'Are You Two Interdependent?'† *Family, Property and Same-Sex Couples in Australia's Superannuation Regime*

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Abstract

Australian law provides an exemption from tax for benefits paid to dependants on the death of a member of a superannuation fund. The federal government recently amended the law to recognise people in an 'interdependency relationship' as dependants for the purpose of this exemption. In contrast with the federal government's general refusal to grant legal recognition to same-sex couples, this reform was apparently aimed at allowing same-sex couples to benefit from the exemption. This article examines in detail the concept of 'interdependency relationship' and shows that it does not create equality of treatment for same-sex couples. Significant discrimination continues to exist in the superannuation regime against same-sex couples and their children. The article then considers the politics and policy of the 'interdependency relationship' reform. This analysis raises some fundamental questions about the intersection of concepts of family and property rights in superannuation on death.

1. Introduction

Around Australia, states and territories have legislated against sexuality discrimination and for equal recognition of same-sex and opposite-sex relationships.[1] Federal law, on the other hand, in most instances fails to recognise same-sex couples and their children and does not prohibit discrimination on the

† Lindsy Van Gelder & Pamela Brandt, *Are You Two Together?: A Gay and Lesbian Travel Guide to Europe* (1991).

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1 All states and territories except South Australia recognise same-sex couples on an equal footing with opposite-sex de facto relationships in respect of inheritance and property laws and state taxes, although equality is not always provided in respect of children. The Statutes Amendment (Relationships No 2) Bill 2005 (SA) has lapsed and has not yet been reintroduced pending the South Australian election. A Civil Unions Bill 2005 (SA) was also introduced in 2005 and has lapsed. Tasmania's Relationships Act 2003 (Tas) provides a registration system for same-sex couples. A civil union regime for same-sex and opposite-sex couples was passed in the ACT: Civil Unions Act 2006 (ACT) and immediately disallowed by federal executive order on 13 June 2006: Commonwealth of Australia Special Gazette No S93, 14 June 2006.

basis of sexuality. Currently, the Human Rights and Equal Opportunity Commission is conducting an inquiry into financial discrimination suffered by same-sex couples.[2] The Prime Minister is alleged to have instructed government departments not to cooperate with this inquiry.[3] In 2004 the federal government legislated to prohibit same-sex marriage[4] and it recently applied its rarely used executive power in respect of territory law to outlaw a civil union statute passed by the Australian Capital Territory legislature because of its resemblance to marriage.[5]

Yet, in a move which appears to run counter to this tide of hostility against the legal recognition of same-sex couples, the federal government in 2004 amended Australia's superannuation and tax laws to recognise people in an 'interdependency relationship' as dependants who can receive tax-free superannuation death benefits.[6] Prime Minister Howard spoke of these apparently contradictory reforms in a speech as follows:

> [We will] … firstly amend the Marriage Act, to insert into the Act the commonly accepted definition of a marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life. We've decided to insert this into the Marriage Act to make it very plain that that is our view of a marriage…
>
> Separately we will be legislating … to expand the definition of dependent for the purposes of paying superannuation death benefits to include a person in an interdependent relationship … including of course members of same sex relationships. The amendments … will not alter the definition of a spouse, it will not specifically recognise same sex relationships.[7]

This article analyses in detail the 'interdependency relationship' reform and its anomalous position in light of the federal government's policy of refusing to recognise same-sex couples. The 'interdependency' reform is a step towards recognition of such relationships. However, it does not eliminate discrimination against lesbians and gay men in respect of benefit payouts, or other aspects of superannuation law. Instead, it reveals the complexity of federal politics and policy concerning superannuation. Same-sex couples and their children continue to fall into the interstices between property and family in this regime.

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2 Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* Discussion Paper (April, 2006).

3 Shadow Attorney-General, Nicola Roxon *Media Release,* (22 June 2006); Laura Tingle, 'Federal Ban on Aiding Same-Sex Rights Enquiry' *AFR* (22 June 2006) at 5.

4 The legislation limits the definition of 'marriage' to a man and a woman, so as to prevent the recognition by our courts of same-sex couples marriages formalised in Canada, the Netherlands or other countries: *Marriage Amendment Act* 2004 (Cth). See Kristen Walker, 'Same-Sex Marriage in Australia' (2006) 10 *IJHR* (forthcoming).

5 Above n1.

6 *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act* 2004 (Cth) Sched 2.

7 Prime Minister John Howard, *Press Conference Transcript* (27 May 2004), available from *Capital Monitor*.

Part 2 briefly describes the superannuation regulatory and income tax regime and the rules applicable to superannuation death benefits. Where relevant, it refers to the Commonwealth Government's proposal to carry out major reforms to Australia's superannuation regime, announced in the 2006–2007 Budget.[8] These proposals have not been legislated and are currently undergoing consultation, but they are stated to apply from 1 July 2007. Part 3 discusses the definition of 'dependant' in superannuation and income tax law. Part 4 examines in detail the new notion of 'interdependency relationship'. Part 5 explains how superannuation and tax laws continue to discriminate against same-sex couples and their children in spite of this recent reform. Part 6 considers the politics and policy of the interdependency reform and the fundamental questions of recognition of family and property rights that it raises. Part 7 concludes.

2. The Superannuation Regime

Superannuation is the major way in which Australians save for retirement and superannuation savings now total more than $741 billion.[9] The superannuation regime combines compulsory contributions by Australian workers and employers under the Superannuation Guarantee Scheme,[10] plus the ability to make voluntary contributions, with tax concessions in respect of contributions, earnings in the superannuation fund and benefit payments.[11] The tax concessions for superannuation are Australia's largest tax expenditure, estimated at $15.52 billion in revenue forgone in 2005–6.[12] In the 2006–7 Budget, the Commonwealth Government proposed reforms which cement the status of superannuation as Australia's most tax-advantaged savings regime by completely exempting from tax benefits paid on retirement or at death.[13]

Superannuation funds are established under trust deeds, and the relationship between members and trustees is determined by the provisions of the deed.[14] The terms of trust deeds and actions of trustees of superannuation funds are in turn regulated under a detailed scheme in the *Superannuation Industry (Supervision) Act* 1993 (Cth) (hereafter '*SIS Act*'). The primary regulator is the Australian Prudential Regulatory Authority (hereafter 'APRA'). A range of income tax

8 Commonwealth of Australia, Treasury, *A Plan to Simplify and Streamline Superannuation: Detailed Outline* (9 May 2006), available from <http://simplersuper.treasury.gov.au> (14th July 2006) (hereafter 'Simpler Superannuation').

9 Minister for Revenue, Mal Brough, 'Super Savings Continue Strong Growth' Media Release (13 October 2005).

10 *Superannuation Guarantee Charge Act* 1992 (Cth) and associated legislation.

11 The tax concessions are contained in the *Income Tax Assessment Act* 1936 (Cth) (hereafter '*ITAA* 1936') and the *Income Tax Assessment Act* 1997 (Cth) (hereafter '*ITAA* 1997').

12 Commonwealth of Australia, Treasury, *Tax Expenditures Statement 2005* (2005) Item C1 at 113 and Appendix B (hereafter 'Tax Expenditures Statement').

13 Simpler Superannuation, above n8.

14 Public superannuation schemes for government employees are established under state and federal government legislation. Retirement Savings Accounts (hereafter 'RSAs') are an alternative to superannuation funds under the *Retirement Savings Account Act* 1987 (Cth). This article does not discuss RSAs in any detail; however, the discussion as to superannuation funds generally applies to RSAs.

concessions apply to superannuation funds that 'comply' under the *SIS Act* by (among other things) operating only for certain listed purposes including provision of benefits to members after retirement and on death to his or her dependants.[15] Members of a fund usually cannot access their fund benefits until a threshold retirement age, or on disability or death.[16] A death benefit may be paid to a 'dependant' of a deceased member of a fund, and if it is so paid, it may be eligible for a tax exemption.

A. Superannuation Tax Concessions

There are three main tax concessions applicable to superannuation contributions, earnings and benefits. First, employer contributions to superannuation are tax-deductible for employers but are not included in income for employees, and contributions by the self-employed are tax-deductible, up to a dollar ceiling.[17] These contributions effectively come out of pre-tax income, so that superannuation is treated more favourably than other forms of saving, which are usually out of after-tax income. The government also provides a co-contribution of up to $1500 annually, at a rate of 150 per cent of personal contributions by low income earners.[18]

Second, in the hands of the superannuation fund, contributions and earnings on investments are generally subject to a 15 per cent tax rate, which is lower than the marginal tax rate for most individuals.[19] Under the reforms proposed to apply from 1 July 2007, employers could deduct all contributions on behalf of employees up to the age of 75 and there would be no limit on self-employed deductions. The first $50,000 contribution per person per annum would be taxed in the superannuation fund at the concessional rate of 15 per cent. However, deductible contributions in excess of $50,000 in a year would be taxed at the top individual marginal tax rate, again in the hands of the superannuation fund.[20]

Third, superannuation benefits are currently exempt or subject to a concessional tax rate if paid to a member on retirement, in the event of disability, or to a dependant on death of the member.[21] Benefits may be paid out as lump sums

15 *SIS Act* s62; *ITAA* 1936 s6(1) 'superannuation fund'. The 'compliance' test is set out in *SIS Act* s42; see also Superannuation Industry (Supervision) Regulations 1993, (hereafter 'SIS Regs') Reg 6.22.

16 The threshold age is 60 for individuals born after 30 June 1964 and 55 for most born earlier; however, preserved benefits may be accessed on satisfying a 'condition of release': SIS Regs, Sched 1.

17 *ITAA* 1936 s82AAS, and s82AAT; *Constable v FCT* (1952) 86 CLR 402. The deductible contributions ceiling in 2005–6 is $14,603 if aged under 35; $40,506 if aged 35 to 49 or $100,587 if aged 50 or over.

18 *Superannuation (Government Co-Contribution for Low Income Earners) Act* 2003 (Cth).

19 *Income Tax Rates Act* 1986 (Cth) s26. Noncomplying funds pay tax at the top marginal rate. Other income tax concessions for complying funds include taxation of only two thirds of capital gains under *ITAA* 1997 Div 115 and the exemption of earnings that support pensions under *ITAA* 1936 s282A.

20 Simpler Superannuation, above n8 at 1.1.

21 *ITAA* 1936 s27A. Only the first two concessions qualify as 'tax expenditures' in the context of a comprehensive income tax baseline: see *Tax Expenditures Statement*, Appendix B, discussed in more detail in Part 5.

or pensions. Lump sum payouts are called Eligible Termination Payments (hereafter 'ETPs').[22] The current ETP tax regime is complex and divides the lump sum into a series of components. In most cases, a member's own undeducted contributions to a fund are returned tax-free. A proportion (in 2005–6, the first $129,751) of the balance of an ETP is exempt from tax. The next component is taxed at a 15 per cent rate to the member, up to the lump sum Reasonable Benefit Limit (hereafter 'RBL'), which is $648,946 in the 2005–6 fiscal year. The component in excess of the RBL, if any, is taxed at the top individual marginal rate. The RBL applies cumulatively to all ETPs received by an individual during their lifetime.[23]

Where a member takes a pension from a superannuation fund, it will be taxed at the individual's marginal rate. However, if the pension satisfies certain conditions, the member is entitled to a reduction in tax as a result of the superannuation tax offset, applicable at a 15 per cent rate up to the pension RBL ($1,297,886 in 2005–6). This tax offset effectively compensates the member for the income tax paid over the years by the fund in respect of his or her entitlement.

Under the regime to commence on 1 July 2007, all superannuation benefits, whether paid as a lump sum or a pension, will be exempt from tax where paid to a member over the age of 60.[24]

B. Death Benefits

In many superannuation funds, members are entitled to a benefit in the event of death of the member, either under the general terms of the fund, or by choosing to 'contribute' some of their superannuation balance towards purchasing such 'life insurance' cover. The death benefit may comprise the member's contributions to the fund and earnings on those contributions plus the additional element of life insurance, and may vary depending on the age of the member at death. Under the current regime, a death benefit ETP paid to a 'dependant' as defined in the *ITAA* 1936 is exempt from income tax in the hands of the dependant, up to the level of the pension RBL of the deceased member of the fund (recall that this is $1,297,886 in 2005-6).[25] Under the regime proposed to apply from 1 July 2007, all death benefits paid to a dependant of a deceased member of a fund would be tax exempt.[26]

The rules regarding death benefits for 'dependants' in both the *SIS Act* and the *ITAA* 1936, together with the terms of the fund deed, must be complied with for a death benefit to be paid out and exempted from tax. The *SIS Act* definition of 'dependant' identifies the eligible class of recipients of a death benefit. Where a death benefit is payable, the trustee may pay it to 'the member's legal personal representative, to any or all of the member's dependants, or to both'.[27] The 'legal

22 *ITAA* 1936 s27A.

23 *ITAA* 1936 s140ZD.

24 Simpler Superannuation, above n8 at 12.

25 *ITAA* 1936 s27A(1) 'ETP' para (ba) & s27AAA(4). As for other ETPs, amounts in excess of the RBL are taxed at a 47 per cent rate.

