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Family Law Amendment (Annuities) Bill 2004

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Contents

Purpose.....	2
Background.....	2
The Government’s 2001 election platform	3
History of Part VIII B of the Family Law Act—superannuation interests	3
Annuities	5
Main Provisions	5
Schedule 1: Amendments to Part VIII A A of the Family Law Act	5
Schedule 2: Amendments to Part VIII B of the Family Law Act	6
Practical effect of the amendments.....	7
Concluding Comments.....	7
The proposed treatment of annuities under the Family Law Act.....	7
Form of amendments.....	8
Endnotes.....	9

Family Law Amendment (Annuities) Bill 2004

Date Introduced: 11 August 2004

House: House of Representatives

Portfolio: Attorney-General

Commencement: The formal provisions (sections 1 to 4) commence on Royal Assent; Schedule 1 commences on 17 December 2004; and Schedule 2 commences on proclamation or six months after Royal Assent (whichever occurs first).

Purpose

The Bill amends the *Family Law Act 1975* ('the Family Law Act') to enable the Family Court of Australia ('the Court') (or another court having jurisdiction under that Act) to divide certain annuities as part of a property settlement between separating couples in the same way as the Court currently divides the parties' superannuation interests.

Background

It is important to note that the Bill only deals with 'eligible annuities'. This term refers to those annuities purchased with moneys rolled over from superannuation funds (or similar lump sums). In accountancy parlance, there are three main types of annuities: term annuities, lifetime annuities and allocated annuities.¹ The type which seems to fall most easily within the definition of 'eligible annuity' is the 'allocated annuity', whereby a lump sum is invested 'in return for regular payments until all capital has been exhausted'.²

According to the Second reading speech for the Bill:

Annuities [that is, eligible annuities] are a financial investment product primarily designed for use as retirement income. They receive similar tax concessions and preferential treatment for social security income and asset test purposes as superannuation products. ...

The key distinction between superannuation and annuity products is that annuities are a contractual rather than a legislative product and annuities fund managers are not subject to the same regulation that applies to superannuation fund managers.³

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Currently, the Court can make orders in relation to annuities under Part VIII of the Family Law Act (being the part which sets out the Court's general powers in relation to property, spousal maintenance and maintenance agreements). Part VIII only permits the Court to make orders directed to a party to the marriage (such as an order that one spouse must pay income to the other spouse from annuity payments).⁴

Under Part VIII A of the Family Law Act (which is due to commence on 17 December 2004), the Court will be empowered to make orders and injunctions binding third parties. However, by virtue of the current Bill, the Court will only be able to make an order under Part VIII A in relation to those annuities which do not meet the definition of 'eligible annuity'. Part VIII B of the Family Law Act (which deals with superannuation interests) will apply to 'eligible annuities'.

The Government's 2001 election platform

In its platform for the 2001 federal election, the Government promised to continue to reform the family law system in relation to the division of matrimonial assets, saying:

We will ensure that life insurance products [that is, eligible annuities] can be split by parties on divorce, in the same way that couples will be able to split superannuation interests.⁵

It may therefore be useful to examine the treatment of superannuation interests under the Family Law Act.

History of Part VIII B of the Family Law Act—superannuation interests

Until the commencement of Part VIII B of the Family Law Act on 28 December 2002, the Court had no power to divide superannuation interests as part of a property settlement following the breakdown of a marriage—unless those interests had already vested.⁶ The only property which the Court could divide between the parties was the type of asset which was able to be liquidated readily, such as the former matrimonial home, motor vehicles, shares and household effects. Likewise, even parties who were able to agree on the terms of a property settlement without requiring a determination by the Court could not agree to divide future superannuation benefits.

The Court regarded a superannuation interest as a financial resource available to the party in whose name the superannuation fund was created and not as property to be divided between the parties. Thus, the Court usually awarded a greater share of the presently-available property to the non-superannuated spouse, in recognition of the fact that the superannuated spouse would be solely entitled to receive the superannuation moneys when he (or she) retired and became eligible to receive them. However, any such award was made in the exercise of the Court's discretion to make an order for property settlement under section 79 of the Family Law Act; there were no rules about how the Court was to treat superannuation.

