



Australian Government

Attorney-General's Department

Submission of the Attorney-General's Department

Senate Legal and Constitutional Affairs Legislation Committee

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



24 January 2020

Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019

Submission of the Attorney-General's Department

The Attorney-General's Department (the department) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the opportunity to make a submission to its inquiry into the Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019 (the Bill).

The Bill will give effect to a referral of power from Western Australia to the Commonwealth in respect of superannuation matters in family law proceedings for separating de facto couples in Western Australia. It will also extend federal bankruptcy jurisdiction to the Family Court of Western Australia to hear bankruptcy proceedings concurrently with family law proceedings, where appropriate.

The purpose of the Bill is to end the differential treatment that Western Australian de facto couples have experienced in certain aspects of family law proceedings compared to other de facto couples across Australia. The Bill will enable Western Australian separating de facto couples to split their superannuation interests upon relationship breakdown, either by court order or by an agreement made between them. It will also enable de facto couples in Western Australia to have bankruptcy matters heard concurrently with their family law proceedings, avoiding the need to pursue them as separate proceedings in two different courts.

Superannuation splitting measures

Current legal framework and referral of power

Between 2003 and 2010, all states except Western Australia provided the Commonwealth with full subject matter referrals of power for de facto property, maintenance and superannuation in family law matters. Since these referrals took effect, all de facto couples, except for those in Western Australia, have been able to split their superannuation interests following the breakdown of their relationship.

In 2006, Western Australia enacted the *Commonwealth Powers (De facto Relationships) Act 2006* (WA) to provide a limited referral of power to the Commonwealth, to enable the splitting of Western Australian de facto couples' superannuation in family law matters. This narrow referral was not previously accepted by the Commonwealth, on the basis that it did not extend to other de facto financial matters – the allocation of property interests more broadly, and spousal maintenance.

It has become increasingly clear that the inability of Western Australian de facto couples to split their superannuation is resulting in inequitable property settlements in some cases. Superannuation is an increasingly valuable asset for Australians, and can be the largest single asset in the property pool of a separating family. Being unable to split this important asset can lead to unfair outcomes and disproportionately affects women, who accumulate less superannuation, on average, than men.

To end this inequality, the Government announced in October 2018 that it would accept the narrow referral of power from Western Australia and enact legislation to enable Western Australian de facto couples to split their superannuation and be treated consistently with couples across Australia.

Proposed amendments in the Bill

Schedule 1 of the Bill will create a new Part VIIC in the *Family Law Act 1975* (Cth) which deals exclusively with superannuation splitting for Western Australian de facto couples. This schedule largely replicates provisions in existing Parts VIIIB and VIIIC of the Family Law Act, which relate to financial matters for de facto couples and superannuation splitting for married and de facto couples elsewhere in Australia. Schedule 1 vests power in the Family Court of Western Australia and the Magistrates Court of Western Australia to make superannuation splitting orders for de facto couples in Western Australia. It also enables separating de facto couples to make agreements about how their superannuation should be split following separation. These superannuation splitting agreements will form part of a single financial agreement under the *Family Court Act 1997* (WA), so Western Australian couples do not need to make two separate agreements dealing with different aspects of their property.

The superannuation splitting regime established by the Bill relies on the application of both federal and state family law. In hearing a de facto family law property dispute, Western Australian courts will apply federal law for the superannuation component of the property pool, and state law for the remaining property in the pool at the same time. This is in contrast to all other states in Australia, which have provided a full subject matter referral for de facto financial matters. In those states, only federal family law will apply. The Bill aims to make this application of Commonwealth and Western Australian law as seamless as possible for Western Australian courts to apply, and for applicants and lawyers to use.

Commencement and transitional arrangements

The new superannuation splitting regime under the Bill will commence on a date to be fixed by proclamation, after the commencement of the *Commonwealth Powers (De facto Relationships) Act 2006* (WA). That Act refers the necessary power to the Commonwealth to make laws for superannuation splitting for Western Australian de facto couples provided for by this Bill. Commencing the Bill by proclamation will allow time for necessary amendments to be made to Western Australian legislation to support the operation of the new regime. Amendments are also required to subordinate legislation at the Commonwealth level, including superannuation regulations and trust deeds which underpin the operation of superannuation splitting in family law matters.

Western Australian de facto couples will be able to begin splitting their superannuation as part of family law property settlements once the Bill commences. Western Australian couples who already have final court orders dividing their property will not be able to access the new regime and have their superannuation interests split. This is consistent with the 'clean break' principle in family law property matters, which provides that court orders finalise the financial relationship between the parties.

Couples who already have a financial agreement in place will be able to terminate that agreement and make a new one after the Bill commences, if they want the new superannuation splitting regime to apply to them. This will only be possible if the property which is the subject of the existing financial agreement has not already been distributed between the couple.