26 Simpler Superannuation, above n8 at 16.

27 *SIS Act* s62(1)(b)(iv) and (v); SIS Regs, Reg 6.22.

personal representative' (hereafter 'LPR') is the executor or administrator of the member's estate, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by the member.[28] If more than one dependant is located, the trustee may allocate the death benefit between them in a manner that the trustee considers fair and reasonable. A member may nominate their preferred beneficiary, and under some trust deeds, is able to make a binding nomination, but this only binds the trustee where the definition of 'dependant' is satisfied in any event.[29]

Only if neither the LPR nor dependants can be found is the trustee empowered (but not required), subject to the deed, to pay out some or all of the death benefit to another person. Identifying the LPR and dependants for distributions on death is sometimes a contentious issue, as indicated by the fact that complaints about distribution of death benefits made up 28 per cent of complaints to the Superannuation Complaints Tribunal in 2004, the largest category, and comprised the largest or second-largest category of complaints in previous years.[30] It is important that the law as to 'dependants' is as clear as possible to minimise such disputes.

When the tax treatment of the contributions and earnings in the superannuation fund is taken into account, the exemption for a superannuation death benefit paid to a dependant means that the superannuation savings and earnings have been taxed at an overall rate of 15 per cent. In contrast, where a death benefit is not paid to a dependant as defined, the element over and above any undeducted contributions to the fund by the deceased will be taxed at 15 per cent to the recipient.[31] Combined with income tax of 15 per cent in the superannuation fund, this generates an overall tax rate of 30 per cent for a death benefit paid to a non-dependant.

Lump sum payments from a superannuation fund directly to a dependant are the most common type of death benefit ETP.[32] A payment made to the LPR of a deceased member will not qualify for tax exemption unless passed on to a dependant as defined in *ITAA* 1936. The exemption can also apply to lump sum payments from the employer of the deceased, paid to the LPR and passed on to a dependant;[33] from an Approved Deposit Fund;[34] on death of the holder of certain annuities;[35] and payments in respect of small superannuation accounts or superannuation guarantee shortfall payments.[36]

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28 *SIS Act* s10(1).

29 *SIS Act* s59(1A). A nomination is also only binding for three years from the date it is made.

30 Superannuation Complaints Tribunal, *Annual Report 2003–2004* (2005) at 31–32 (Table 2).

31 *ITAA* 1936 s27AA and s27AB.

32 A death benefit ETP can include the commuted value of a pension from a fund: *ITAA* 1936 s27AAA(2), Item 4 and s27AAA(7) in some circumstances.

33 *ITAA* 1936 s27A(1) 'eligible termination payment' para (aa), s27A(3)(b).

34 *ITAA* 1936 s27A(1) 'eligible termination payment' para (c), s27A(3)(b).

35 *ITAA* 1936 s27A(1). This applies when the annuity was purchased after 12 January 1987.

36 *ITAA* 1936 s27A(1) 'eligible termination payment' paras (fd), (ff); s27A(3)(b). These are payments under *Small Superannuation Accounts Act* 1995 (Cth) s76(7) and any 'shortfall component' paid under *Superannuation Guarantee (Administration) Act* 1992 (Cth) s76.

3. Who is a 'Dependant'?

The definitions of 'dependant' in each of the *SIS Act* and the *ITAA* 1936 are similar but not identical. Since 1 July 2004, an individual has been able to qualify as a 'dependant' of a deceased member of a superannuation fund in one of four ways, as: (1) a spouse of the deceased; (2) a child of the deceased; (3) a dependant of the deceased, in the ordinary meaning of the word; and (4) if an 'interdependency relationship' is established. As explained below, the ordinary meaning of 'dependant' has been effectively confined to individuals who were *financially* dependant on the deceased at the date of death.

The definition of 'dependant' in the *SIS Act* includes 'the *spouse* of the person, any *child* of the person and any person with whom the person has an *interdependency relationship*' (emphasis in original).[37] The definition of 'dependant' in the *ITAA* 1936 reads:[38]

> 'dependant', in relation to a person (the *first person*), includes: …
>
> (b) … (i) any spouse or former spouse of the first person; and
> (ii) any child, aged less than 18 years, of the first person; and
> (iii) any person with whom the first person has an interdependency relationship.

Each element of the definitions will be considered in turn, incorporating the difficulties faced by a member of a same-sex relationship, and children of such a relationship, in qualifying as a dependant.

A. Spouse

A 'spouse' means a person who is legally married to the member of the fund (a de jure spouse). Since the early 1990s, 'spouse' in the *SIS Act* and in the *ITAA* 1936 has been extended to include a de facto spouse as follows:[39]

> 'spouse' in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person.

There is no judicial authority that the meaning of 'spouse' or indeed, marriage itself, is confined to opposite-sex couples in Australia, although dicta in Australian and English court decisions suggest that the definition of 'spouse' in the context of marriage cannot include same-sex couples.[40] As indicated in Part 1, the federal government legislated in 2004 to recognise only marriages between a man and a woman. This legislation does not affect the extended meaning of de facto spouse

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37 *SIS Act* s10(1) 'dependant', amended effective 1 July 2004 to include 'interdependency relationship' by *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act* 2004 (Cth) Sched 2. An identical amendment was also made to the *Retirement Savings Account Act* 1987 (Cth).

38 *ITAA* 1936 s27A(1) 'dependant'.

39 *ITAA* 1936 s6(1); *SIS Act* s10(1).

40 *Hyde v Hyde and Woodman* (1866) LR 1 P&D 130; *R v L* (1991) 174 CLR 379; *Cth v HREOC & Anor* [1998] 138 FCA; *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. These decisions have not interpreted the meaning of 'marriage' in the Australian Constitution; see further Walker, above n4.

and there is no judicial authority concerning the potential application of the extended definition of de facto spouse to a member of a same-sex couple. In 1995, the Administrative Appeals Tribunal (hereafter 'AAT') held in *Re Brown and Commissioner for Superannuation* that the phrase 'lived together as husband and wife' in the *Superannuation Act* 1976 (Cth) applied only to an opposite-sex relationship, as that is the meaning 'inherent in the words themselves'.[41] The AAT declined to extend the notion of 'as husband and wife' by analogy, to include a same-sex couple in a relationship which the AAT nonetheless acknowledged to be both 'close' and 'marriage-like'.

This view has been applied in administration of the *SIS Act* by APRA and the income tax law by the Australian Taxation Office (hereafter 'ATO').[42] The Superannuation Complaints Tribunal (hereafter 'SCT') has suggested that if a superannuation trust deed were amended to define 'spouse' to include a same-sex couple, there is a real issue as to whether this would breach the *SIS Act* (thereby possibly leading to non-complying status).[43] The effect of exclusion from the definition of 'spouse' for same-sex couples is illustrated in the following example:

> *Example 1.* Allan and Joe are long-term domestic partners who live together. They each have superannuation and independent sources of income and have made wills that specify the other as LPR and have nominated each other as preferred beneficiary with their superannuation funds. On Joe's death, as Joe has no other dependants and Allan is specified as Joe's LPR, the trustee may pay Allan a death benefit from Joe's superannuation fund, but is not obliged to do so.[44] As Allan is not recognised as Joe's spouse for tax purposes, the benefit is not tax-exempt. Instead, the taxable component that will be taxed in Allan's hands at 15 per cent rate up to the pension RBL.[45]

In contrast, assume in *Example 1* that Allan was instead Amanda, Joe's de jure or de facto opposite-sex spouse. Amanda is automatically a 'dependant' and so is entitled to the death benefit even if she is not designated as the LPR of Joe's estate. The death benefit paid to Amanda will be exempt from tax in her hands.

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41 (1995) 21 AAR 378 at [57]. This case was recently discussed and applied in the context of denying capital gains tax rollover relief to members of a lesbian couple under ITAA 1997: [2006] AATA 728, August 2006.

42 Insurance and Superannuation Commission, *Superannuation Circular No IC2* (June 1995); reiterated by APRA, *Superannuation Circular No IC2* (March 1999). The Commissioner of Taxation has not issued a binding ruling on the meaning of 'spouse' but takes the view that same-sex partners can not be 'spouses' in a number of non-binding interpretive decisions, which are anonymised published statements of decisions relating to specific taxpayers: ATO Interpretive Decision ID 2002/731 (not a spouse for superannuation death benefit purposes); ID 2002/649 (not a spouse for superannuation contribution purposes); ID 2002/211 (no dependant spouse rebate); ID 2002/826 (no transfer of baby bonus to same sex partner); ID 2003/7 (not an 'associate' except if there is an 'arrangement' for purposes of Fringe Benefits Tax).

43 Superannuation Complaints Tribunal, *Legal Issues in Death Benefits: Forum Discussion Paper* (January 2002) at [7.3.1], available from <http://www.sct.gov.au> (14 July 2006).

44 The situation would have been more difficult for the trustee of the fund had Allan not been specified as LPR, although many trustees would have made a payment to Allan after exhausting other inquiries.

45 See ATO Interpretive Decision ID 2003/871 for similar facts to this example. The ceiling is based on Joe's pension RBL. If any of the payment came from an 'untaxed' source, such as Joe's former employer, it will be taxed at a 30 per cent rate.

B. Child

A 'child' of a member of a superannuation fund will qualify as a dependant under the *SIS Act* and so will be entitled to receive a death benefit payout. However, under the *ITAA* 1936 definition (set out above), to qualify for income tax exemption, the child must be under the age of 18 at the time of death. For both purposes, 'child' is defined as follows:

> '*child* includes an adopted child, step-child or ex-nuptial child'.[46]

The question of when an individual is recognised as a 'child' of another person is complex and is affected by state and federal legislation as well as common law definitions and presumptions; and a detailed examination of the issue is beyond the scope of this article.[47] The statutory definition is inclusive, encompassing the common law or ordinary meaning of 'child', being the biological or 'natural' child of a person.[48] It also includes an individual recognised as a child of a person under presumptions as to parentage in the *Family Law Act* 1975 (Cth) or under state or territory status of children legislation.[49] An 'adopted child' is defined in the *SIS Act* and *ITAA* 1936 as a child adopted under the law of any state or territory, or another country where the adoption would be recognised as valid by a state or territory.[50] A 'step-child' is not defined in either statute; however, it is generally considered that marriage is a necessary pre-requisite for existence of a step-child and a step-child is the non-biological child of the married spouse of the child's biological mother or father.[51]

Determining whether an individual qualifies as a 'child' of a member of a superannuation fund is most complex when the individual is not the biological child of the member of the fund. For a child of an opposite-sex couple, whether de jure or de facto, this situation is likely to be resolved as a result of presumptions as to parenting. So, the child is likely to be presumed to be the 'child' of the spouse of the biological mother or father.[52] A child conceived with donor sperm and born to a woman and a man in a de jure or de facto spouse relationship is likely to be

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46 *SIS Act* s10(1); *ITAA* 1997 s995–1(1).

47 For an overview, see *The Laws of Australia* (2000) at [17.6], Parts A – C. Some of the issues are discussed in Victorian Law Reform Commission, *Inquiry into Assisted Reproductive Technology and Adoption, Position Paper 2 – Parentage* (2005); see also Taxation Ruling TR 98/4 concerning child maintenance trusts.

48 Henry Finlay, Rebecca Bailey-Harris and Margaret Otlowski, *Family Law in Australia* (5th ed, 1997) at 354; *B v J* (1996) 21 Fam LR 186; *Tobin v Tobin* (1999) FLC 92–848; *ND v BM* (2003) 175 FLR 355; *Re Mark* (2003) 179 FLR 248.

49 *The Laws of Australia*, above n47, 17.6 Part C [12](2). Status of children legislation includes the *Parentage Act* 2004 (ACT); *Status of Children Act* 1978 (NT); *Status of Children Act* 1996 (NSW); *Status of Children Act* 1978 (Qld); *Family Relationships Act* 1975 (SA); *Status of Children Act* 1974 (Tas); *Status of Children Act* 1974 (Vic); and *Inheritance (Family and Dependants Provision) Act* 1972 (WA).

50 *SIS Act* s10(1); *ITAA* 1997 s995–1.

51 This is the approach taken by the SCT under the *SIS Act*: see SCT, above n43 at [7.2.3].

52 However, if there is no de facto spouse relationship established, the SCT takes the view that the trustee must be satisfied that an ex-nuptial child is, in fact, the biological child of the deceased member of the fund: SCT, above n43 at [7.2.3].

recognised as the legal child of both spouses as a result of state and federal laws governing donor insemination, and the donor is not recognised as a father at law.[53]

In contrast, the law does not presume that an individual is a 'child' of a non-biological parent who is a partner of the biological parent in a same-sex couple. Neither the same-sex relationship itself, nor the parental status of the non-biological member of the couple, is recognised at federal law.[54] The Family Court is empowered, and does exercise its power, to issue parenting orders in respect of non-biological parents of children in same-sex couples, but these orders do not affect the status of the children for other legal purposes and in any event, such orders expire when the child reaches 18 years of age.[55] The following example illustrates this problem of recognition of the child of a same-sex couple for superannuation and tax purposes:

> *Example 2.* Helen and Jane are co-mothers of Anna. Anna is the biological child of Helen, conceived by anonymous donor insemination. Helen and Jane live together as a couple and both contribute to the parenting, financial support and care of Anna. To ensure recognition of Jane's status as a responsible parent for Anna and in Anna's best interests, they have obtained a parenting order from the Family Court in respect of Jane.
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> Jane dies when Anna is aged 3. Anna will not qualify as a 'child' of Jane in spite of the parenting order. Consequently, Anna is not entitled to benefits from Jane's superannuation fund on this basis.

