

The Parliament of the Commonwealth of Australia

**INTERIM REPORT
ON THE PROVISIONS OF THE
FAMILY LAW LEGISLATION AMENDMENT
(SUPERANNUATION) BILL 2000**

**SENATE SELECT COMMITTEE ON
SUPERANNUATION AND FINANCIAL SERVICES**

November 2000

Commonwealth of Australia

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SENATE SELECT COMMITTEE ON
SUPERANNUATION AND FINANCIAL SERVICES

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TERMS OF REFERENCE

On 10 May the Senate referred the provisions of the Family Law Legislation Amendment (Superannuation) Bill 2000 to the Select Committee on Superannuation and Financial Services for examination and report by 14 August 2000.¹

The Committee sought and obtained from the Senate on 8 June, an extension of time in which to report to 31 October. A further extension was sought and granted on 9 October, with the time to report extended to 28 November 2000.

1 Selection of Bills Committee Report No 7/2000.

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PREFACE

The Family Law Legislation Amendment (Superannuation) Bill 2000 (the Bill) will amend the *Family Law Act 1975* to include superannuation within the definition of property and to allow superannuation to be divided on marriage breakdown in one of two ways: either by agreement of the separating couple or by court order. The Bill will permit separating couples to make binding agreements about how to divide their superannuation interest or interests. This gives people the flexibility to settle their own financial affairs wherever possible, and therefore to avoid costly and protracted litigation.

At the request of the Government, the Committee considered the provisions of the Bill in the context of the associated proposed draft regulations, which when finalised, will be issued under the *Family Law Act 1975* and the *Superannuation Industry (Supervision) Act 1993*. Consultation drafts of the proposed regulations were issued on 10 October 2000.

Two of the most important features of the Bill and proposed regulations concerned the methods to be used to determine the value of the superannuation interest (particularly in the case of valuing lump sum interests and pension interests in defined benefit schemes) and the cost to industry to implement the proposed changes. The Committee acknowledges that there needs to be a balance between the complexity required to take into account constitutional constraints with the inescapable costs of doing this.

This report has been prepared as an interim report on the provisions of the Bill. It outlines the background to the inquiry and identifies the matters raised in evidence to the Committee. Many of these issues related to both the content and application of the Bill itself, while others related to the detail contained in the consultation draft of the regulations, or, indeed, raised broader matters. The report neither draws any conclusions, nor makes recommendations, about the Bill.

Instead, the Committee has determined that it can best facilitate the development of the proposed legislation and associated regulations, by drawing to the attention of the relevant government departments – in this case the Attorney-General's Department and Treasury – the issues which have been raised during the inquiry. In particular, the Committee considered it appropriate to draw attention to the evidence presented by the Family Court of Australia seeking further simplification, clarification or guidance for the Court to be able to implement the proposed legislation.

Officials from the two departments advised the Committee that, as part of their own consultation processes on the draft regulations, that they would have regard to the alternative approaches raised in this report, would consult further, and report back to the Committee with the outcome of those consultations, including any proposed amendments to both the Bill and the draft regulations.

The Committee expects that a number of the issues identified during the inquiry will be able to be addressed to the satisfaction of most parties. The Committee has indicated that it would be willing to hold a roundtable discussion with relevant parties early in the new year if there are any outstanding matters.

Once the response has been received from the Attorney-General's Department and Treasury about their position in relation to the proposed Bill and regulations to be issued under both the SIS Act and the Family Law Act, the Committee expects to be able to present its final report, possibly in February 2001.

CHAPTER 1

INTRODUCTION

Background to the inquiry

1.1 The Family Law Legislation Amendment (Superannuation) Bill 2000 ('the Bill') was introduced into the House of Representatives on 13 April 2000. On 10 May the Senate referred the provisions of the Bill to the Select Committee on Superannuation and Financial Services for examination and report by 14 August 2000.¹ The Bill will amend the *Family Law Act 1975* (Family Law Act) to provide for the division of superannuation interests on marriage breakdown.

1.2 The Bill was seen by the Government as being part of an overall reform package which would include regulations under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and regulations under the Family Law Act together with consequential amendments to income tax, social security and other legislation (yet to be introduced). Consultation drafts of the regulations were not released until 10 October 2000.

1.3 In order to provide the opportunity for interested parties to comment on the Bill in the context of the consultation draft regulations, the Committee sought and obtained from the Senate on 8 June, an extension of time in which to report to 31 October. When it became apparent that the consultation draft of the regulations would not be issued within the time frame for the Committee to conduct its inquiry and report, a further extension was sought and granted on 9 October, with the time to report extended to 28 November 2000.

Conduct of the inquiry

1.4 The inquiry was advertised in the *Australian Financial Review* on 19 May 2000 and in the *Weekend Australian* on 20-21 May 2000, inviting submissions. Information about the inquiry, including a number of media releases advising extensions to the dates for the receipt of submissions, was also posted on the Committee's website.

1.5 The Committee received a number of submissions from individuals, superannuation industry bodies and service providers, legal and other professional associations and other organisations, including the Family Court of Australia. A list of the submissions received is at **Appendix 1**.

