22 February 2020

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URGENT

By email to:

Dear Madam,

FAMILY LAW AMENDMENT (WESTERN AUSTRALIA DE FACTO SUPERANNUATION SPLITTING AND BANKRUPTCY) BILL 2019 – PROPOSED TRANSITIONAL PROVISIONS

I refer to the above matter, and my email dated 8 February 2020.

I am a family law specialist from Perth, Western Australia, where I have been practicing solely in the area of family law for the last 12 years.

I have recently read the proposed amendments in the abovementioned Bill, and support amendments which would permit the splitting of superannuation in Western Australian de facto matters.

There is one part of the Bill however which is cause for some concern among West Australian de facto couples, and in particular women. That is the transitional provisions at Schedule 4, Part 2, which essentially provide that superannuation splitting will not be available to parties where applications have been made under the *Family Court Act 1997* prior to the commencement of the new amendments (save if both parties agree to 'opt in').

These transitional provisions will:

1. Inflict a serious injustice upon those de facto partners, almost exclusively women, who currently have applications before the Court in cases where there are not enough non-superannuation assets available to satisfy their proper entitlements;

2. Cause an influx in applications to the Court from parties who hold a large proportion of their wealth in superannuation (whether it has been held that way legitimately or is placed there in anticipation of separation) so as to exclude the Court's ability to deal with it; and

3. Protract cases currently before the Court where there:

   (a) has been an adjournment, whether pursuant to section 205ZG(5) of the *Family Court Act 1997* or pursuant to the Court's general powers, in anticipation of, inter alia, legislative amendments to permit superannuation splitting; and/or

   (b) are limited options for dealing with the matter without superannuation splitting.

I am aware from discussions with colleagues, and from my own practice, that there are a number of examples of each of the abovementioned scenarios currently occurring. For obvious reasons, the 'opt in' mechanism contained in the Bill will do little, if anything, to help the financially weaker party in these situations.

There does not appear to be any comment in the Explanatory Memorandum or the Reading Speeches to explain why the transitional provisions have been drafted the way they are. In fact, both the Memorandum and the Second Reading Speech state that the reason for the amendments is to end the disadvantage to de facto couples in Western Australia. The transitional provisions as they stand will continue to disadvantage de facto partners currently going through the Courts.

I understand some of the reasons the transitional provisions have been drafted as they are is because:

1. They might be seen as retrospective adverse legislation that might affect matters before the Courts. However, noting the Constitution does not bar the enactment of such legislation:

    (a) Retroactive legislation is routinely put in place for matters such as taxation amendments, where it often comes into force at the time of announcement. In this case, that would be 26 June 2006 when the West Australian Parliament enacted the *Commonwealth Powers (De facto Relationship) Act 2006* which sought to refer powers in relation to superannuation splitting, adopting the amendments to the *Family Law Act 1975*. In these circumstances, no one could reasonably assert they were not on notice of what changes were intended, or the specificity of the same (despite it having taken this long).

    (b) Some of the common rationale for putting retroactive legislation into place is that it is in the interests of justice and fairness. Taking into account:

        (i) The Honourable Mr Porter's comments in:

            (A) the Explanatory Memorandum to the effect that these changes will improve access to justice to de facto partners in Western Australia; and

            (B) the second reading speech that it has become clear that the inability of de facto couples in Western Australia to split their superannuation is resulting in unfair and inequitable property settlements in many cases;

        (ii) The statutory requirement that the Court must only split superannuation if it considers it is just and equitable to do so;

        (iii) The changes do not impose any penalty upon any person; and

        (iv) The potential for injustices to some members of the community mentioned earlier if the amendments were not available to matters currently before the Court;

        It seems plain that it is in the interests of justice and fairness for the amendments to apply to all de facto matters that have not yet been resolved.

        Further, and importantly, since the decision of the Full Court of the Family Court in *Mackah & Mackah* (2017) 93-770, there is real doubt about the

Courts ability to deal with de facto superannuation matters by adjourning the proceedings under section 205ZG(5) until the member spouse is able to access their superannuation.

(c) There is no bar to parliament enacting legislation which might affect existing Court proceedings (see *Australian Builders Construction Employee's & Builders Labourers' Federation v Commonwealth* [1986] HCA 47 at paras 17 and 18).

2. They might lead to an influx in workload for an already under-resourced Family Court system, however:

(a) The points raised above would suggest that this would not be the case, and that the availability of superannuation splitting in de facto matters currently before the Court will in all likelihood expand the ability of the Court to resolve matters fairly; and

(b) It is not proposed that the amendments apply to matters already dealt with by final orders under the *Family Court Act 1997* (any more than the proposed legislation may currently allow this via the addition of section 44(9) and 90YZD(3), having regard to the limited exclusions listed in the notes at 90YX, of the *Family Law Act 1975*).

While there may be other matters at play which I am not aware of, a review of the Hansard and other documents mentioned above does not reveal such matters. In any event, I respectfully propose that Schedule 4, Part 2, Item 3(1)(b) of the Bill, be amended so as to allow the Court to split superannuation either:

1. Where there have been no final orders made under the *Family Court Act* 1997, save for orders made in the same proceeding or pursuant to section 90YZE;

2. Where proceedings were commenced after 26 June 2006; or

3. Prior to the commencement date with leave of the Court, such leave only to be granted if the Court is satisfied that hardship would be caused to the party or a child if leave were not granted (a similar test to granting leave out of time).

In the alternative, I understand the Minister may, pursuant to Schedule 3, Part 5, item 6(1) of the Bill, make rules of a transitional nature (including prescribing any saving or application provisions) relating to the amendments. Might it be that the Minister intends, and if not I ask that they consider, providing for rules that would allow de facto parties currently before the Court access to the superannuation splitting regime without having to secure the financially stronger party's consent.

I respectfully request that these matters be brought to the attention of the Senate Committee before progressing the Bill, and thank them in advance for taking the time to consider the matters raised in this letter.

Yours faithfully
FAHEY MWENDA D'ADAMO

Per: Samuel Fahey
Director