, February 1999, pp. 62-5; Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *Report*, AGPS, Canberra, November 1992.

15 (1981) 148 CLR 337.

16 Sections 80 or 114.

17 According to Gibbs J in *Lambert's* case, the question to be asked was whether '… the legislation creates, defines or declares rights or duties that arise out of, or have a close connection with, the marriage relationship.' *Re Lambert; Ex Parte Plummer* (1980) FLC ¶90-904 at 75,691.

18 Subsequently, Gibbs CJ said in *Fountain v. Alexander* (1982) 150 CLR 615: 'The power of the Parliament to make laws with respect to marriage does not extend to laws for the protection or welfare of the children of a marriage except in so far as the occasion for their protection or welfare arises out of, or is sufficiently connected with, the marriage relationship.' In *Lambert's* case, Murphy J rejected the idea that a close relationship was needed between the subject matter of legislative power and the challenged law (at 470). On the other hand, Wilson J concluded that a close relationship was needed (at 487). In *Gazzo v. Comptroller of Stamps* (1981) 149 CLR 227, Mason J stated that a 'sufficient' connection was all that was required and that a 'close' connection was too limiting (at 248). In the same case, Aicken J used a test of 'sufficient' or 'close' (at 267), while Stephen J talked of a 'reasonable' connection (at 244).

19 S Bourke, P Meibusch & M Durkin, 'Proposed superannuation reforms', Third National Family Law Conference, 20–24 October 1998, Melbourne

20 ibid.

21 Second Reading Speech, *Parliamentary Debates (Hansard)*, 13 April 2000, p. 15890.

22 Cited in Australian Institute of Family Studies, *Superannuation and Divorce in Australia, Working Paper No. 18*, May 1999.

23 ibid, p. 11.

24 Second Reading Speech, *Parliamentary Debates (Hansard)*, House of Representatives, 13 April 2000, p. 15890.

25 AIFS, op.cit, pp. 16–17.

26 The superannuation guarantee requires employers to contribute to their employee's superannuation.

27 Australian Bureau of Statistics, 'Australia's older population: past, present and future', in *Australian Demographic Statistics, June Quarter 1999*, ABS Catalogue number 3101.0. http://www.abs.gov.au/Ausstats/ABS%40.nsf/94713ad445ff1425ca25682000192af2/b57ac79ff8a27cbcca2568a900154b7c

28 Australian Bureau of Statistics, 'Divorces', *Australia Now—A Statistical Profile*, http://www.abs.gov.au/Ausstats/ABS%40.nsf/94713ad445ff1425ca25682000192af2/189dcccc4fe3b4deca2568a900154b0e

29 AIFS, op.cit.

30 ibid, p.2.

31 Second Reading Speech, *Parliamentary Debates (Hansard)*, House of Representatives, 13 April 2000, p. 15891.

32 AIFS, op.cit.

33 ibid, p. 27.

34 ibid.

35 Joint Select Committee on the Family Law Act, *Family Law in Australia*, volume 1, AGPS, Canberra, 1980, p. 95.

36 ibid, p. 96.

37 Australian Law Reform Commission, *Matrimonial Property*, Report No.39, AGPS, Canberra, 1987, pp. 210–213.

38 Attorney-General's Department, *The Treatment of Superannuation in Family Law*, Discussion Paper, March 1992 summarised in Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *Report*, November 1992.

39 Family Law Council, *Choices: A Paper on Superannuation*, 1992.

40 Australian Law Reform Commission, *Collective Investments: Superannuation*, Report No.59, 1992.

41 Joint Select Committee, 1992, op.cit.

42 Attorney-General, *Family Law Act 1975. Directions for Amendment. Government Response to the Report by the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975*, December 1993.

43 *Super and Broken Work Patterns*, Canberra, November 1995, p. 141.

44 ibid.

45 The Bill lapsed when the 1996 General Election was called.

46 *Parliamentary Debates (Hansard)*, Senate, 1 December 1995, p. 4551.

47 'Family law: future directions', National Press Club, 15 October 1996.

48 Emphasis added.

49 Position Paper, op.cit.

50 ibid, p. 65.

51 ibid, p. 66.

52 The Discussion Paper stated that it did not cover options for reform of the law dealing with superannuation in the accumulation phase.

53 'Shaping family law for the future', National Press Club, 27 October 1999.

54 S Bourke, op.cit.

55 Attorney-General, News Release, 13 October 2000.