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Thus, a property settlement may not have been fair to either party—one party may have received the bulk of the assets and no future entitlement to superannuation/income (either by way of periodic payments or a lump sum on retirement), whereas the other party may have received few (if any) assets but the whole of the future income entitlement.⁷ The result was particularly unjust where the parties had few (or no) assets but a disproportionately large (and growing) future entitlement to superannuation—although in some cases, the Court adjourned the proceedings until the vesting of the superannuation (so that the superannuation could be included in the pool of property available for distribution between the parties).⁸

The situation was further complicated by the fact that the Court had no power to make an order binding a third party, such as the trustee of the superannuation fund. In *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337, for example, the High Court of Australia held that the Family Court had no power to make orders imposing on a third party a duty which the third party was not otherwise liable to perform.

In the late 1980s and early 1990s, there was a series of discussion papers and reports on the treatment of superannuation in property settlements. Importantly, the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act published its report in November 1992. It recommended (at paragraph 9.62), among other things, that the Family Law Act should be amended to include superannuation entitlements as property; that the Court should be empowered to order that superannuation be split and shared between ‘the contributing and non-contributing spouse’; and that a court order should ‘be required to direct the trustee of a superannuation fund how to divide the entitlement’.⁹

Part VIIIB of the Family Law Act was inserted by the *Family Law Legislation Amendment (Superannuation) Act 2001*. The object of Part VIIIB is to ‘allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between the parties to a marriage, either by agreement or by court order’: section 90MA of the Family Law Act. Part VIIIB comprises:

- Division 1, which sets out preliminary matters such as definitions of terminology
- Division 2, which permits parties to agree to payment splitting or flagging (and includes section 90MR, which provides that a superannuation or flag-lifting agreement can be enforced by court order, having regard to the principles of law and equity)
- Division 3, which permits payment splitting or flagging by court order
- Division 4, which contains general provisions about payment splitting (including fees payable to trustees and the waiver of rights), and
- Division 5, which contains miscellaneous provisions (including the service of documents and the fact that an order made under Part VIIIB is binding on the trustee in certain circumstances).

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Annuities

As noted in *Australian Family Law and Practice*, Part VIII B does not currently apply to annuities (eligible annuities or otherwise):

...the current changes do not directly cover rollover life insurance products, such as annuity and deferred annuity contracts. Hence, when a party has rolled over all or part of their [superannuation] entitlement into a deferred annuity product, the parties (and the Family Court) are not able to effect a split of the underlying capital sum, as the life company is not caught under Part VIII B of the Family Law Act.¹⁰

Further, annuities do not seem to be mentioned in the series of discussion papers and reports on the treatment of superannuation in property settlements. However, as detailed in the Second reading speech for the Bill, annuities were the subject of parliamentary consideration in relation to the *Family Law Legislation (Superannuation) Amendment Act 2001* and the *Family Law Amendment Act 2003*.¹¹

Nonetheless, it is appropriate that eligible annuities (that is, annuities that have been purchased with the proceeds of a rolled-over superannuation fund or similar lump sum) should be treated in the same way as superannuation, because, as noted in the Second reading speech, the annuity may have been purchased with moneys ‘rolled over’ from a superannuation fund where:

- the fund only permitted payment by way of a lump sum and not as an income stream, or
- the person changed his or her place of employment and the particular superannuation fund did not ‘allow for retention of funds’ (for example, if the fund did not permit former employees/employees of other organisations to contribute to the fund).¹²

In such instances, the eligible annuity is really a superannuation interest in another guise and should be treated in a comparable way.

Main Provisions

Schedule 1: Amendments to Part VIII A A of the Family Law Act

Schedule 1 commences on 17 December 2004, being the date when Part VIII A A commences.¹³

Clause 1 of Schedule 1 inserts **proposed section 90ACA** into the Family Law Act. It provides that the powers of the Court under Part VIII A A in relation to orders and injunctions binding third parties do **not** apply to ‘eligible annuities’. That is, a court cannot make an order under section 79 (the general power to make an order altering property interests) or an

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order or injunction under section 114 (the general power to make injunctions) where the order or injunction would be directed to, or alter the rights, liabilities or property interests of a third party in an ‘eligible annuity’. However, Part VIII A (when it commences on 17 December 2004) will apply to annuities which do not meet the definition of ‘eligible annuity’.

Proposed subsection 90ACA(2) defines the term ‘eligible annuity’ by reference to the definition of ‘annuity’ in section 10 of the *Superannuation Industry (Supervision) Act 1993* (‘the SIS Act’), which provides:

annuity includes a benefit provided by a life insurance company or a registered organisation, if the benefit is taken, under the regulations, to be an annuity for the purposes of this Act.

