



FAMILY COURT OF WESTERN AUSTRALIA

**FAMILY LAW AMENDMENT
(WESTERN AUSTRALIA DE FACTO SUPERANNUATION SPLITTING
AND BANKRUPTCY) BILL 2019**

**SENATE LEGAL AND CONSTITUTIONAL
AFFAIRS LEGISLATION COMMITTEE INQUIRY**

**SUBMISSION BY THE
FAMILY COURT OF WESTERN AUSTRALIA**

14 January 2020

1. The Family Court of Western Australia (“the FCWA”) welcomes the introduction of the Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill (“the Bill”) on 27 November 2019. As the Federal Attorney General confirmed in his media release, women in de facto couples in Western Australia have been particularly disadvantaged, as superannuation entitlements in de facto property settlements are treated differently in Western Australia to those of married couples in Western Australia and all couples in the rest of Australia. The Bill will amend this anomaly.
2. The FCWA only wishes to make one submission in relation to the Bill, and that relates to the transitional provisions, in particular as set out in Schedule 4 to the Bill. The Court notes that it is proposed that notwithstanding parties may have entered into a financial agreement prior to the commencement of the relevant sections in the Bill, that agreement can be terminated by the parties, and they may make a new financial agreement, to include a superannuation splitting agreement as part of their financial agreement. The Court supports this provision.
3. The FCWA is concerned about the transitional provisions which relate to parties who have commenced proceedings in the FCWA under Part 5A of the *Family Court Act 1997* (WA), when those proceedings have not yet been finally determined. The Court notes the general rule is that those parties will not be able to access the superannuation splitting provisions as referred to in the Bill, unless both parties agree. If parties do agree, there are additional requirements.
4. In 2001, when amendments to the *Family Law Act 1975* (Cth) were made subsequent to the Family Law Legislation Amendment (Superannuation) Bill 2000, the policy intention was that the superannuation amendments would not apply if a property settlement had been finally concluded prior to the commencement of the superannuation amendments, unless the relevant Court order or Court approval for an agreement was subsequently set aside.
5. The effect of the above was that the superannuation amendments applied to all marriages, and only did not apply if there was a finalised property settlement which was not subsequently set aside. This meant it could apply to parties to a marriage who had proceedings which had not yet been finally determined by the Court when the said Bill was introduced on 13 April 2000, and subsequently passed in 2001.
6. The FCWA observes that the proposal for WA de facto couples insofar as superannuation splitting orders are concerned is not the same as occurred in 2000/2001 with parties to a marriage, when that was the only change to the way that financial proceedings were dealt with by the Court, as is the current situation.

7. When the significant amendments were made to the *Family Law Act* in 2008 to extend federal jurisdiction under that Act to financial matters arising out of the breakdown of de facto relationships in all states but WA, both parties had to make a choice for the amendments to apply. However, that situation was significantly different to the current position of WA de facto couples.
8. Prior to the 2008 amendments, power over the property rights of de facto couples had resided in each state and the laws concerning the property of de facto couples varied from one state to another. At that time, in some states, there were significant differences in the way that married couples and de facto couples were treated by the law, including in relation to property and maintenance rights. However, in Western Australia, since the *Family Court Act 1997 (WA)* was amended in 2002, there is little or no difference in the principles that apply on the breakdown of de facto relationships and the principles which apply on the breakdown of marriages, save and except insofar as the way that parties' superannuation entitlements are treated.
9. It seems that the current proposal, for the parties to "choose" whether the amendments apply, mirrors the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, where the new provisions did not extend to a de facto relationship that had broken down prior to the commencement of the new laws, unless both parties opted in. The current position is that the only additional right, albeit which may well be substantial in quantum, is to treat superannuation entitlements as property and allow for super splitting orders to be made.
10. Given the Bill has now been introduced and has been referred to the Committee for a final report, it may in fact be some considerable time before proposed amendments to the *Family Law Act 1975* are able to take effect. Parties, in particular, the 'member' spouse, may well take advantage of this delay, and commence proceedings, thereby effectively ensuring the regime to allow their superannuation to be treated as property is not available to the 'non-member' spouse.
11. Even if both parties choose for the new regime to apply, the "opt in" proposals could be unnecessarily onerous on a party who may be in difficult financial circumstances (usually the woman), as it requires each party to obtain independent legal advice from a legal practitioner regarding the advantages and disadvantages in making the choice, with the legal practitioner being required to provide a signed statement that the necessary advice was given. This will be an additional cost for each of the parties to bear.
12. As currently drafted, a number of women potentially will continue to be disadvantaged, and inequitable splits of property will continue to result, in particular those women involved in pending de facto financial proceedings in the FCWA, and any proceedings that are commenced between now and when this legislation (and no doubt the legislation that will need to be introduced by the WA Government to support the operation of the Bill) takes effect.