In many cases, Anna is likely to qualify as a financial dependant of Jane, or as being in an interdependency relationship with her, and so may still be eligible to receive a death benefit (this is discussed below). However, the lack of status accorded to children of same-sex couples is nonetheless clearly discriminatory, a situation that is clearly not in the best interests of those children. I return to this issue in Part 5.

C. Financial Dependant

The definition of 'dependant' in the *SIS Act* and the *ITAA* 1936 is not exhaustive and so it encompasses an individual who is a 'dependant' of a member of a superannuation fund in the ordinary meaning of the term. Whether an individual is a 'dependant' has been held to be a question of fact to be determined at the time of death of the member of the fund.[56] However, 'past events and future probabilities' should also be considered.[57]

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53 See *Parentage Act* 2004 (ACT) at Div 2.2; *Status of Children Act* 1978 (NT) at Part IIA; *Status of Children Act* (1996) (NSW) s14; *Status of Children Act* 1978 (Qld) at Part III; *Family Relationships Act* 1975 (SA) at Part IIA; *Status of Children Act* 1974 (Tas) at Part III; *Status of Children Act* 1974 (Vic) at Part 2; *Artificial Conception Act* 1985 (WA) ss5, 6 & 7; and *Family Law Act* 1975 (Cth) s60H(1); *Re Patrick* (2002) 28 Fam LR 579.

54 Victorian Law Reform Commission, *Position Paper 2*, above n47 at [3.4]–[3.5].

55 *Family Law Act* 1975 (Cth) s61D.

56 *Kauri Timber Co (Tas) Pty Ltd v Reeman* (1973) 128 CLR 177; *Aafjes v Kearney* (1976) 180 CLR 199 (Barwick CJ) at 202. Note that this means that case law is 'instructive' but not binding: *Aafjes* (Mason J) at 210.

The Macquarie Dictionary defines 'dependant' as follows:

> (1) one who depends on or looks to another for support, favour, etc;
> (2) a person to whom one contributes all or a major amount of necessary financial support.

This definition has potential to be quite broad. However, it is the financial element of the definition that has been adopted in the superannuation regime. APRA guidelines state that 'dependant' in the *SIS Act* means 'any person who was financially dependent on the member at the time of the member's death' and emphasise that 'it is the trustee's responsibility to decide' whether a person was financially dependent.[58] As trustees are required to exercise caution, individuals must produce evidence of financial dependence on the deceased member of the fund. Nonetheless it appears that trustees take a fairly broad approach to determining financial dependence. It was observed in *Faull v SCT*[59] that 'industry practice' has been to interpret the notion of financial dependence generously in order to facilitate payment of death benefits, so that a regular, albeit relatively minor financial contribution is sufficient to establish at least partial dependence. Reflecting this practice, superannuation trust deeds frequently define 'dependant' to include individuals who are *wholly or partially* financially dependent on the member of the fund.[60] The SCT explains further that a range of factors are considered in determining whether financial 'dependence' is established, including the wishes of the deceased, nature of the relationship between the deceased and potential beneficiaries, the financial circumstances of potential beneficiaries and their relative financial needs.[61]

The ATO appears to take a stricter approach to financial dependence than APRA, as it requires that a 'dependant' is one who is 'actually dependent upon the deceased taxpayer for maintenance or support'.[62] The ordinary meaning of 'dependant' in the income tax context has been considered by the AAT in *Re Malek*.[63] The AAT cited the Macquarie Dictionary definition and then observed:

> Given the fiscal nature of the legislation with which we are concerned, it is appropriate to consider the issue of financial dependence as the primary issue, although emotional and physical dependence can be relevant.[64]

The AAT considered that it is not necessary that the deceased member provided the entire financial support for the dependant, but rather that the dependant relied on the deceased for a 'regular continuous contribution' so as 'to maintain the person's normal standard of living'.[65] In another case, the AAT found that the

57 *Lee v Munro* (1928) 21 BWCC 401, 408, cited with approval by Gibbs J in *Aafjes v Kearney*, above n56 at 208; and see SCT, above n43 at [7.4].
58 APRA, *Superannuation Circular No IC2*, above n42 at [14].
59 [1999] NSWSC 1137 (Rolfe J) at [16].
60 Id at [10].
61 SCT, above n43 at [7.6].
62 Income Tax Ruling IT 2168 at [41] (28 June 1985); ATO Interpretive Decision ID 2002/731.
63 *Re Malek v FCT* (1999) 42 ATR 1203.
64 *Re Malek*, above n63 at 1207 (Pascoe, Senior Member).
65 *Re Malek*, above n63 at 1206.

parents of a son who died young were not the son's 'dependants' because they were not financially dependent on him; the physical support and assistance the son provided regularly in the family business and the close family relationship between them was insufficient to establish that they were his 'dependants'.[66] Recent ATO Interpretive Decisions illustrate the circumstances that may qualify an individual as a dependant. An adult daughter who gave up work to care for her terminally ill parent and who received financial support only from the parent until their death was found to be a dependant.[67] Partial dependence, if regular, may suffice. An adult son who lived at home until his parent's death was a 'dependant' although the son received youth allowance. The youth allowance was calculated at a lower 'at home' rate and this fact, compared to the level of financial support provided by the parent, was sufficient to indicate financial dependence.[68]

A same-sex partner of a deceased member of a superannuation fund may qualify as a dependant by establishing financial dependence. A few decisions of the SCT consider death benefits for same-sex partners.[69] In three decisions, the SCT decided that the entire death benefit should be paid to the same-sex partner of the deceased, even where only partial financial dependence was established.[70] In two decisions, half of the death benefit was paid to the same-sex partner of the deceased and the remainder to other family members, such as siblings or parents who also established financial dependence or who would have benefited from the estate.[71] In one decision, the SCT remitted the matter to the trustee for a decision on the issue of dependence of the same-sex partner.[72] The existence of jointly owned property, joint bank accounts, sharing of household expenses, and a nomination of the partner to receive superannuation by the deceased, support an argument that the same-sex partner is a financial dependant even where the partner has some other source of income.[73]

Based on these decisions, in *Example 1* above, a trustee could find at least partial financial dependence of Allan on Joe at the time of Joe's death, even though Allan has independent means of support, assuming it could be shown that they shared household and other expenses (such as payment of a mortgage) using their respective incomes.[74] If there were no other dependants or potential beneficiaries of the estate, the SCT decisions suggest that a trustee could pay the whole benefit

66 *Case 2/2000*; (2000) 43 ATR 1273 at [13]–[14].

67 ATO Interpretive Decision ID 2002/480.

68 ATO Interpretive Decision ID 2002/481.

69 SCT Determinations D00–01\045 (20 July 2000); D00–01\152 (23 November 2000); D01–02\212 (28 February 2002); D04\05–078 (28 September 2004); D04–05\197 (30 May 2005); D05–06\061 (30 May 2005), available from <http://www.sct.gov.au> (14th July 2006). Two earlier Determinations, in early 1996 and 1997, were referred to by Margaret McDonald, Director of the SCT, in evidence before the Senate Select Committee on Superannuation and Financial Services. See Commonwealth of Australia, Senate Select Committee on Superannuation and Financial Services, *Hearings, Reference: Provisions of the Superannuation (Entitlements of Same Sex Couples) Bill 2000* (Hansard) 3 March 2000 at 20.

70 Determinations D00–01\152 (23 November 2000); D04\05–078 (28 September 2004); D04–05\197 (30 May 2005).

71 Determinations D01–02\212 (28 February 2002); D05–06\061 (30 May 2005).

72 Determination D00–01\045 (20 July 2000)

73 Determinations D04–05\078 (28 September 2004); D04–05\197 (30 May 2005).

to Allan. However, if there were other dependants, it seems likely that the death benefit would be divided between Allan and the other dependants. That is, a same-sex partner is unlikely to be accorded equal status to a de jure or de facto opposite-sex spouse, who frequently will receive the entire death benefit.[75] The Association of Superannuation Funds of Australia (hereafter 'ASFA') has stated that establishing financial dependence between same-sex couples can be difficult, particularly where there are no joint mortgage payments, and generates uncertainty and disadvantage for same-sex partners.[76]

There is one published decision of the ATO which accepts that a same-sex partner may qualify as a dependant for purposes of the tax exemption.[77] A woman who had been the same-sex partner of a deceased woman was found to be a financial 'dependant' because she was able to demonstrate that she had no independent source of income and had lived with the deceased. However, this decision does not provide assistance regarding the more common situation of partial financial dependence or financial sharing.

What of the child of a same-sex couple? As explained above, where there is no biological connection, it is unlikely that an individual can establish that they are a 'child' of a deceased member of a fund. However, it *should* be possible to establish that an individual is a financial dependant of a deceased non-biological parent, particularly where the individual is under the age of 18 at the date of death. There do not appear to be any reported decisions that discuss this situation. So, in *Example 2* above, Anna (aged 3) should qualify as a financial 'dependant' of Jane, as long as evidence of dependence by Anna *and* financial support from Jane can be produced. While this may seem straightforward, it is likely to require that the trustee of the superannuation fund recognise that Helen and Jane are co-parents of Anna and thus, indirectly, requires recognition of their relationship. It has been suggested that superannuation trustees have refused or failed to either investigate or acknowledge the claim to dependency of a child of a same-sex couple in this situation.[78]

In spite of the approach of APRA and the ATO, there is a strong argument that the ordinary meaning of 'dependant' extends beyond financial dependence to encompass an individual who relies or depends on another for other kinds of support, for example, physical or emotional support. An illustration of this broader interpretation is in *Hope and Brown v NIB Health Fund Ltd* (hereafter *Hope and*

74 This is supported by a workers' compensation decision that suggests dependency may be established by showing the sharing of earnings expended for joint needs *Re Lambroglou v Cth* (1989) 19 ALD 33 at 36 (AAT) (Senior Member Handley), which the SCT apparently applies in the superannuation context: SCT, above n43 at [7.6.9].

75 See, Determination No D00–01\103, in which the SCT overturned a distribution of a death benefit four ways between the deceased's de facto spouse of 20 years and his three adult sons, and determined that the whole benefit should be paid to the de facto spouse; and see SCT, above n43 at [7.6.17].

76 Evidence of Philippa Judith, CEO of ASFA, before the Senate Select Committee on Superannuation and Financial Services, above n69 at 1.

77 ATO Interpretive Decision ID 2002/731.

78 Anthony Albanese, evidence before the Senate Select Committee on Superannuation and Financial Services, above n69 at 13.

Brown)[79] in which the NSW Equal Opportunity Tribunal found that a health fund had discriminated by failing to recognise the members of a same-sex couple as dependants of each other so as to access the 'family' rate for health insurance benefits. The Tribunal stated:

> 'Dependant' … is an ordinary word having normal connotations of reliance and need, trust, confidence, favour, and aid in sickness and in health including social and financial support and its normal meaning is not limited to financial dependence as contented by NIB: … The mere fact that one member of a household couple is in receipt of earnings does not mean that he or she is not a dependant of the other or that they may not be mutually dependent.[80]

In state laws concerning family maintenance it has also been acknowledged that other forms of dependence, or only partial financial dependence, may be required; it has been suggested by Jenni Millbank that the meaning of 'dependant' may be changing as a consequence.[81]

The emphasis on financial dependence in superannuation and tax law can be traced to judicial decisions concerning workers' compensation and public sector superannuation.[82] However, a close examination reveals that the legislative provisions considered in those cases expressly or impliedly *limited* the court to consideration of financial dependence. Thus, in *Kauri Timber Co (Tas) Ltd v Reeman*,[83] the High Court considered the definition of 'dependants' in Section 3 of the *Workers' Compensation Act* 1927 (Tas), as 'such members of the family of the worker … as (a) were dependent, wholly or in part, upon the earnings of that worker at the time of his (sic) death ...'. Clearly, financial dependence was required by that statute.[84] In *Re Commr of Superannuation and Scott*,[85] the Full Federal Court considered payment of a superannuation benefit to a separated spouse of a man who was a member of the Commonwealth Superannuation Scheme. Under section 3 of the *Superannuation Act* 1976 (Cth), a spouse who at the time of death was legally married to, but no longer living with 'on a permanent and bona fide domestic basis' a member of the fund was only eligible for death benefits if the spouse 'was wholly or substantially dependent' on the deceased member at the

79 *Hope and Brown v NIB Health Fund Ltd* (1995) 8 ANZ Insurance Cases 61–269, discussed in Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same-sex Couples,* HRC Report No 7 (1999); and see NSW Gay and Lesbian Rights Lobby, *Superannuation and Same Sex Relationship* (Anne Scahill & Michael Alexander), 18 June 1996, available from <http://www.glrl.org.au> (14 July 2006).

80 *Hope and Brown*, above n79 at 76,021 (King, Jowett & Alt JJ).