The benefits which ‘are taken to be’ annuities for the purposes of the SIS Act are spelt out at length in regulation 1.05 of the *Superannuation Industry (Supervision) Regulations 1994*. However, in order to constitute an ‘eligible annuity’ for the purposes of **proposed subsection 90ACA(2)**, the annuity must also be treated, for the purpose of Division 14 of Part III of the *Income Tax Assessment Act 1936* (‘the Tax Act’) as ‘being purchased wholly out of rolled-over amounts’.

The term ‘rolled over amount’ is defined in section 27A of the Tax Act as follows:

rolled-over amount, in relation to the purchase price of an annuity or superannuation pension, means so much of an eligible termination payment as is deemed by the application of section 27D to have been applied in payment of any part of the purchase price.

The term ‘eligible termination payment’ is also defined in section 27A of the Tax Act. The definition is complex—it refers to various types of payments made in respect of a taxpayer ‘in consequence of the termination of any employment of the taxpayer’. In some circumstances, it includes superannuation, and thus the proposed amendments contained in the Bill would apply to annuities purchased with rolled-over eligible termination payments (including superannuation proceeds that do not constitute income).

Schedule 2: Amendments to Part VIII B of the Family Law Act

Schedule 2 commences on proclamation or six months after Royal Assent (whichever occurs first). The primary purpose of the delay is to enable consequential amendments to be made to the Family Law (Superannuation) Regulations 2001 in relation to the valuation of annuities.¹⁴

Item 2 of Schedule 2 amends the definition of ‘eligible superannuation plan’ in section 90MD to include reference to ‘an eligible annuity’. That term is inserted into section 90MD by **item 1 of Schedule 2** to the Bill in the same language as used in **item 1 of Schedule 1**.

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Practical effect of the amendments

The amendments mean that Part VIIIIB will govern the treatment of eligible annuities, because they will fall within the revised definition of ‘superannuation interest’, even though that definition is not the subject of amendment.¹⁵

The term ‘superannuation interest’ is used in various provisions in Part VIIIIB and is defined in section 90MD as:

an interest that a person has as a member of an **eligible superannuation plan**, but does not include a reversionary interest (emphasis added).

As mentioned, **item 2 of Schedule 2** amends the definition of ‘eligible superannuation plan’ to include reference to ‘an eligible annuity’. Thus, references to a ‘superannuation interest’ in the Family Law Act are to be read as references to eligible annuities, which means that the Court can make orders about eligible annuities (and/or that parties can make financial agreements dealing with eligible annuities) under Part VIIIIB.¹⁶

Concluding Comments

The proposed treatment of annuities under the Family Law Act

It is not clear why the amendments contained in the Bill are restricted to ‘eligible annuities’ and do not extend to all annuities. The restriction may create unnecessary confusion, depending on the facts and circumstances of the case. It may also create unfair results. For example, an annuity (eligible or not) could be purchased with funds which the parties may otherwise have used to purchase assets which could be distributed between the parties in the event of a marital breakdown or which might otherwise have provided the parties with retirement income (such as a rental property). In order to purchase the annuity (directly or indirectly via contributions to a superannuation or like fund), the parties may have lived a more frugal lifestyle than might have been the case if they had not purchased the annuity. Thus, both parties can be regarded as contributing to the acquisition and growth of the annuity, even if only one party made a direct financial contribution to its purchase. Therefore, it may be unfair **not** to compensate both parties appropriately, particularly if the annuity is of greater value (real or anticipated) than current assets. By splitting an annuity in the same way as the Court is now able to split superannuation interests, both parties would have a continuing interest in the annuity. Further, splitting the annuity would result ‘in an equitable solution providing retirement income’ for both parties.¹⁷

That said, each case is determined on its own facts and merits. The amendments **may** produce a more just and equitable result in some property settlement cases than may occur under the present legislation, but the outcome will also depend on factors such as:

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- the nature of the property to be divided between the parties
- the parties' contributions to that property and the family unit, and
- the relevance of any of the matters specified in section 75(2) of the Family Law Act (such as the age and health of the parties) which may cause the Court to adjust the parties' contribution-based entitlements to the property.¹⁸

Moreover, two things should be noted: annuities comprise only 2.3 per cent of all superannuation assets and even then, they seem to be on the decline.¹⁹ Thus, on the assumption that relatively few people hold annuities, the amendments may be of limited application.

