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Friday 1 August 2008

Dear Mr Hallahan

Inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008
Inquiry into the Evidence Amendment Bill 2008
Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

Thank you for the opportunity to make this submission on selected legal and policy matters relating to these Inquiries. My submissions relate only to the amendments in the subject Bills concerning equality for same-sex couples and their children in the relevant laws.

About the author

I joined the Law School at the University of Melbourne in 2000. I have 15 years experience in tax law across government, private practice and academia, in Australia and the United States. I am a Fellow of the Taxation Institute of Australia, a member of the International Fiscal Association (Australian Branch) and an International Fellow of the Centre for Business Taxation at Oxford University. I have published widely across a a range of tax law and policy topics, including a specific focus on tax issues relating to the family, death and same-sex relationships. Relevant publications include as a co-author of the leading text, *Death and Taxes: Tax-effective Estate Planning* (2007, 2nd edition, Thomson); *Income Taxation: Text, Materials and Essential Cases* (2007, 8th edition); and journal articles including 'Tax and Same Sex Couples: Still Waiting for a Fair Go' (April 2008) 42(9) *Taxation in Australia* 517; 'Superannuation and Same Sex couples: Interdependent but not Equal' (2006) 27(2) *Sydney Law Review*; and 'Domesticating Tax Reform: The Family in Australian Tax and Transfer Law' (1999) 21(3) *Sydney Law Review* 453.

I was a paid consultant to the Human Rights and Equal Opportunity Commission for its inquiry into discrimination, *Same-Sex: Same Entitlements, National Inquiry into Discrimination against people in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (May 2007), in particular on the topics of taxation and superannuation.

Inquiry into the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008
Inquiry into the Evidence Amendment Bill 2008

Couple relationships

The purpose of the Same-Sex Relationship (Equal Treatment in Commonwealth Laws-Superannuation) Bill 2008 is to eliminate discrimination against same-sex couples and the children of same-sex relationships in Commonwealth legislation that provide for reversionary superannuation benefits upon the death of a scheme member, and in related taxation treatment of superannuation benefits. The purpose of the Evidence Amendment Bill is to ensure that members of a couple, whether same-sex or opposite-sex, are not required to give evidence against each other in court.

The reform of Commonwealth superannuation laws is particularly urgent as members of these superannuation funds, who are in a same-sex relationship and who have paid in mandatory contributions throughout their working lives, are currently unable to provide a reversionary pension or death benefit to a surviving partner in relation to their lifetime contributions.

I support the general approach of the government in these Bills to extend equal recognition to same-sex couples on a de facto basis. The HREOC Inquiry identified 58 laws that required amendment to end discrimination and the government has identified a further 47 laws. The proposed amendments will end this discrimination in an appropriate way, overall.

A general definition of a ‘couple relationship’ that will include a same-sex couple is the simplest way to carry out this major reform project (and this may apply in the expected future omnibus bill). However, it is important to acknowledge that in various statutes, specific definitions of ‘couple’ apply. For example, in superannuation laws it is usually required that a de facto couple live together for at least 3 years, or else provide additional evidence of the relationship. This limits the financial cost to the government and provides superannuation benefits only where that additional hurdle is satisfied. It is appropriate, as the government has done, to incorporate same-sex relationships into each statute but retaining the differences in ‘couple’ definition to ensure complete equality of treatment.

A different definition of “couple relationship” already applies in the Evidence Act to that in the various superannuation statutes; as stated above, it is appropriate for the amendment to apply that specific definition to both same-sex and opposite sex couples in that Act.

It is appropriate, as the Superannuation Bill does, to replace the words ‘husband or wife’ in various definitions of couple with the word ‘partner’ (eg the amendment to section 4B

of the *Parliamentary Contribution Superannuation Scheme Act* (item 7)). This will ensure that the words 'husband' and 'wife' will apply only to a formally married opposite sex couple and will not be used to apply to other forms of de facto relationship (whether same sex or opposite sex). This exclusive use of 'husband and wife' for a married couple is accurate, simple and makes it clear that the reforms do not affect the status of a *de jure* married couple in Australia.

Recommendation: The Committee accept the definition of "couple relationship" as drafted in the Bill.

Interdependency Relationships

Schedule 4, Clause 10 of the Superannuation Bill amends the Superannuation Industry (Supervision) Act 1993 (**SIS Act**) to include a partner in a same-sex couple as a 'partner' of a member of a superannuation fund where they are 'in a relationship as a couple'.

In the SIS Act and associated tax legislation, the previous government introduced the concept of an "interdependency relationship" which would potentially encompass caring, live-in companion relationships (including some same-sex couples) (s 10A of the SIS Act). The Bill leaves this category of relationship untouched but amends the "couple" definition to incorporate same-sex couples.