81 Jenni Millbank, 'Which, Then, Would be the 'Husband' and Which the 'Wife'?': Some Introductory Thoughts on Contesting 'the Family' in Court' (September 1996) *Murdoch University Electronic Journal of Law*, Conference Papers from 'Sexual Orientation and the Law' at [19]–[23]; *Ball v Newey* (1988) 13 NSWLR 489; *Benney v Jones* (1991) 23 NSWLR 559.

82 *Kauri Timber Co (Tas) Ltd v Reeman*, above n56; *Re Commr of Superannuation and Scott* (1987) 13 FCR 404.

83 (1973) 128 CLR 177.

84 A long line of similar decisions concern 'dependants' in state and federal workers' compensation statutes which all require dependence on 'earnings' of the worker, or expressly limit it to 'dependence for economic support' as in the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) *s*4.

85 *Re Commr of Superannuation and Scott*, above n82.

time of death. Although this provision makes no reference to finances, the most relevant form of dependence in the situation of separated spouses is financial; the breakdown of the spousal relationship illustrates that other forms of dependence are irrelevant or have only minor significance. Unsurprisingly, the court approved an interpretation that required the spouse to be 'essentially' financially dependent (even so, two judges took a broad view, suggesting that the need of financial support, even if it was not supplied by the deceased, might be sufficient).[86]

This author argues that physical, emotional, domestic or other forms of dependence *should* be considered in ascertaining the ordinary meaning of 'dependant' and that the existing precedents pose no impediment to so doing. A 'financial' connotation should not be read into the *SIS Act* or the *ITAA* 1936 merely on the basis of their 'fiscal' nature. A broader view that would encompass 'reliance and need, trust, confidence, favour, and aid in sickness and in health *including* social and financial dependence', alluded to in *Hope and Brown*, would be more appropriate.

D. Interdependency Relationships

The restrictive interpretation of the ordinary meaning of 'dependant' was one reason given for the introduction of a fourth way in which an individual may qualify as a 'dependant', through establishing the existence of an 'interdependency relationship', effective for death benefits paid on or after 1 July 2004.[87] This new concept has been further explained in Regulations assented to on 10 November 2005.[88] It is clearly intended to encompass a broader range of forms of 'dependence' than mere financial dependence. However, through the addition of more criteria, the concept of 'interdependency relationship' will in some cases be quite restrictive. As the definition of 'dependant' remains non-exhaustive, financial dependence remains sufficient to qualify a person as a 'dependant', and if a person can show financial dependence at the date of death, it may be simpler to qualify them as a 'dependant' on that basis than to demonstrate an 'interdependency relationship'. However, where an interdependency relationship is demonstrated, each individual in the relationship is eligible to receive the deceased partner's death benefits tax-free. Thus, in contrast to the ordinary meaning of 'dependant', the notion of 'interdependency' is a two-way street.

4. What is an Interdependency Relationship?

The definition of 'interdependency relationship' contains four, or perhaps five, separate criteria that must be satisfied.[89] This Part discusses those criteria and

86 *Re Commr of Superannuation and Scott,* above n82 (Fisher & Spender JJ) at 410.

87 Supplementary Explanatory Memorandum accompanying the Senate to the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2003 (hereafter 'the EM') at [2.6].

88 *Income Tax Amendment Regulations* 2005 (No 7) (Cth) (hereafter 'IT Reg'); *Superannuation Industry (Supervision) Amendment Regulations* 2005 (Cth) inserting new Reg 1.04AAAA into the SIS Regs. The Regulations are in identical terms and are based on Exposure Draft Regulations released by Treasury in May 2005, with some minor amendments.

89 *ITAA* 1936 s27AAB(1)(a–d).

considers the impact of the Regulations. It is useful to set out the entire definition of 'interdependency relationship' in the new section 27AAB of the *ITAA* 1936:[90]

> Sec 27AAB Interdependency Relationship
>
> (1) Subject to subsection (3) ... 2 persons (whether or not related by family) have an interdependency relationship if:
>
> (a) they have a close personal relationship; and
>
> (b) they live together; and
>
> (c) one or each of them provides the other with financial support; and
>
> (d) one or each of them provides the other with domestic support and personal care.
>
> (2) Subject to subsection (3) … if:
>
> (a) 2 persons (whether or not related by family) satisfy the requirement of paragraph (1)(a); and
>
> (b) they do not satisfy the other requirements of an interdependency relationship under subsection (1); and
>
> (c) the reason they do not satisfy the otherrequirements is that either or both of them suffer from a physical, intellectual or psychiatric disability; they have an interdependency relationship.
>
> (3) The regulations may specify:
>
> (a) matters that are, or are not, to be taken into account in determining under subsection (1) or (2) whether 2 persons have an interdependencyrelationship; and
>
> (b) circumstances in which 2 persons have, or do not have, an interdependency relationship.

Subsection 27AAB(1) contains the primary definition and sets out the actual criteria for an 'interdependency relationship'; it is important to note that *all* of these criteria must be satisfied. Subsection (2) establishes an exception enabling two people who have a 'close personal relationship' to qualify as an 'interdependency relationship', even if they fail to satisfy any or all of (1)(b), (c) or (d), because either or both of them suffer from a disability. Subsection (3) delineates the topics on which regulations may be issued. The relationship between the statutory definition and the regulations is complicated by the fact that the primary definition in subsection (1) is stated to be 'subject to subsection (3)'. It appears that regulations made under subsection (3)(a) may specify matters to be taken into account in finding that the criteria in (1)(a) to (d) are satisfied, so as to assist in applying the primary definition or to elucidate that definition. In contrast, regulations made under subsection (3)(b) may *supplant* the primary definition in subsection (1) by specifying independent circumstances in which two persons will or will not have an 'interdependency relationship'. The Regulations promulgated in November 2005 are authorised in part under subsection 3(a) and in part under subsection 3(b), a matter of some importance in their interpretation.

90 *SIS Act* s10A is in identical terms.

The Assistant Treasurer's press release accompanying the introduction of the 'interdependency relationship' amendment gave three examples of interdependency relationships including (1) two elderly sisters who reside together and are interdependent; (2) an adult child who resides with and cares for an elderly parent; and (3) same-sex couples who reside together and are interdependent.[91] However, as indicated in the speech of Prime Minister Howard earlier in this article, the new concept of 'interdependency relationship' is not intended to, and does not, produce equality between same-sex couples and de jure or de facto opposite-sex spouses. Indeed, it was crucial for the government that the reforms did *not* extend equal treatment or 'specifically' recognise same-sex couples. As a result, the government did not take the simple approach of extending the definition of 'de facto' spouse, nor did it adapt or apply the definition of 'member of a couple' used in the *Social Security Act* 1991 (Cth).[92]

The language of 'interdependency' in section 27AAB *ITAA* 1936 is used elsewhere by the federal government in respect of same-sex couples. It has been applied for some years in relation to the 'interdependency visa', the category of visa enabling a person to bring a same-sex partner to Australia.[93] There is no statutory definition of 'interdependency' in the migration context and it seems to have been interpreted as incorporating the same basic features as a de facto spouse relationship. An applicant for an interdependency visa and his or her partner must:

> Show a mutual commitment to a shared life to the exclusion of all others. You and your partner must be living together or, if not, any separation must be only temporary. You must also have a genuine and continuing relationship. The relationship must also have existed for the entire 12 months prior to making the application.[94]

The notion of interdependent relationship, meaning a same-sex couple, has also recently been adopted for provision of Defence Force housing and other benefits.[95]

Instead of adapting one of these concepts already used in federal law, the new definition of 'interdependency relationship' draws on New South Wales state law (though this is nowhere explicitly stated). Section 5(1) of the *Property (Relationships) Act* 1984 (NSW) has since 1999 recognised as a 'domestic relationship':

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91 Minister for Revenue and Assistant Treasurer Senator Helen Coonan, *Fairer Treatment for Interdependent Relationship* Media Release (27 May 2004). There is no mention of same-sex couples in the EM, above n87.

92 Section 4(3). That notion refers to a marriage-like relationship, requiring examination of the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, any sexual relationship and the nature of each person's commitment to each other: *Lambe v Director-General of Social Services* (1981) 57 FLR 262; *Re Tang v Director-General of Social Services* (1981) 3 ALN N83.

93 Migration Regulations 1994 (Cth) Reg 1.09A.

94 Department of Immigration and Multicultural Affairs, *Interdependency Visa*: <http://www.immi.gov.au/migrants/partners/interdependence/814-826/eligibility-applicant.htm> (14 July 2006).

95 Commonwealth of Australia, Department of Defence, DEFGRAM No 590/2005 (21 October 2005), commencing 1 December 2005.

> (a) a de facto relationship, or
>
> (b) *a close personal relationship* (other than a marriage or de facto relationship) *between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care*.' [Emphasis added.]

The new definition of 'interdependency relationship' in the *SIS Act* and *ITAA* 1936 adopts, almost word for word, para (b) of the definition of 'domestic relationship' in the *Property (Relationships) Act*, with the addition of a requirement of financial support. Yet, the *Property (Relationships) Act* 1984 (NSW) clearly contemplates that a same-sex couple who live together will usually qualify under the *first* limb of this definition as a 'de facto relationship', rather than under the second limb. Section 4(1) of the Act defines a 'de facto relationship' in terms that apply to same-sex and opposite-sex couples, as:

> a relationship between two adult persons:
>
> (a) who live together as a couple, and
>
> (b) who are not married to one another or related by family.

The second limb of the definition of 'domestic relationship' in section 5(1) of the *Property (Relationships) Act* is intended to cover relationships *other than* couples who live together. That second limb incorporates some criteria to further delimit those non-couple relationships that will meet the threshold of a 'domestic relationship': specifically, the parties must live together and one or each must provide the other with domestic support and personal care.

The new definition of 'interdependency relationship' is highly problematic, as it squeezes same-sex couples into a definition which was specifically drafted to deal with *non*-couple relationships, and which contains a long list of criteria, all of which must be satisfied. Most importantly, the criterion requiring 'domestic support and personal care' would seem to be over and above the usual requirements for a de facto spouse relationship (this is discussed further below). This drafting approach significantly constricts the scope of the concept of 'interdependency relationship'. Nonetheless, this author argues that the drafting of the statute and Regulations will lead to continued discriminatory treatment of same-sex couples compared with opposite-sex couples.

The Regulations issued in November 2005 go some way towards mitigating the strictures of the statutory definition. First, they establish a list of matters to be taken into account in identifying an 'interdependency relationship', some of which may assist same-sex couples (and others which may make qualification more difficult). Second, the Regulations override the statutory definition in some circumstances, in a manner that will assist same-sex couples to a limited extent.

A. Matters in Finding an 'Interdependency Relationship'

New IT Reg 8A(1) made under section 27AAB(3)(a) of the *ITAA* 1936 sets out a list of matters to assist in interpreting the primary statutory definition of 'interdependency relationship' in section 27AAB(1). The following 'matters' are 'to be taken into account':[96]

(a) all of the circumstances of the relationship between the persons, including (where relevant):

(i) the duration of the relationship; and

(ii) whether or not a sexual relationship exists; and

(iii) the ownership, use and acquisition of property; and

(iv) the degree of mutual commitment to a shared life; and

(v) the care and support of children; and

(vi) the reputation and public aspects of the relationship; and

(vii) the degree of emotional support; and

(viii) the extent to which the relationship is one of mere convenience; and

(ix) any evidence suggesting that the parties intend the relationship to be permanent.

The matters are set out as relevant to establishing an 'interdependency relationship' as a whole, rather than with respect to any one of the specific criterion. This holistic approach is reinforced by the requirement to consider 'all the circumstances of the relationship'. Thus, while an 'interdependency relationship' must exist at the time of death, it seems that an examination of the entire relationship over time of the two people is warranted. This is likely to provide more flexibility than exists in relation to establishing dependence in the ordinary meaning of the term. The limitation to consider the listed factors only to the extent 'relevant' was not in the Exposure Draft, but was included following comments by ASFA.[97] For example, the care and support of children will not be relevant to all cases and so clearly should not be taken into account.

The list of matters for ascertaining an 'interdependency relationship' in IT Reg 8A(1) appears to be based, like the statutory definition itself, on a similar provision in the *Property (Relationships) Act* relating to domestic relationships.[98] In turn, the state legislation draws on precedents dating back twenty years concerning the meaning of de facto spouse.[99] The leading precedent is usually considered to be *Roy v Sturgeon* (1986) 11 NSWLR 454, in which Powell J spoke of the Court being required, in each case, to make a value judgment, having regard to a range of

96 IT Reg 8A(1); SIS Reg 1.04AAAA(1).

97 ASFA, Letter of 17 June 2005 to The Treasury, available from: <http://www.superannuation.asn.au> (14th July 2006).

98 *Property (Relationships) Act* 1984 (NSW) s4(2) requires that 'all the circumstances of the relationship are to be taken into account, including any one or more of the following matters as may be relevant in a particular case —
(a) the duration of the relationship; (b) the nature and extent of common residence; (c) whether or not a sexual relationship exists; (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties; (e) the ownership, use and acquisition of property; (f) the degree of mutual commitment to a shared life; (g) the care and support of children; (h) the performance of household duties; (i) the reputation and public aspects of the relationship.'
See also *Property Law Act* 1958 (Vic) ss275(1), 275(2), which contains a very similar list of factors for determining the existence of a 'domestic relationship' in Victoria.