Form of amendments

At first blush, the proposed amendments may **not** seem to achieve their intended purpose without further legislative amendment. That is, the Bill seems to do no more than insert or amend definitions in section 90MD of the Family Law Act. For example, the Bill does not amend section 90MA (which sets out the object of Part VIII B, being 'to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between the parties to a marriage, either by agreement or by court order') or section 90MC (which provides that a superannuation interest 'is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4') to refer expressly to eligible annuities.²⁰

It could be argued that the lack of explicit reference to eligible annuities in the substantive provisions of Part VIII B may be confusing to the general public (or even to lawyers who do not practise exclusively in family law). Any confusion may be overcome by the insertion of a note drawing attention to the application of Part VIII B to eligible annuities.

Nonetheless, the Bill achieves its purpose in a neater way than amending every section in Part VIII B (or inserting a whole new part dealing with eligible annuities) simply by amending the definition of the term 'eligible superannuation plan'. That definition in turn feeds into the definition of 'superannuation interest'. Therefore, once the reader appreciates that the term 'superannuation interest' includes eligible annuities, there should be no confusion about the scope and application of Part VIII B.

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Endnotes

- 1 A useful description of the three types can be found at: http://www.cpaaustralia.com.au/cps/rde/xchg/SID-3F57FEDE-C66356EA/cpa/hs.xml/3668_9844_ENA_HTML.htm (as at 23 August 2004).
- 2 *ibid.*
- 3 Philip Ruddock, Attorney-General, ‘Second reading speech: Family Law Amendment (Annuities) Bill 2004’, House of Representatives, *Debates*, 11 August 2004, p. 32 378.
- 4 An exception to this premise occurs where a third party has formally intervened in the proceedings.
- 5 Paragraph (iii), Part 2 (Helping Families Solve Their Legal Problems), The Howard Government, *Putting Australia’s Interests First: Election 2001—Our Future Action Plan: Better Law, More Options*, 2 November 2001, p. 8.
- 6 Part VIII B was introduced into the Family Law Act by the *Family Law Legislation Amendment (Superannuation) Act 2001*.
- 7 See, for example, *Coulter v Coulter* (1990) FLC 92-104.
- 8 See, for example, *O’Shea and O’Shea* (1988) FLC 91-964, where the Court adjourned the proceedings for 20 years.
- 9 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975: Aspects of its Operation and Interpretation*, Australian Government Publishing Service, Canberra, November 1992, pp. 251–252.
- 10 *Australian Family Law and Practice* (looseleaf service), CCH Australia Ltd, North Ryde (NSW), 2003 at ¶38-160.
- 11 Philip Ruddock, Attorney-General, ‘Second reading speech: Family Law Amendment (Annuities) Bill 2004’, House of Representatives, *Debates*, 11 August 2004, p. 32 379.
- 12 *ibid.*
- 13 Part VIII A A is inserted by Schedule 6 of the *Family Law Amendment Act 2003*.
- 14 Philip Ruddock, Attorney-General, ‘Second reading speech: Family Law Amendment (Annuities) Bill 2004’, House of Representatives, *Debates*, 11 August 2004, p. 32 379.
- 15 Section 90MB of the Family Law Act provides that Part VIII B of the Family Law Act overrides other laws and trust deeds.
- 16 A financial agreement can deal with annuities, regardless of whether the annuities exist when the agreement is made: section 90MH of the Family Law Act. The part of the agreement that deals with ‘superannuation interests’ (including eligible annuities) is a ‘superannuation agreement’ for the purposes of Part VIII B of the Family Law Act: subsection 90MH(2).
- 17 Joint Select Committee, *op. cit.*, p. 246 at paragraph 9.37 (although this argument is made there in relation to the slitting of superannuation funds).
- 18 See section 79 of the Family Law Act.

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- 19 Philip Ruddock, Attorney-General, 'Second reading speech: Family Law Amendment (Annuities) Bill 2004', House of Representatives, *Debates*, 11 August 2004, p. 32 379, and Barrie Dunstan, 'An income for your life', (The Smart Investor), *Australian Financial Review* 26 June 2004, p. 38.
- 20 Paragraph (ca) of the definition of 'matrimonial cause' in section 4 of the Family Law Act provides as follows:
- (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:
 - (i) arising out of the marital relationship;
 - (ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or
 - (iii) in relation to the dissolution or annulment of that marriage or the legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that dissolution, annulment or legal separation is recognized as valid in Australia under section 104.

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