Western Australian de facto couples who have family law proceedings on foot when the Bill commences will be able to 'opt in' to the new regime if they both agree. To do so, both parties must request that the court also make orders about their superannuation interests. The parties must make this request in writing, after receiving independent legal advice about the advantages and disadvantages of opting in to the superannuation splitting scheme.

This is consistent with the approach taken when Part VIIIAB of the Family Law Act was extended to de facto couples in other jurisdictions by the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008. The ability for parties to 'opt in' to the new regime by mutual agreement and with appropriate safeguards was included in the Bill in response to a recommendation by this Committee in its 2008 report on the Bill.¹ Providing a mechanism for parties to be able to 'opt in' seeks to balance the potential unfairness that may result if a party with proceedings on foot is unable to access the new regime, with the recognition that enabling one party to unilaterally apply for superannuation splitting to be included in property proceedings that are already underway, is likely to engender additional financial costs to both parties and to delay the finalisation of proceedings.

Bankruptcy measures

Current legal framework

Currently, unlike other Australian couples, Western Australian de facto couples must pursue their family law and bankruptcy matters in two different courts: family law proceedings in the Family Court of Western Australia, and bankruptcy proceedings in the Federal Court of Australia or the Federal Circuit Court of Australia. This is due to the operation of section 35B of the *Bankruptcy Act 1966* (Cth), which limits the jurisdiction in bankruptcy of the Family Court of Western Australia to concurrent bankruptcy and family law proceedings involving parties to a marriage.

Proposed amendments in the Bill

The bankruptcy provisions in this Bill will help Western Australian de facto couples to resolve their family law matters more simply, where one or both parties are also involved in bankruptcy proceedings. The Bill will ensure that the rights of Western Australian de facto couples upon relationship breakdown are consistent with those of their married counterparts. These amendments will also create a nationally consistent approach to the exercise of jurisdiction in bankruptcy in concurrent bankruptcy and family law proceedings.

Schedule 2 of the Bill amends the Bankruptcy Act to extend the jurisdiction in bankruptcy of the Family Court of Western Australia to hear bankruptcy matters concurrently with family law matters for Western Australian de facto couples. This will avoid the need for those couples to resolve family law and bankruptcy proceedings in two different courts, saving them valuable time and money.

¹ See recommendation 4 of the Senate Committee on Legal and Constitutional Affairs, Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008.

Subject to Western Australia implementing enabling amendments, separating Western Australian de facto couples will be able to have their bankruptcy matters dealt with concurrently with their family law matters in two circumstances:

- when a party to a de facto relationship is a bankrupt and the trustee in bankruptcy is a party to property settlement proceedings or spousal maintenance proceedings, or an applicant to have property orders varied or set aside under the Family Law Act or the Family Court Act, and
- when bankruptcy proceedings are transferred from the Federal Court or Federal Circuit Court to the Family Court of Western Australia to be heard concurrently with family law proceedings.

The amendments will allow the Family Court of Western Australia to determine co-existing bankruptcy and family law property matters at the same time and in the same forum. The amendments will therefore ensure the Family Court of Western Australia can make orders that appropriately take into account the interests of all relevant parties including the bankrupt, the non-bankrupt partner and creditors.

Commencement and transitional arrangements

The bankruptcy measures in the Bill will commence on a date to be fixed by Proclamation, after the commencement of the *Commonwealth Powers (De facto Relationships) Act 2006* (WA). Commencing the Bill by proclamation will allow time for the commencement of necessary amendments to Western Australian legislation to support the operation of the bankruptcy measures.

The Family Court of Western Australia will be able to exercise jurisdiction in bankruptcy from the time the Bill commences.

Western Australian couples with a family law proceeding, involving a party who is bankrupt, which is on foot when the Bill commences will be able to have their bankruptcy matter considered together with their family law matter by the Family Court of Western Australia.

For Western Australian couples who have commenced family law and bankruptcy proceedings separately in two different courts, the Federal Court and the Federal Circuit Court will be able to exercise their discretion to transfer the bankruptcy proceeding to the Family Court of Western Australia where appropriate.

Consultation

The Bill has been developed in close consultation with the Western Australian Government and the Western Australian courts, given the close interaction of the Bill with Western Australian laws. The federal family courts have also been consulted in the development of the Bill. The Departments of Finance, Defence, Veterans' Affairs, Treasury, Home Affairs, and Social Services have been consulted on the consequential amendments to legislation in those portfolios.

Conclusion

The Bill will support WA de facto couples to achieve a fair split of their superannuation assets as part of a property settlement, and facilitate quicker and cheaper resolution of concurrent family law and bankruptcy matters. In doing so, the Bill will bring WA de facto couples in line with other de facto and married couples across Australia.

The department would be happy to provide further information to the Committee as required.