99 *Roy v Sturgeon* (1986) 11 NSWLR 454; *Weston v Public Trustee* (1986) 4 NSWLR 407 and see *Australian De Facto Relationships Law* (2005) at 9–695 referring to a 'vast case law'.

factors.[100] These factors are also applied in the superannuation and income tax contexts to assist in determining if a de facto spouse relationship exists.[101]

As a result of these common factors, the Regulations appear to bring the definition of 'interdependency relationship' closer to the concept of de facto spouse, which may assist in producing equal treatment of same-sex and opposite-sex couples. Nonetheless, there are some differences between the matters listed in the Regulations and the factors generally used in finding a de facto spouse relationship. Matters (vii) relating to the 'degree of emotional support'; (viii), 'the extent to which the relationship is one of mere convenience,' and (ix) regarding evidence that the parties intended the relationship to be 'permanent', do not appear in lists of factors in state statutes or case law. While these additional matters may merely add substance to the definition, they may also require a more narrow reading, which could disadvantage same-sex couples. For example, it is not clear why 'permanence' should be emphasised in ascertaining interdependency; and in any event, this would appear to be sufficiently covered by matter (i) 'duration' of the relationship and matter (iv) 'mutual commitment to a shared life'.

The long list of relevant matters may in fact be targeted at making it more difficult for *non-couple* relationships to qualify as interdependent. This appears to be the intention with respect to the relationship between adult children and their parents. The Explanatory Statement to the Regulations emphasises that 'generally speaking, it is not expected that children will be in an interdependency relationship with their parents', and gives an example purporting to show that adult children and their parents tend to live together 'for convenience' only and that this is not 'permanent'.[102] The example concerns access by parents to a death benefit in respect of an adult child who lives with them. This relatively uncommon situation should not be of great concern to either APRA or the ATO. It has only minor revenue implications, as most young adults will have accumulated relatively little in the way of superannuation benefits. However, as 'interdependency' is a two way street, this interpretation would also prevent adult children from qualifying as 'dependants' of their parents by establishing an interdependency relationship, so as to access the tax exemption for death benefits of their parents. Superannuation and tax policy for this situation has been that adult children can access death benefits, but can only access the tax exemption if they qualify under the stricter definition as a financial 'dependant'. The Explanatory Statement seems to have the aim of continuing this policy by limiting the scope of 'interdependency relationship'.

The narrow approach in the Explanatory Statement to the Regulations appears to conflict with ATO Interpretive Decision ID 2005/143 (which is non-binding but indicative of the ATO view), published before the Regulations were issued. The Decision, discussed further below, takes a generous approach to a case where a son

100 *Roy v Sturgeon*, id at 458–9. One factor stated by Powell J that is not in any of the various statutory lists is 'the procreation of children'. However, the 'care and support of children' remains in all lists.

101 See SCT, above n43 at [7.2.1]. An example of application of these factors in the superannuation context is found in *Hourn v Farm Plan Pty Limited* [2003] FCA 1122.

102 *Explanatory Statement* accompanying Income Tax Amendment Regulations 2005 (No 7) (Cth), at 5.

died and the issue arose as to whether his mother was a 'dependant'. The Assistant Treasurer's press release also suggests that an adult child could be in an 'interdependency relationship' with a parent, where the child resides with and cares for the parent.[103]

The Regulations provide that a statutory declaration by an individual that they are in an 'interdependency relationship' may be taken into account in ascertaining the existence of that relationship.[104] The statutory declaration could have been signed by the deceased member of the fund or the surviving partner. Such a declaration may assist trustees with evidentiary requirements, although trustees are still required to investigate all the circumstances of the relationship and apply the matters as relevant. It is noteworthy that the Regulations do not accept the *registration* of a domestic relationship under state law as a factor evidencing an 'interdependency relationship'. A registration regime that recognises same-sex and other caring relationships exists in Tasmania.[105] The Australian Capital Territory civil union regime has been disallowed by federal executive order but is likely to be re-enacted in modified form.[106] Registration would be insufficient evidence for an 'interdependency relationship' on its own, as it is generally not necessary that parties to a registered relationship live together. Nonetheless, registration of a relationship by both parties could carry significant weight in establishing the existence of a 'close personal relationship', at least in terms of commitment, intention and public aspects of the relationship.

B. Close Personal Relationship

The first criterion in the statutory definition of 'interdependency relationship' in section 27AAB(1) is a requirement for there to be a 'close personal relationship' between the two members of the relationship. The EM describes this as a relationship 'that involves a demonstrated and ongoing commitment to the emotional support and well-being of the two parties'.[107] Love and affection are not explicitly required. The duration of the relationship, the degree of mutual commitment to a shared life, and the reputation and public aspects of the relationship (such as whether it is publicly acknowledged) are all relevant to proving a 'close personal relationship'.[108] These matters also appear in IT Reg 8A(1) as relevant to the entire existence of an interdependency relationship.

In ATO ID 2005/143, the ATO found that this criterion was satisfied by a mother and adult son who had 'a close familial relationship' at the time of the son's death, demonstrated 'in a number of ways such as the emotional support that the [son] provided during difficult times'. In contrast, as discussed above, the Explanatory Statement to the Regulations seems to set the threshold higher in its

103 Above n91.

104 IT Reg 8A(1)(b); SIS Reg 1.04AAAA(1)(b).

105 The *Relationships Act* 2003 (Tas) allows registration of same-sex or opposite-sex 'significant relationships'.

106 See above n1; for more detail see ACT Department of Justice and Community Safety, *The Recognition of Same Sex Relationships in the ACT: Discussion Paper* (Canberra: DJCS, 2005).

107 EM, above n87 at [2.12].

108 Ibid.

example concerning an adult son and his mother, finding that an adult son will not usually provide sufficient 'emotional support', unlike a husband who stays home from work and cancels social and sporting engagements.[109]

C. Living Together

The second requirement for an 'interdependency relationship' is the requirement that the parties live together (subsection 27AAB(1)(b) of the *ITAA* 1936). This requirement is consistent with the definition of de facto spouse in the *SIS Act* and *ITAA* 1936 and in various state laws.[110] While it appears to be a straightforward requirement, case law concerning de facto spouse relationships suggests that a couple may be found to 'live together' even if not *actually* living together at the relevant time, as long as they have lived together before, have plans to live together (again) in the future, and have had or are having a temporary absence or separation.[111] Where two people have never lived together, however, it is unlikely that they will satisfy this definition, even if they had plans to live together at the time of death.[112]

If two people in a close personal relationship have a temporary period of living apart, an exception is provided in the Regulations enabling them to qualify as an 'interdependency relationship' and removing the requirement to demonstrate financial support and domestic support and personal care, where these are not satisfied because of the temporary period of living apart.[113] The Explanatory Statement illustrates this with a bizarre example involving an elderly woman who goes to jail for two years, but maintains an interdependency relationship with her elderly sister. While this makes the point about enforced temporary absence, it would have been helpful to see an example of the somewhat more common situation of one person temporarily absent because of, say, a job transfer to a different city.

If one or both people suffers permanent incapacity and this is a reason for living apart, this will not prevent the existence of an interdependency relationship.[114] In this case, the Regulations extend the statutory exception for cases of physical, intellectual or psychiatric disability in section 27AAB(2) of the *ITAA* 1936.

D. Financial support

The third criterion for establishing an 'interdependency relationship' is that one or each of the individuals must provide the other with financial support.[115] The extent of financial support, in terms of quantum, or length of time, is not specified and is

109 Explanatory Statement, above n102 at 4.

110 However, the *Relationships Act* 2003 (Tas) recognises domestic relationships where the parties do not cohabit, as does Victorian law for certain 'non-financial' purposes, such as decisions as to organ donation: see, eg, *Human Tissue Act* 1982 (Vic) s3(1), definition of 'domestic partner'.

111 *AAT Case 12,501* (1987) 37 ATR 1233; *Richardson v Kidd* [2002] NSWSC 306; *McRae v McRae* (1967) 68 SR (NSW) 361; *Hibberson v George* (1989) 12 Fam LR 725.

112 Explanatory Statement, above n102 at 5.

113 IT Reg 8A(3)(c)(i), which supplants those requirements in the definition of interdependency relationship by virtue of being made under *ITAA* 1936 s27AAB(3)(b).

114 IT Reg 8A(3)(c)(ii).

115 *ITAA* 1936 s27AAB(1)(c).

not addressed in the Regulations. The Explanatory Memorandum distinguishes the concept of 'interdependency relationship' from financial dependence and this seems to imply that 'financial support' requires something less than financial dependence, but this is not explicitly stated.[116]

In ATO ID 2005/143, a generous interpretation of 'financial support' is applied, such that an adult son who made financial contributions towards mortgage repayments, household bills, groceries and for a period of time, substantial weekly motor vehicle loan repayments, was found to have provided 'financial support' to his mother. There is no evidence in the decision to suggest that the mother was dependent on her son for ongoing or regular financial support, or had no other substantial source of financial support.

As the inquiry regarding an 'interdependent relationship' is a holistic one, it may be possible to argue that financial support in the past is sufficient, even if no financial support is actually provided at the time of death. Case law in a different context suggests that spouses with usual household sharing arrangements are generally found to provide each other with financial support and maintenance.[117] It would seem appropriate that the same approach be taken to the members of a same-sex couple who share household expenses and other costs. Finally, support from the surviving partner to the deceased member of the fund will count, rather than only support from the deceased to the surviving partner (in contrast to a determination of the ordinary meaning of 'dependent'). Consequently, it seems reasonable to argue that, in *Example 1* above, Allan and Joe, in a same-sex relationship and sharing household costs and other expenses, have provided each other with financial support.

E. Domestic Support and Personal Care

The final criterion in section 27AAB(1)(d) of the *ITAA* 1936 for establishing an 'interdependency relationship' is a requirement that 'one or each of the individuals provides domestic support and personal care to the other'. This is the most problematic criterion for same-sex couples.

The EM states that 'domestic support and personal care' will 'commonly be of a frequent and ongoing nature', for example:[118]

> [D]omestic support services will consist of attending to the household shopping, cleaning, laundry and like activities. Personal care services may commonly consist of assistance with mobility, personal hygiene and generally ensuring the physical and emotional comfort of a person.

116 EM, above n87 at [2.7].

117 It has been stated that 'it is an almost impossible task' to show that de jure or de facto opposite-sex spouses who share a household do *not* contribute to each others' maintenance or financial support: *Re Karpf and Commr of Taxation* [2004] AATA 900 (AAT), considering that members of a de facto couple could not rebut a presumption that they had 'contributed to the maintenance' of each other under *ITAA* 1936 s251R(3)(c) (health insurance Medicare Levy surcharge). See also *Thompson v FCT* (1999) 99 ATC 2130 (AAT), where a joint bank account was sufficient to demonstrate maintenance; and Taxation Ruling TR 93/35.

118 EM, above n87 at [2.16].

This suggests that 'domestic support and personal care' is not to be interpreted as a composite phrase but comprises two independent criteria, each of which must be satisfied. This appears to be the approach adopted in the Regulations and in ATO ID 2005/143. The Regulations also emphasise that people who share accommodation for convenience (e.g. flatmates), or people who provide care as part of an employment relationship or on behalf of a charity, do not qualify.[119]

It seems likely that 'domestic support', involving the sharing of household chores, will be fairly easily satisfied by people who share a household and live together as a couple, and also by people who live together as companions. For example, in ATO ID 2005/143, the ATO considered that contributions to household and garden chores and shopping constituted domestic support.

The notion of 'personal care' is more difficult. This concept appears on its face to be targeted to a 'carer' rather than a 'couple' relationship, an interpretation that is largely supported by the statement in the EM, extracted above. Most of us attend to our own mobility, personal hygiene and physical comfort, leaving considerable weight to fall on the provision of 'emotional comfort' as establishing 'personal care' in many relationships. The potentially narrow compass of the notion of 'personal care', particularly as it might apply to a same-sex couple, is demonstrated in two New South Wales cases concerning the application of the *Property (Domestic Relationships) Act* 1994 (NSW). In *Dridi v Fillmore*,[120] concerning division of property on breakdown of a domestic relationship, Master Macready found that a domestic relationship did not exist between two men under the definition in Section 5(1)(b) of that Act, because 'domestic support and personal care', and specifically 'personal care', was not demonstrated. After finding that these are independent requirements, he referred to dictionary definitions of 'personal' that connote care taken in respect of matters concerning the 'private individual or self', or 'pertaining to a person's body or figure'; consequently, he stated:[121]

> I would not have thought that matters such as 'emotional support' would by themselves have fallen within the composite expression ['domestic support and personal care']. The expression seems to be directed to a different level of reality such as assistance with mobility, personal hygiene and physical comfort. Such activities obviously however will include an element of emotional support.

Master Macready subsequently applied that decision in *Devonshire v Hyde*,[122] a case under the *Family Maintenance Provision Act* 1982 (NSW), in which he again had to decide whether two men had been in a domestic relationship. He found that a close personal relationship as defined in the statute did not exist, as there was no evidence of 'personal care'.