I have previously published, and still hold the view, that as a matter of policy and of legal clarity and certainty of administration, it is inappropriate to include same-sex couple relationships in the category of interdependency relationships ('Superannuation and Same Sex couples: Interdependent but not Equal' (2006) 27(2) *Sydney Law Review*). The two kinds of relationships are different; the latter concept is clearly targeted to a carer relationship and is well suited to that category only. Same-sex couple relationships are much more similar to opposite-sex couple relationships than they are to any form of carer/companion, sibling or parent/child relationship, the categories intended to be covered by the interdependency category, according to the Explanatory Memorandum to that legislation. Trustees will be able to administer superannuation funds with greater certainty, and the Commissioner of Taxation will be able to administer more easily the tax concessions applying to death benefits, utilizing a definition of a "couple" relationship, with which they already have significant experience in assessing opposite-sex relationships.

Recommendation: The Committee accept the definition of "couple relationship" as drafted and approve the retention of the "interdependency relationship" category for companion and carer-type relationships which would not satisfy the couple definition.

SIS Act amendments not mandatory for Trustees

Paragraph 267 of the Explanatory Memorandum states that the SIS Act amendment including same-sex couple relationships "will ensure a person in a same-sex relationship is able to receive their partner's superannuation benefits as a dependant, upon the death of their partner".

This statement in the EM is correct as regards the Commonwealth superannuation schemes which directly reference the SIS Act definition, but is not strictly correct as regards private superannuation funds. The SIS Act regulates private superannuation

funds that are administered under superannuation trust deeds, as well as providing definitions to which the various Commonwealth superannuation funds refer. The SIS regulatory regime is generally permissive (except for its prudential requirements on funds). Thus, this amendment, while enabling recognition of the partner of a private superannuation fund member, does not mandate such recognition.

Whether same-sex couples and their children will be treated equally as dependants in private superannuation funds depends on the terms of the trust deed. Many trust deeds refer directly to the definitions in the SIS Act and so this should not be a problem. However, many others may continue to contain discriminatory definitions of 'spouse' and 'child' in the deed. It is important, to ensure full equality of the bulk of working and contributing lesbian and gay Australians in superannuation, that superannuation fund deeds be amended to incorporate same-sex couples explicitly into the definition of dependant, ideally by incorporating the definitions in the SIS Act.

Trustees, who are understandably cautious in administering funds, may be reluctant to amend the deed unless they are required to do so. They may also need assurance that amendments to the deed to expand the potential class of dependants will not cause any resettlement of the trust deed (which could have significant tax consequences). Case law suggests that the class of potential beneficiaries (including dependants) can be changed without causing a resettlement.[1] However, the Australian Tax Office has suggested that changing beneficiaries could in some circumstances trigger a resettlement.[2] Trustees may be understandably cautious in this situation.

Recommendation: The Bill mandate amendment of trust deeds to ensure equality of recognition of the bulk of Australian same-sex couples who contribute to private superannuation trust funds. The government in the Explanatory Memorandum or other published advice, should make it clear that such amendment will not cause any resettlement of the trust funds or otherwise pose a risk to security of those funds including tax liability.

Registered relationships

Increasingly, both same- and opposite-sex couple relationships are being recognized in Australian state and territory laws, and in laws in other countries, as registered relationships or civil unions. It is appropriate, then, that the Bill incorporates a reference to a registered relationship in Clause 25 of the Bill, amending s 4AB(4)(ba) of the *Judges Pensions Act 1968*, as relevant evidence of a "couple relationship", which is referred to in all the statutes.

As a matter of drafting, it would be more appropriate to have this general provision in the Acts Interpretation Act, as it is relevant to all the statutes being amended. However, in any event, where it is currently, this will assist in providing evidence of a "couple relationship" for those administering the statute.

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[1] FCT v Commercial Nominees of Australia Ltd [2001] HCA 33 (High Court of Australia)

[2] ATO, Creation of a New Trust - Statement of Principles (August 2001), available at www.ato.gov.au

It is submitted that, in addition to enabling the government to "prescribe" a state or territory law enabling registration of a relationship, this provision should be extended so as to enable the government to prescribe the law of another country under which registration is allowed, so as to assist in this evidentiary exercise.

Further, it is submitted that the Committee should consider whether the existence of a "registered" relationship is enough, on its own, to satisfy the definition of a "couple relationship", rather than as simply evidence of a de facto "couple relationship". The registration law could still be required to be "prescribed", so as to enable the government to ensure that the relationship definition was similar enough to the definition of "couple relationship" in the relevant Australian federal law. The ability to submit evidence of a registered relationship under a prescribed law, whether state, territory or of another country, as conclusive proof of a "couple relationship" would greatly simplify the administration of the law.

Recommendations:

- The Bill should be amended so that the reference to registered relationships in Clause 25 of the Bill should instead be inserted into the Acts Interpretation Act from the Judges' Pensions Act.

- The content of Clause 25 be amended so as to expand it to encompass a prescribed law of another country, in addition to a state or territory law.

- The Committee consider extending the amendments so that proof of a prescribed, registered relationship can be tendered as conclusive proof of a "couple relationship" for purposes of the Bill and other amending legislation.

