Family Law Practitioners' Association
Western Australia

Your ref: S Wellings

24 January 2020

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By Online Submission

Dear Committee Secretary,

Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019

We write to provide a submission in relation to the abovementioned Bill.

As the principal representative body of Western Australian lawyers practising in the area of family law, we have long advocated for legislative change in relation to superannuation splitting for de facto couples in our state and are extremely pleased that this matter has been progressed.

The Association largely supports the form and purpose of the Bill. However, we seek to be heard primarily in relation to *Schedule 4 – Application and transitional provisions.*

The Association submits as follows

1. Existing Property Settlement Orders at Commencement

   Our reading of the Bill is that there is no provision which prevents an application for orders pursuant to the new proposed section 90YX where parties already have final orders for property settlement pursuant to Part 5A of the *Family Court Act* 1997 (WA) ("the FCA").

   This creates serious doubt about the finality of all existing final property orders pursuant to the FCA as at the commencement.

   Further, proposed section 44(9) allows a party to be granted leave to bring an application beyond the usual time limitation period (two years from the date of separation) where the Court is satisfied that hardship would be caused to a party by not allowing leave out of time.

   In a practical sense
   a) the failure to create a jurisdictional bar in respect of the new amendments for parties where final orders exist under the FCA;

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b) read together with section 44 (9) (which by itself the Association has no objection to)

creates a position where parties with existing orders, however long they have been in place, can have no certainty that their former partner will not claim against their super entitlements.

This is likely to result in a number of fresh applications pursuant to 90YX where the Court has already been required to determine a claim under Part 5A of the FCA.

The Association submits that the need for certainty of existing orders overrides the need to 'correct' any previous inequality created in cases already determined.

The Bill should be modified to ensure the amendments do not operate where there are existing final orders pursuant to the FCA at commencement.

2. Choice Mechanism

The Bill only allows for separating couples to apply to the Court for a super split if

a) their matter has not been instituted prior to the commencement date; or

b) their matter has not been finally resolved prior to the commencement date and both parties consent for the legislation to apply.

We are concerned about the requirement for joint consent.

The purpose of this legislation is to overcome inequity in cases where the inability to super split leaves one party without access to the appropriate property entitlement.

As is noted in paragraph 6 of the Explanatory Memorandum

> *In recent times superannuation has become an increasingly valuable asset for Australians, and can be the largest single asset in the property pool of a separating family. The inability for de facto in Western Australia to split their superannuation has led to increasing inequity, particularly for couples with low-value asset with low-value asset pools where superannuation may be the only asset. It also disproportionately affects women who, on average, accumulate less superannuation.*

The Association fully endorses that statement.

For that reason, we do not support the requirement for a process which places the disadvantaged party at the mercy of the advantaged party consenting to the amendments applying.

It is entirely adverse to the purpose of the legislation and in our view perpetuates the inequity of the financially weaker party where there is no real benefit (as in, for example, the need for certainty with existing orders).

Anecdotally, as a result of the awareness of the proposed amendments in the profession and public, individuals in Western Australia have delayed finalising their settlements so as to be able to access the ability to super split. However, there is a limitation period during which separated de facto couples must bring their application for property settlement, being 2 years from the date of separation.

This means many people who may benefit from the changes in the legislation had no choice but to file to protect their right to claim. Given present delays, these parties may have years until their matter is resolved and even so, will be reliant on a former partner to agree to something adverse to that partner's own interest.

The Association is of the view that this proposed 'choice' mechanism will cripple the Court's ability to ensure a just and equitable result in cases without joint consent. For that reason, the Association submits this mechanism should not be included and instead the legislation should apply to any matter which is yet to be finally determined on the commencement date.

Provided adequate notice is provided to the Court, the profession and the public about the changes and the commencement date, matters can be briefly adjourned in cases where it would cause an injustice to weaker party.

3. Binding Financial Agreements

The Association submits that the Court should not have jurisdiction to apply the superannuation amendments in any case where the parties executed a valid binding financial agreement ("BFA") pursuant to the FCA prior to the commencement date and where that BFA has not subsequently been set aside.

The present drafting of the Bill appears to only address when de facto couples in WA may include superannuation splitting in BFAs (see Schedule 4, Part 2) and fails to address what will occur with those already in existence.

This has the potential to create an adverse impact on those parties who have entered into (or will enter into) a BFA pursuant to the Court Act prior to the commencement date.

BFAs pursuant to the FCA executed up to the date of commencement can only oust the jurisdiction/power of the Court under the FCA. It has not been open to parties to oust the jurisdiction of the Court in relation to the proposed amendments to the *Family Law Act* 1975 (Cth).

Thus, any amendment which has retrospective operation in that it does not bar an application for a super split where a BFA is in place at commencement, may inadvertently leave parties who were under the impression they were protected by a BFA, open to a claim in respect of super entitlements.

Given the majority of BFAs pursuant to the FCA currently in existence are those prepared prior to or during the de facto relationship to protect a future claim on separation, this will create a serious injustice by leaving those parties open to a claim they were not legally in a position to protect against.

The Association submits that Section 90YK should not apply to any cases where there is a valid BFA existing as at commencement and where that BFA has not been set aside.

Should the Committee require any further submission or clarification, they are invited to contact the Association.

Yours faithfully

Stacey Wellings
Vice President & Chair of Law Reform Sub-committee