119 IT Reg 8A(4).
120 [2001] NSWSC 319.
121 *Dridi v Fillmore* [2001] NSWSC 319 at [108].
122 [2002] NSWSC 30.

These decisions indicate the difficulty caused by the specific requirement for 'personal care' in an interdependency relationship. The narrow scope of the concept was identified by the Standing Committee on Social Issues of the New South Wales Parliament, which recommended that the NSW legislation be amended to include a broader range of interdependent relationships ascertained on a case by case basis.[123] The New South Wales Law Reform Commission has also observed that the case law 'highlight[s] the restrictive nature of the definition of close personal relationship in that it only covers relationships involving a degree of personal care' and suggested that it might be preferable to have a more inclusive definition rather than one which automatically excludes otherwise meritorious claims, perhaps with a high evidentiary burden to prove financial and personal interdependency.[124]

More generally, these decisions illustrate the difference in interpretive approach that could be taken when finding an interdependency relationship, as opposed to a de facto spouse relationship. Master Macready observed the difference in drafting between 'de facto' relationship and 'close personal relationship' in the New South Wales statute and stated:[125]

> Concepts relating to a 'couple' are not relevant to the meaning of 'close personal relationship' in Section 5(1)(b) of the *Property (Domestic Relationships) Act* 1994 (NSW), rather, the definition calls for two different links. The first is that the parties are 'living together'. The second is that 'one or each of whom provides the other with domestic support and personal care'.

In ID 2005/143, the ATO rejects the narrow approach taken to 'domestic support and personal care' in *Dridi v Fillmore*, and relies on the reference to 'emotional support' in the EM as an indication that a broader interpretation should apply in the federal tax context. The ATO seems to accept in this decision that assistance in matters such as heavy lifting and buying groceries by an adult son in his mother's household were 'clearly directed at ensuring her physical comfort' and when combined with emotional support given by the son to the mother in 'difficult times', this criterion is satisfied.

The Regulations mitigate the narrow scope of the statutory requirement for 'personal care' in two ways, neither of which is as direct and clear as the ATO approach. First, the Regulations emphasise 'emotional support' by listing it as a matter to be considered in ascertaining an 'interdependency relationship.[126] Second, and more importantly, the Regulations *supplant* the requirement for 'domestic support and personal care' altogether and replace it with an alternative form of words that on their face appear more generous for same-sex couples. IT Reg 8A(2), made under s27AAB(3)(b) of the *ITAA* 1936, states that where two

123 NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform: Report of the Inquiry into De Facto Relationships Legislation* (1999) Recommendation 7 and see discussion at 55.

124 New South Wales Law Reform Commission, *Discussion Paper No 44: Review of the Property Relationships Act* 1984 (NSW) (2002) at 227.

125 *Dridi v Fillmore*, above n121 at [19].

126 IT Reg 8A(1)(vii).

persons have demonstrated a 'close personal relationship', they 'live together' and 'one or each provides the other with financial support', then instead of 'domestic support and personal care', what is required is that:[127]

> one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a mere friend or flatmate.
>
> *Examples of care normally provided in a close personal relationship rather than by a friend or flatmate*
>
> (1) Significant care provided for the other person when he or she is unwell.
>
> (2) Significant care provided for the other person when he or she is suffering emotionally.

The Explanatory Statement to the Regulations explains this provision by first emphasising that 'personal care' requires *significant* and *constant* care:[128]

> The preparation of a meal or assistance with medication when a person is unwell would not normally of itself satisfy this provision. More likely the kind of care and support normally provided in a close personal relationship would extend to constant care (for example, overnight), attending medical appointments with the person or the provision of personal and physical assistance as required.
>
> This provision distinguishes between the kind of care outlined above and the care that a friend or flatmate might reasonably be expected to provide, for example merely checking in on a person when they are unwell and cooking or providing pre-cooked meals.

However, it goes on to acknowledge that many couple relationships do not involve such levels of sickness, and so *minor* levels of care would be adequate:

> Not all relationships are going to experience the type of sickness or distress that would require a significant level of support and care. In those circumstances the manner in which minor levels of support and care are provided would be relevant.

The example of significant care of a person 'suffering emotionally' in the Regulation is not explained. Overall, in spite of the acknowledgement that minor levels of care and support are relevant, the Regulations and Explanatory Statement still appear to take a narrower view than the ATO had previously taken on this matter.

In summary, five criteria must usually be satisfied to establish the existence of an 'interdependency relationship'. The most difficult to satisfy for same-sex couples is likely to be the notion of 'personal care'. While the Regulations may supplant this requirement in some cases, they still appear to emphasise a 'carer' relationship including significant physical or emotional care at times of serious illness or emotional trauma. The 'interdependency relationship' definition thus combines features of a 'couple'-like relationship with features of a 'carer'

127 IT Reg 8A(2).

128 Explanatory Statement, above n102 at 4.

relationship, in a manner that will be cumbersome to apply in practice and that has the potential to cause discrimination for at least some same-sex couples. This outcome is clearly the result of the efforts of the federal government *not to recognise* same-sex couples, in contrast to the relationship regimes in states and territories around Australia, which have aimed to equalise the treatment of same-sex and opposite-sex couples.

5. Discrimination Against Same-Sex Couples in the Superannuation Regime

The superannuation regime discriminates against same-sex couples and their children in a number of other respects, in addition to the differential treatment of same-sex couples as compared to opposite-sex spouses, and the requirement for a member of a same-sex couple to qualify as being in an 'interdependency relationship', or as a financial dependant rather than as a 'spouse'.

A. Gaps in the 'Interdependency Relationship' Reform

First, the 'interdependency relationship' reform has a number of significant gaps in coverage. It does not extend to all members of public sector and defence force superannuation schemes. It does not apply to pensions that automatically revert to a spouse on the death of a member of a superannuation fund. Finally, the reform fails to cover so-called 'no-detriment' payments by trustees to a person on death of a member of a fund.

(i) Public Sector Schemes

Public sector federal employees are members of either the Public Sector Superannuation Accumulation Plan (hereafter 'PSSap'), the Public Sector Superannuation scheme (hereafter 'PSS') or the original Commonwealth Superannuation Scheme (hereafter 'CSS'). These schemes are administered under trust deeds established by legislation and contain specific definitions setting out who may benefit from payouts on death of a member.

In the PSSap, for employees hired on or after 1 July 2005, 'dependant' has the same meaning as in the *SIS Act*, and death benefits are payable to dependants or the LPR of the deceased, similarly to other superannuation funds.[129] Consequently, the new notion of 'interdependency relationship' applies for new members of the PSSap. Similarly, in the Accumulation Plan that operates under the PSS, that broad definition of 'dependant' applies.[130]

However, in the CSS and in the PSS defined benefit plan, death benefits are limited to opposite-sex 'spouses' who are in a 'marital relationship' with the deceased member of the fund.[131] A 'marital relationship' exists where two people have ordinarily lived together as husband and wife in a permanent and bona fide domestic relationship for a continuous period of at least three years prior to the date of death. Factors to be considered include the length of the relationship;

129 *Commonwealth Superannuation Act* 2005 (Cth); PSSap Trust Deed Sched 1 Cl 1.2.1 & 3.2.2.

130 *Commonwealth Superannuation Act* 1990 (Cth) and Cl A.1.2 PSS Trust Deed Sched 1.

whether the persons were legally married; financial dependence; whether there were children of the relationship; joint ownership of property; and other evidence. The AAT has construed these provisions as requiring that the persons must be of the opposite sex, as inherent in the words 'husband' and 'wife'.[132] These provisions were not amended to incorporate the notion of 'interdependency relationship'.

A similar restriction to opposite-sex spouses in a 'marital relationship' applies for Defence Force personnel.[133] The most recent Defence Force superannuation regime explicitly provides in relation to member contributions that 'a person is not, for the purposes of these Rules, a spouse in relation to another person if he or she is of the same sex as that other person.'[134] As discussed above, the notion of an 'interdependent relationship' has now been adopted in the Defence context, for the purpose of recognising same-sex couples in relation to housing, education assistance and relocation and compensation.[135] However, this change does not extend to the provision of veteran's benefits or superannuation.

(ii) Reversionary Pensions

A member of a superannuation fund may receive benefits as a pension from the fund rather than as a lump sum. A superannuation pension may be 'reversionary' such that it will revert automatically to another nominated person on death of the pensioner. Most trust deeds only allow for reversion of a pension to a de jure or de facto spouse, which does not include a partner in a same-sex relationship; as a result, trustees have refused to pay reversionary pensions to surviving members of same-sex couples.[136] As the 'interdependency relationship' reform has not amended the meaning of 'spouse', an amendment of trust deeds to include a same-sex partner in this category may breach the *SIS Act*.

(iii) No-detriment Payments

A superannuation fund trustee is empowered to pay out additional amounts to dependants of a deceased member of the fund so as to 'top up' the death benefit in some circumstances. To prevent double tax, the fund is entitled to a tax deduction for this payment, as long as the benefit of that deduction (which would usually be 15 per cent of the amount of the payment), is passed on to the dependant.[137] This

131 For the CSS, see *Commonwealth Superannuation Act* 1976 (Cth) s8A, 8B and Part VI; see also *Death Benefits*: <http://www.css.gov.au/css/benefits/death_benefits.html> (14 July 2006). For the PSS, see the Trust Deed, Cl B.1.2.1, definition of 'marital relationship' and Part B 7 Sched B and *Death Benefits*: <http://www.pss.gov.au/pss/benefits/death_benefits.html> (14 July 2006).

132 *Brown v Commr for Superannuation* (1995) 38 ALD 344.

133 *Defence Force Retirement and Death Benefits Act* 1973 (Cth) s6A and 6B; and Form of Trust Deed, Sched 1 Glossary, Part 5 'spouse', in Sched to *Military Superannuation and Benefits Act* 1991 (Cth).

134 *Military Superannuation and Benefits Act* 1991 (Cth), Sched, Military Superannuation and Benefits Rules, Part 2 Rule 7.

135 Above n133.

136 This was alluded to by Mr Anthony Albanese in his evidence before the Senate Select Committee on Superannuation and Financial Services, above n69 at 13.

137 *ITAA* 1936 s279D.

'no-detriment' provision contains its own definition of 'dependant' that includes a spouse, former spouse, child (of any age) or financial dependant of the deceased member of the fund.[138] In an apparent omission, the 'interdependency relationship' amendments have not been applied to the no-detriment rule. This may result in recipients of no-detriment payments who are in interdependent relationships being overtaxed, or the superannuation fund being, in effect, penalised for making such payments.

B. Children of Same-Sex Couples

In Part 3 above, the issue of who qualifies as a 'child' for the purposes of being a 'dependant' was discussed. It was explained that the definition of 'child' is unlikely to recognise the child of a non-biological parent in a same-sex relationship.[139] In practice, this should not be a problem for minor children where it can be proved that a child of a non-biological parent in a same-sex relationship is financially dependent on the deceased. Thus, in *Example 2* above, Anna, aged 3, is likely to qualify as a financial 'dependant' of Jane, the deceased member of the fund, and so will be eligible to receive a tax-exempt death benefit payout. However, this requires proof of financial dependence.

Alternatively, a child may be able to satisfy the requirements of an 'interdependency relationship' with their non-biological parent if the child lived with the parent, and they can show a 'close personal relationship', some financial support, and 'domestic support and personal care'. However, as discussed above, the Explanatory Statement to the Regulations appears to take a strict approach to parent-child relationships, particularly where the child is an adult. This strict approach may render it more difficult for an individual to establish 'interdependency' with their non-biological parent.

Where a child of a same-sex relationship lives apart from their non-biological parent, or cannot qualify as a financial 'dependant', there remains the potential for discriminatory treatment. Consider *Example 3* below, a variation of *Example 2:*

> *Example 3.* Helen and Jane are co-mothers of Anna, who is the biological child of Helen. At the time of Jane's death, Anna is aged 19 and lives and supports herself independently. Although Anna and Jane have a close personal relationship, Anna will not qualify as a financial dependant of Jane, nor be in an interdependency relationship with her, as she no longer lives with her. This means that the trustee of Jane's superannuation fund may not be able to pay a death benefit to Anna, unless Jane has designated Anna to be the LPR. If such a benefit were paid, Anna would be taxed at 15 per cent on it.

The discrimination in *Example 3* relates to the ability of a trustee to pay the death benefit to Anna under the *SIS Act*. In respect of the tax consequences, as she is over

138 *ITAA* 1936 referring to para (a) of the definition of 'dependant' in s27A(1) and s279D(4).

139 Similar problems also exist under the provisions in the CSS and PSS public sector funds, under which an individual may be eligible for benefits if they were the biological, adopted, ex-nuptial or step-child, or a ward, of the member of the fund, or his or her opposite-sex spouse who lives with the member or is wholly or substantially dependent on him or her at the time of death: *Commonwealth Superannuation Act* 1976 (Cth) s3(1).

age 18, Anna is in the same position as other adult children who are financially independent of a deceased parent.

Problems would also arise for Anna if, at the time of her non-biological parent's death, her parents had separated and she lived with only one parent. This is illustrated in *Example 4*.

> *Example 4.* At the time of Jane's death, Jane and Helen have separated. Anna is aged 16 and lives with Helen. If Jane paid financial support for Anna, then Anna may qualify as a financial dependant of Jane, although this may depend on the support at the time of death. If little or no financial support was paid at the time of death, Anna would fail to qualify as a dependant because she is not a 'child' of Jane; she is unlikely to be a financial 'dependant' and she is not in an 'interdependency relationship' with Jane.