Child

I support the recognition of parent-child relationships for children in same-sex families and the proposal for a general definition that will encompass all relevant children. This is crucial to ensure equality of treatment and opportunity for all children and in the best interests of the child in a same-sex family. Federal recognition using a consistent definition will ensure that children are not treated differently just because of the state or territory in which they are born and raised, or the kind of family who raises them.

It is important that a child be recognized as a child of both the biological mother and of the co-mother in a lesbian relationship, or of both the biological father and of the co-father in a gay relationship, for all federal laws. This will ensure full parental responsibility and equal rights for care and financial support in the child.

The approach taken by the government will ensure equality of treatment of children raised in same-sex relationships in the subject superannuation statutes and should achieve the goal of consistency and coverage of affected children. My main comment relates to a lack of clarity.

The new definition (see, eg, Schedule 1, Clause 17 repealing the definition of 'child' in subsection 19AA(5) of the *Parliamentary Contribution Superannuation Scheme Act* and inserting a new definition) states:

> *Child* means a child of the person, including : … (b) if, at any time, the person

> had a partner (whether the persons are the same sex or different sexes) – a child who is the product of the person's relationship with that partner.

A further provision limits this definition (see Item 5 of the Bill, inserting new subsection 4(7) into the *Parliamentary Contribution Superannuation Scheme Act*):

> A child cannot be the product of the relationship between two persons (whether the persons are the same sex or different sexes) for the purposes of this Act unless the child is the biological child of at least one of the persons or is born to a woman in the relationship.

Together, these definitions are intended to ensure that a child born and raised in a lesbian relationship will be recognized as the child of both the biological mother and non-biological co-mother, for federal superannuation purposes. This puts the child in an equal position as compared with a child born into a de facto opposite sex relationship. A similar result follows for a child raised by a gay couple, where the child has both a biological father in the couple and has a non-biological co-father who is the other member of the couple.[3]

However, there is no definition of the new concept or phrase, "*product of the relationship"* in the amending Bill. There is also no explanation of this phrase in the Explanatory Memorandum. An ordinary Dictionary meaning of "product", so far as it appears relevant, is "a result of an action or process" (Oxford English Dictionary, accessed 1 August 2008). A sensible interpretation would interpret the phrase to require an agreement, or joint action or process by the members of the couple in the relationship, which leads to the joint decision and action of bringing a child into the world and raising him or her.

That is, it seems to be intended that consent or a joint intention to raise the child is required for the child to be a *product of the relationship*. However, this is not made clear in the amending Bill or EM. The EM illustrates some aspects of the intended meaning in its Examples (see p. 9, paras 51-54). These illustrate that the recognition as a child of both parents will continue even if the relationship breaks down, ensuring security of recognition for the child into the future (Examples 1 and 2). They also make clear (Example 3) that a child of a previous relationship is not recognized as a child of a new partner in the couple relationship.

Recommendation: No amendments are required. Some further explanation in the Explanatory Memorandum, in particular about a requirement of consent in the non-biological partner in the relationship, and timing of this consent (at the date of conception? Or birth?) as enabling the child to be considered a "product of the relationship" would be helpful in interpreting this phrase.

[3] It is important to note that some children raised by gay dads are not the biological child of either father. In this situation, adoption is the appropriate form of legal recognition; however, the existence of discriminatory adoption laws in states and territories and at the federal level (regarding inter-country adoption) mean that children of these same-sex families are still not accorded equal treatment under the law.

Inquiry into the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008

The Family Law Act 1975 (Cth) contains provisions defining a "parent" (in section 4) and establishing a presumption of parenthood where a child is conceived using assisted reproductive technology (section 60H), of a consenting (non-biological) male partner in a couple relationship.

The simplest and most sensible way to ensure recognition of a non-biological co-mother in a lesbian "couple relationship" with a biological mother is to extend this presumption of parenting to the situation of a woman who is the partner of a birth mother and to amend the definition of "parent" accordingly.

The Bill amends section 60H in relation to lesbian couples for the purposes of property division and maintenance issues in the Family Court, but not in relation to parenting specifically (Cl 50 of the Bill, inserting Part VIIIAB including new section 90RB(3)). This is unduly complex and illogical; why grant recognition for property purposes but not for parenting responsibilities? Further, why give the Family Court jurisdiction as to property but not parenting in this situation?

It is noted that than amendment to extend equal treatment to lesbian co-parents under this parenting presumption would capture the bulk of children currently being conceived in and raised by same-sex families. It provides a quicker and easier route to ensuring adequate parenting in the best interests of the child for these same-sex families and to alleviating stress and uncertainty currently faced by them.

Recommendation: Amend section 60H to extend the parenting presumption to a partner of a birth mother on a gender-neutral basis. This amendment should be *in addition to* the reforms to the Superannuation Bills, discussed above, that ensure equality in all federal laws for children in either lesbian or gay same-sex families.