Federal child support and maintenance legislation does not apply to same-sex couples. Consequently, no financial support may have been provided, or it may be difficult to prove that financial support has been provided over time where a couple has separated. *Example 4* illustrates the discriminatory outcome. Anna is clearly in a worse position than an individual who qualifies as a 'child' of a separated relationship, such as the biological child of a separated de facto couple, who would remain be eligible for the death benefit and who would also, being under the age of 18, qualify for the tax exemption. It is also illustrated in both *Examples 3* and *4* that the child Anna does not derive any legal status from the existence of an interdependency relationship between Jane and Helen, unlike, say, a step-child who is the non-biological child from a former marriage of one spouse in a new marriage.

One way to address this problem might be to establish a legal presumption as to parents of a child of a same-sex couple, to deal with the situation where a same-sex relationship ceases, as is currently applicable for spouse relationships. This is done in some state laws, for example, the *Property (Domestic Relationships) Act* 1994 (NSW) recognises the parental responsibilities of partners in a same-sex domestic relationship for purposes of that Act.[140] However, Anna's status as a 'child' of the non-biological parent need not necessarily depend on the interdependency relationship itself. A better alternative would be for the parent-child relationship between Anna and her non-biological mother, Jane, to be granted recognition. This may be able to be done by amendment of state laws concerning the status of children or adoption in a same-sex couple.[141] Even if a solution could be found in state and territory law, it is unclear whether it would be effective in all cases for purposes of federal superannuation and tax law. In any event, such a solution is likely to lead to arbitrary differences in the status of children that depend on the state or territory in which the child and same-sex parents reside.

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140 *Property (Domestic Relationships) Act* 1994 (NSW) s5(3)(d).

141 The *Adoption Act* 1994 (WA) ss38 and 39, and *Adoption Act* 1993 (ACT) s18, which both allow adoption of a child in a same-sex couple; see further Jenni Millbank, 'Recognition of Lesbian and Gay Families in Australian Law: Part 2: Children' (2006) *FLR* (forthcoming).

A possible trigger in federal law for recognition of a 'child' for superannuation and tax purposes would be for such recognition to apply if a parenting order exists or has existed under the *Family Law Act* 1975 (Cth), in the name of the member of the superannuation fund in respect of the child. Another possibility is to allow a member of a superannuation fund to nominate a non-biological child as their 'child' for purposes of superannuation death benefits. These are both only partial solutions. Parenting orders apply only for a child under the age of 18, and would have no effect for other legislation (without further legislative reform) and not all non-biological parents obtain parenting orders, and similarly, not all members of a fund would complete appropriate nominations. The most effective and fairest way to ensure equality of treatment for all children is through direct recognition of a 'child' of a in the relevant federal law.

C. Other Superannuation Concessions for Spouses

A range of other superannuation tax concessions apply for de jure or de facto spouses for which same-sex couples are not eligible. The 'interdependency relationship' reform has done nothing to eliminate the discriminatory application of these concessions.

First, where a member makes contributions to a superannuation fund in favour of his or her opposite-sex spouse,[142] and the spouse's assessable income and reportable fringe benefits for the fiscal year are less than $13,800, the contributor is entitled to a tax offset, or rebate, in respect of maximum 'eligible spouse contributions' of $3,000 each year.[143] The tax offset can reduce the tax payable by the contributing spouse by up to $540 each year.[144] These contributions enable an individual who is earning little or no salary or wages to accumulate superannuation savings subsidised by his or her spouse. This tax expenditure is estimated to cost $13 million in revenue fore gone in 2005–6.[145]

Second, in 2005 the Government enacted a rule allowing splitting of superannuation contributions and account balances between spouses, effective from 1 January 2006.[146] In spite of being enacted *after* the interdependency relationship reform, no reference is made to same-sex couples.

Superannuation splitting between spouses has been the policy of the Howard government since 2001.[147] The EM to the reforming bill stated that superannuation splitting would benefit low-income or non-working spouses by allowing them to have superannuation assets under their own control, thus generating their own income in retirement.[148]

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142 See discussion above in Part 3.A; ATO Interpretive Decision ID 2002/649.

143 *ITAA* 1936 ss159T, 159TC.

144 *ITAA* 1936 s159TA.

145 *Tax Expenditures Statement,* above n12, Appendix B, Table B1.

146 *Tax Laws Amendment (Superannuation Contributions Splitting) Act* 2005 (Cth) (Act No 148 of 2005), amending *ITAA* 1936.

147 Commonwealth of Australia, Treasury, *Election Statement 2001: A Better Superannuation System* (2001); Commonwealth of Australia, Treasury, *Election Statement 2004: Super for All and Understanding Money* (2004).

148 Explanatory Memorandum accompanying the Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 at 3.

Superannuation splitting is implemented through a concept of a 'contributions-splitting ETP' that is 'designated as a spouse contributions splitting amount' under IT Regulations and SIS Regulations.[149] A 'contributions-splitting ETP' is rolled over to the spouse's superannuation account with no immediate tax consequences.[150] This is a voluntary, 'annual split' model in which members of participating superannuation entities may request that contributions made by them in a year be split with their spouse, after the end of each financial year.

Superannuation splitting provides single income opposite-sex couples with access to two ETP low-rate thresholds and two RBLs; recall that the RBL of a member of a superannuation fund sets the upper ceiling for concessional taxation of benefits in respect of the member. As such, it is most valuable for high income earners who are able to contribute significant amounts to superannuation or whose entitlements are nearing their personal RBL, such that a portion of any superannuation payouts is at risk of being taxed at a rate of 47 per cent. In effect, it introduces a spouse unit into the tax regime for superannuation of wealthy income-earners with home-maker spouses.[151] The Budget proposal to reform superannuation by exempting benefits from tax entirely and modifying contribution rules will reduce the benefit of the superannuation splitting concession and may affect the value of other concessions.[152] However, the extent of this impact is unclear as yet. Nonetheless, superannuation splitting remains a discriminatory provision in the superannuation and tax law.

6. Politics and Policy

Australia's superannuation and tax regime continues to discriminate explicitly and in significant ways against same-sex couples and their children. It seems clear that the 'interdependency relationship' reform does not represent a serious change in government policy towards same-sex relationships. Why, then, did the government carry out the reform at all? And what *should* the law be in relation to superannuation death benefits and dependants? This Part considers the politics and policy of the 'interdependency relationship' reform.

The most obvious explanation for the interdependency relationship reform - both the way it was carried out and the convoluted drafting of the statute and Regulations — is simply politics. The Howard government has since its election in 1996 consistently opposed any recognition of same-sex couples in federal law. This is in spite of many government reports having previously identified this discrimination and argued for law reform to end it.[153] Since 1996, the Australian Democrats have sought to outlaw sexuality discrimination in superannuation and other federal laws and have introduced a number of Bills into the Parliament.[154] Federal Labor MP Anthony Albanese has also introduced private member's Bill to

149 New s27A(1) 'contributions-splitting ETP' of the *ITAA* 1936. This is further explained in new SIS Regs, Division 6.7, *Superannuation Industry (Supervision) Amendment Regulations* 2005 (No 8), *Select Legislative Instrument* 2005 No 334, 15 December 2005.

150 *ITAA* 1936 s27D(4).

151 On the existence of a 'spouse' unit in tax and transfer laws, see Miranda Stewart, 'Domesticating Tax Reform: The Family in Australian Tax and Transfer Law' (1999) 21 *Syd LR* 453.

152 Simpler Superannuation, above n8.

eliminate discrimination.[155] Most recently, in 2000, Government senators sitting on a Senate Committee refused to recommend passage of a Democrats Bill to amend superannuation law, although the amendments were supported by ASFA, the Institute of Chartered Accountants in Australia, the Australian Society of Certified Practising Accountants and the Australian Council of Trade Unions, among others.[156] The Committee made some comments sympathetic to outlawing discrimination, but suggested merely that federal legislation should be fully reviewed at some point, and the issue seemed to go into the closet again.[157]

However, it seems that in 2004, the Democrats finally managed to use the leverage that they then enjoyed in the Senate to obtain legislative changes through bargaining related to passage of the Superannuation Choice legislation, which was a core element of the government's superannuation policy platform. That legislation had the primary goal of allowing employees to choose the complying superannuation fund into which they want to have their employer contributions paid. Towards the end of protracted negotiations between the government and Democrats, the 'interdependency relationship' amendment was introduced into the amending Bill in the Senate.[158]

Whether or not the only reason for the 'interdependency relationship' reform is politics, it raises some fundamental questions of the correct policy for superannuation death benefits, and in particular the intersection of property and family in this area of law. Prime Minister Howard, in his speech seeking to reconcile the logic of prohibiting marriage by same-sex couples while granting 'interdependency' status to them for purposes of superannuation, relied on *property* rights in superannuation as justification for the 'interdependency relationship' reform:

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153 Senate Select Committee Superannuation, *Report* (1993) at [14.42] and Recommendation 14.1; Australia, Senate Legal & Constitutional References Committee, *Report of Inquiry into Sexuality Discrimination* (1997); Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same-Sex couples, Report of Examination of Federal Legislation*, Report No 7 (1999).

154 The Democrats introduced the Sexuality Discrimination Bill 1996, which lapsed and was reintroduced in 1998.

155 Anthony Albanese introduced a private member's Bill to eliminate discrimination in superannuation (the Superannuation (Entitlements of Same Sex Couples) Bill 1998) and reintroduced it twice subsequently when it lapsed, and has fought tirelessly for recognition of same-sex couples at the federal level. The Labor Party has recently produced a draft Bill to outlaw discrimination on the basis of sexuality: Nicola Roxon MP, Shadow Attorney-General, Media Statement (7th July 2006).

156 Senate Select Committee on Superannuation and Financial Services, above n69.

157 Senate Select Committee on Superannuation and Financial Services, *Report on the Provisions of the Superannuation (Entitlements of Same Sex Couples) Bill 2000* (2000), Government Senators' Report at 39.

158 Above n37; and see EM, above n87. An account of the political tussle between the Democrats and the government can be found on the weblog of Rodney Croome, gay activist: <http://www.rodneycroome.id.au/weblog?id=C0_67_1> (14 July 2006) who comments that it took some time before the government 'figured out how it can recognise same-sex couples without actually mentioning them'.

> [T]he question of what you do with … superannuation is something that goes to questions of property rights and I think you can quite consistently and logically take the view that this legislation will (sic) on the social and legal character of marriage in our society but also recognise that if people do have a close interdependency, whether they're in a same sex relationship or they may be a independently supported child who's living at home with one of his elderly parents, that they ought to have the same superannuation rights as married people and dependent children … .[159]

A. Superannuation Death Benefits as Property Rights

Australia's superannuation regime has many different goals and Australia has always subsidised superannuation saving through the tax system.[160] The basic goal of superannuation is for contributing members to access benefits to support *themselves* in retirement. Thus, it aims to privatise some of the cost of caring for the retired and aged, with the associated goal of reducing the cost to government of the age pension and, possibly, increasing the standard of living of those people in retirement. A second goal is to ensure that Australia has sufficient savings to provide an adequate pool of investment capital to fund economic growth. A third goal is to mandate or encourage saving for the support of a member's dependants in the event of his or her death. This goal thus supports concessions in favour of superannuation death benefits. The Asprey Report concluded in 1975 that the provision of life insurance or superannuation benefits on death for dependants has been seen as desirable by society for over a century, and so has always attracted significant tax concessions.[161]

On one view, the exemption of death benefits is simply another subsidy for the cost of caring for the aged or retired. Frequently, a superannuation death benefit will be paid to a person, such as a spouse, who is of a similar age to the deceased and is already over retirement age. However, the death benefit regime as currently structured is not targeted to achieve that end. A death benefit lump sum may go to minor or adult children and there is no requirement that it be rolled over or deposited in a superannuation fund until the recipient receives retirement age.

Tax exemptions or concessions are frequently analysed as 'tax expenditures' that depart from the benchmark of a comprehensive income tax. From this perspective, the tax expenditures for superannuation are the concessions applicable to contributions and earnings and not the exemption of benefits.[162] However, this author prefers to examine the tax treatment of superannuation against the existing baseline of 'hybrid' income-consumption tax treatment, and to

159 Above n7.

160 The goals of superannuation and forms of government subsidy for it are discussed in many government reports and policy papers including Taxation Review Committee, *Full Report* (hereafter 'Asprey Report') 31 January 1975 at 349–380; Senate Standing Committee on Community Affairs, *Report, Income Support for the Retired and the Aged: An Agenda for Reform* (August 1988); Treasurer, John Dawkins, 'Security in Retirement: Planning for Tomorrow Today' (30 June 1992); Treasurer, Peter Costello, 'Recognising Older Australians' (20 August 1996); and see references at n140 above.

161 *Asprey Report*, id at 349.

consider the correct policy for benefits on death *given that* we do not tax contributions and earnings fully. This enables us to consider who, if anyone, should benefit from concessional tax treatment.

As indicated above, Prime Minister Howard identified a key assumption that underlies the superannuation regime as a reason for recognising interdependency relationships. This is that superannuation savings are the *property* of the member of the superannuation fund. Recall that superannuation assets now have a value exceeding $741.7 billion. For most people, their superannuation savings will be their second largest asset next to a home that they own; for some, superannuation will be their only, or their most valuable, asset.

To what extent is the assumption of property in superannuation correct? At law, each member is a beneficiary of a trust fund and in that sense has 'property' in their superannuation. This entitlement differs as between contemporary accumulation funds, in which members are 'entited' to their own 'account' of contributions and earnings in the fund, in contrast to the older-style defined benefit funds, in which members are entitled only to specific *benefits* as defined. Death benefits are frequently 'purchased' by the fund member, either in general terms under the trust deed, or on specific election by the member to use some of their own 'account' to acquire the death benefits. Judicial authority suggests that members of a superannuation fund may be considered to have purchased death benefits by their contributions.[163] Family law also treats superannuation balances like other property, allowing superannuation lump sum and pension entitlements to be transferred or split as part of a divorce settlement or agreement. The income tax law ensures that such transfers will not generate immediate tax consequences, in a manner similar to other property transfers on family breakdown (such as the transfer of investment property).[164]

On this view, a member of a superannuation fund does have property in the fund and so superannuation differs from social security or child support laws, which are more concerned with the *need* for financial support of spouses and children.[165] If superannuation were truly recognised as 'property' of a member of a fund, then it would be logical to treat death benefits as part of the member's estate and divide them according to his or her will, or under intestacy, or under family maintenance or provision legislation. A surviving partner in a same-sex couple would be secure if their partner had made a will passing the superannuation benefits to the partner, or under state laws as to deceased estates, most of which have now been reformed to recognise the partner as next of kin for intestacy or family maintenance purposes.

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162 *Tax Expenditures Statement,* above n12, Appendix B. This is because applying the baseline of a comprehensive income tax, contributions and earnings should be taxed to the member of the fund at their marginal income tax rate each year as they accrue. Recall that Australia taxes contributions and earnings concessionally (at a 15 per cent rate). Against this baseline, it is appropriate to exempt superannuation payouts from tax.

163 *Re Commr of Superannuation and Scott*, above n82 at 411.

164 *ITAA* 1997 Div 126.

165 Ibid.

However, as we have seen, the *SIS Act* and the income tax law do not fully implement the 'logic' that superannuation is a member's property. The *SIS Act* restricts the class of people who are eligible for the death benefit to 'dependants' or to the LPR of the deceased, determined in the manner that the trustee decides in his or her discretion is fair and reasonable. Neither the wishes of the deceased nor intestacy or family maintenance laws control this decision of the trustee. For example, the next of kin under intestacy law may be the parents of the deceased, but they will not qualify to receive a death benefit if there is a spouse, child financial dependant or member of an interdependency relationship who is entitled to some or all of the benefit.[166]

From a tax perspective, the exemption for death benefits is only provided for benefits paid to a 'dependant' (it will not apply to a benefit paid to the LPR unless it is passed on to the dependant). The tax rules defining 'dependant' limit the cost to government of the exemption of the benefit by defining a restrictive class who are entitled to the exemption. This is important, as currently, the tax exemption for death benefits is an even more generous concession than the exemption for retirement benefits. A death benefit paid to a dependant is exempt up to the pension RBL of the deceased ($1,297,886 in 2005–6) whereas a retirement lump sum is exempt only up to $129,751 (plus any undeducted contributions) and is then taxed at 15 per cent up to the lump sum RBL ($648,946 in 2005–6), with any excess taxed at 47 per cent.[167] This seems contrary to 'strict logic' which 'would seem to suggest that if such lump sums received during life are to be taxable they should also be taxable if received at death'.[168] Under the Government's proposed reforms scheduled to commence on 1 July 2007, this distinction will vanish and all benefits (whether paid on retirement or death) will be exempt from tax.

The generous tax exemption for death benefits raises questions of equity as between low income and high income earners. It may be that as superannuation becomes increasingly widespread throughout the community, the majority of Australians are entitled to death benefits; arguably, then, the subsidy to death benefits does no harm. Nonetheless, the tax exemption for the death benefit is far more valuable to high income earners than low income earners and it is not clear what hardship would be caused by taxing it at a higher rate. The Asprey Committee proposed that death benefits should be exempt from income tax but recognised that they form an accretion to assets that arises on death, and so argued that they should be included in the base for a death duty or wealth tax.[169] This proposal would undoubtedly improve the equity of the system but Australia no longer has death duties and seems unlikely to enact a death or wealth tax in the near future.

166 Some schemes, such as the CSS, do not pay a death benefit if there is no eligible spouse or children.

167 The ceiling for the tax exemption depends on the RBL of the deceased individual rather than of the recipient to prevent 'gaming' of the system through planning for particular individuals to receive distributions through the estate.

168 *Asprey Report*, above n160 at 367.

169 Ibid.

Alternatives would be to apply some income tax to a death benefit, or to retain the exemption but to enforce other regulatory aspects of superannuation, for example, by requiring a death benefit to be rolled over into a superannuation fund until the recipient him- or herself reaches retirement age.

B. Who Should be a 'Dependant'?

Whatever policy is appropriate for the regulatory and taxation treatment of death benefits, it is necessary to consider *who* can benefit. The 'interdependency relationship' reform raises questions about how we determine who can receive a death benefit and how we determine the class who should benefit from the tax exemption. In the *SIS Act*, the policy that *you own your superannuation* intersects another policy, that we could loosely term *you should support your family.* The definition of 'family', or 'dependant', thus becomes crucial.

In Part 2, this article examined in detail each kind of individual or relationship that could qualify as a 'dependant' in the current regime. The married 'spouse' element in the definition of 'dependant' in the superannuation regime derives from the status of the spouse as married, but it also essentially operates as a binding nomination of the spouse as a recipient of a death benefit, applicable until 'undone' by the member of the fund (and even divorce does not prevent some sharing of superannuation). The de facto spouse element is similarly binding, but requires evidence to prove that a de facto relationship in fact exists. In both cases, the legal status of spouse applies across the board for all superannuation concessions, ranging from contributions to splitting to establishment of a reversionary pension, through to death benefit payouts. Status as spouse also works both ways: if one is a spouse, the other will also be a spouse for all purposes of the superannuation law.

The 'child' element of the definition of dependant appears to be an automatic or default classification. However, determining whether an individual qualifies as a 'child' for purposes of superannuation law can be a complicated legal and factual inquiry and the status of a 'child' can change in some circumstances, as when an individual becomes a 'step-child'. The children of same-sex couples will frequently not be recognised as a child of at least one of their parents, even if the parenting responsibilities of that person are recognised under family law.

The policy behind status-based eligibility to be a 'dependant' as a spouse or child appears to be a combination of a presumption as to the deceased's wishes in respect of his or her own property; the operation of law as to the financial responsibilities of the deceased (eg, she or he has an obligation to support her or his children); and normative or ideological conceptions of the 'family'. In contrast to eligibility based on legal status, the ordinary meaning of the definition of 'dependant', as interpreted by administrative agencies, relates directly to financial dependence and is based on a factual inquiry at the time of death; it can only go one way, in that the claimant must establish that he or she was dependent on the deceased; and it relates only to payouts on death. This is a pragmatic and needs-based approach, but it also operates on the presumption that the superannuation is the property of the deceased, and that as the deceased supported the individual during his or her lifetime, it is likely intended that this support should continue after death of the deceased.

The 'interdependency relationship' reform is a hotchpotch of these two approaches. It requires proof based on a factual inquiry at the time of death, but once established it goes both ways, in that either person in an interdependency relationship can be a 'dependant' of the other. It applies only for purposes of the death benefit and not for any other purposes in superannuation law. Same-sex couples may fit into it, but it does not truly recognise their couple status. Despite the frequent use of the example of two elderly sisters living together, there is not likely to be a very large number of people in relationships that would be 'interdependency relationships' but where an individual would not qualify as financially dependent, particularly as the exclusion of people who live together for 'convenience' or as 'flatmates' would exclude many relationships. The most common such relationship seems likely to be one where an adult child cares for an aged parent, but the Regulations are aimed at minimising the applicability of the reform to such parent-child relationships. Fundamentally, then, the 'interdependency relationship' reform seems to be aimed at same-sex couples, but the statute, accompanying EM and Regulations have all been drafted specifically to *avoid* referring to same-sex couples or applying gender-neutral definition of a 'spouse' or partner in a domestic relationship and in a manner that makes qualification needlessly complicated.

Such 'closeting' of a fundamental aspect of the reforms renders the 'interdependency relationship' reform unclear and uncertain in its application. The new concept is ill-suited for application to same-sex couples, as it is drawn from a New South Wales provision that is specifically intended *not* to apply to couple relationships unless they meet a higher threshold of personal care and support than would be usual in couple relationships. The Regulations appear to have been drafted to mitigate the effects of this problematic statutory definition, by actually *supplanting* that definition for many couples, thereby adding to the complexity, in terms that are themselves somewhat obscure. To the extent that it may enable equal recognition of same-sex and opposite-sex couples, the 'interdependency relationship' reform leaves this to an assessment by the trustee of 'interdependency' in each case. Such an assessment will be difficult in many cases.

A number of different possible approaches could be taken to the definition of 'dependant' for superannuation purposes. One possibility is that fact-based 'interdependency' or financial dependence concepts could be applied to all claimants. This would render the superannuation regime more similar to state family maintenance or provision regimes, but those only operate where a claim is made challenging a default inheritance position. It would require confirmation of the interdependency status of an individual in a very wide range of cases and would impose a significant burden on superannuation trustees. Another possibility is that 'bright-line' legal status or binding nominations could be required for all dependants. However, there is evidence relating to the use of a nomination approach for significant relationships that suggests that this kind of approach may be infrequently used.[170] The class of nominees could become out of date quickly and this could cause both administrative problems and injustice. Consequently, there is a need for both a default status-based category *and* a fact-based

dependency category in superannuation law. Same-sex couples should not be squeezed into the latter. Instead, their couple status should be fully and equally recognised in the superannuation law.

7. Conclusion

> [W]ithout the recognition of all family relationships, equality – the cornerstone of democratic society – is missing; public acknowledgment of private affections, commitments, interdependencies and identities is denied.[171]

This article has examined in detail the new 'interdependency relationship' reform in superannuation and tax law. From a practical perspective, the reform is an improvement on the previous law that should assist many surviving partners in same-sex couples and some others in caring live-in relationships. However, the reform does not treat same-sex couples equally with opposite-sex de facto spouses and is likely to be more difficult to satisfy the conditions for 'interdependency' than for 'de facto spouse'. The reforms do not apply to members of existing public and Defence Force superannuation schemes and fail to address the situation of children of same-sex couples. They also do not address the discrimination that exists in other significant tax concessions applicable to superannuation. Indeed, the government has in recent years enacted significant concessions that effectively embed a 'couple' unit in the superannuation regime. Same-sex couples are excluded from these concessions.

When the politics of the 'interdependency relationship' reform are revealed, it is clear that the government acceded to the minimal reform needed to obtain its political compromise. Timing and content of the 'interdependency' reform were driven by political dealing. This mode of law reform leaves much to be desired. One negative consequence has been that amid the fanfare that attended the Superannuation Choice reforms and the anti-gay marriage amendment, the 'interdependency relationship' reform was scarcely noticed. This lack of publicity suited the government, but it means that many in the legal community and in the lesbian and gay community remain unaware of the new definition and its implications for same-sex couples, and the government has put no resources into education of the community in respect of the reforms.

The superannuation fund industry and gay lobby groups have been relatively positive about the 'interdependency relationship' reform, but this would seem to be a case of 'better something than nothing', given the long wait for the reform. As the Chief Executive of ASFA stated more than five years ago, 'this has had a long and sorry history of stop-start improvement'.[172] Nonetheless, it is clear that further

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170 Jenni Millbank, 'Domestic Rifts: Who is Using the Domestic Relationships Act 1994 (ACT)?'(2000) 14 *AJFL* 163–183; the use of binding nominations in the superannuation context has also been problematic for a range of reasons.

171 Alastair Nicholson, 'The Changing Concept of Family: The Significance of Recognition and Protection' (1997) 6 *Australasian Gay and Lesbian LJ* 13 at 14.

172 Philippa Smith, CEO, ASFA, evidence before Senate Select Committee on Superannuation and Financial Services, above n69 at 1.

reform is needed. While the possibility of an extension of marriage to same-sex couples seems rather remote at this juncture, same-sex couples should be recognised as fully and equally as de facto spouses in the current regime. This is the best compromise for both same-sex couples and for superannuation trustees, enabling the application of a large body of existing law concerning couple relationships in a manner that is already being done in many contexts at the state level. The reform should apply to all superannuation tax concessions. Finally, a full review is needed to ensure adequate recognition of the children of same-sex couples.

At the same time as seeking to eliminate discrimination in the current superannuation regime, we must remember that the regime provides sizeable tax subsidies enabling the accumulation and intergenerational transfer of wealth in superannuation. As such, any reform that fully recognises same-sex couples will provide most benefit to those wealthy couples with most assets in superannuation. The broader policy issues concerning regulatory and tax treatment of superannuation death benefits should not be forgotten. We should also re-examine the broad policy of superannuation death benefits in Australia to make the regime more equal in all ways.