1.6 The Committee met in public to consider the provisions of the Bill on 13 and 14 November 2000 in Canberra. During the course of the hearings, representatives from the Attorney-General's Department and Treasury clarified and responded to issues raised by a number of witnesses. A list of witnesses who gave evidence at the public hearings is at **Appendix 2**.

1 Selection of Bills Committee Report No 7/2000.

Background to the Bill

Current arrangements

1.7 Currently, the division of property following marriage breakdown is a matter governed by the *Family Law Act 1975* (Family Law Act). It allows couples to make their own informal arrangements, or use the Family Court in a variety of ways to settle matters between the parties, particularly to make property orders under section 79. However, there have been legal difficulties in dealing with superannuation interests because they are not currently defined as property under the Family Law Act.

1.8 Doubts have also been raised over the Family Court's power to affect the rights of people who are not parties to the marriage (eg trustees of superannuation funds). There is doubt not only whether the Family Law Act authorises this but also whether the Commonwealth has the constitutional power to legislate to enable the Court to do so.

1.9 The Family Court can, and does, take superannuation interests into account and divides other property accordingly. However, this is far from ideal because it often means that current property—usually the family home—has to be traded off against superannuation that may not be able to be accessed for many years. In many cases, this may leave one person with a house but no retirement income, and the other person with no accommodation but significant retirement income that may not be accessible for many years. As the Attorney General observed, the proposed legislation 'is designed to address the inequity and inflexibility of this situation.'²

Demographics relating to divorce and the value of superannuation in Australia

1.10 In 1998, there were 51,370 divorces in Australia. A recent Australian Bureau of Statistics study of marriages from 1977 to 1994 concluded that about 43 per cent of all marriages end in divorce. Of these, 8 per cent occurred within five years of marriage, 19 per cent within ten years, 32 per cent within 20 years and 39 per cent within thirty years.³

1.11 On the value of superannuation policies in Australia the Parliamentary Bills Digest No 55 notes:

An increasing number of Australian employees now have superannuation policies. The relative value of those policies is increasing and is projected to continue increasing. In 1986, a report published by the Australian Institute of Family Studies (AIFS) revealed that of the men and women surveyed, in about 55 per cent of cases at least one spouse had superannuation. By 1997, 81 per cent of the men and women sampled by the AIFS reported that at least one spouse had superannuation. By 1999, 91 per cent of Australian employees had a superannuation account. AIFS estimates that the percentage of a couple's total net assets represented by superannuation increased from about 14 per cent in the late 1980s to about 25 per cent in the late 1990s.⁴

2 The Hon Daryl Williams MP, Second Reading Speech, Hansard, p. 15890, 13 April 2000.

3 Australian Bureau of Statistics, 'Divorces', *Australia Now-A Statistical Profile*, <http://www.abs.gov.au/Ausstats/ABS%40.nsf/94713ad445ff1425ca25682000192af2/189dcccc4fe3b4deca2568a900154b0e>

4 Bills Digest No 55 2000-01, *Family Law Legislation Amendment (Superannuation) Bill 2000*, p. 6.

The lead up to the Bill

1.12 From 1987 to 1999 a series of reports and discussion papers has canvassed what to do about the problems associated with superannuation in the context of marriage breakdown. For example:

- 1987: the Joint Select Committee on the Family Law Act's Report *Family Law in Australia* recommended a discretionary power to enable 'the court to defer the making of a final order in property proceedings until superannuation benefits have been received'.⁵
- 1987: the Australian Law Reform Commission's Report *Matrimonial Property* suggested that the notional value of superannuation be included in the value of matrimonial property unless this would lead to inequity.⁶
- 1992: the Attorney-General's Department proposed in a discussion paper that on marriage breakdown the vested portion of a person's superannuation interest be re-allocated between the parties.⁷
- 1992: the Family Law Council recommended that superannuation be divided on marriage breakdown in proportion to the length of cohabitation – unless injustice would result.⁸
- 1992: the Australian Law Reform Commission's Report *Collective Investments: Superannuation* made several recommendations:
 - for accumulation schemes: the court be empowered to order the relevant entity to divide the superannuation interest and to roll over the non-contributor's share into an approved deposit fund; the funds accumulated during the cohabitation period be divided equally (unless the court ordered otherwise).
 - for defined benefit schemes: the court be empowered to order the relevant entity to pay an amount (to be determined by a prescribed formula) into an approved deposit fund.
 - that subject to court approval the parties could agree to vary the shares.⁹
- 1992: the Joint Select Committee on Certain Aspects of the Family Law Act recommended that superannuation interests be included in the definition of property in the Family Law Act and the value of the interest being the notional realisable value at

5 Joint Select Committee on the Family Law Act, *Family Law in Australia*, volume 1, AGPS, Canberra, 1987, p.96.

6 Australian Law Reform Commission, *Matrimonial Property*, Report No.39, AGPS, Canberra, 1987, pp 210-213.

7 Attorney-General's Department, *The Treatment of Superannuation in Family Law*, Discussion Paper, March 1992 summarised in Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *Report*, November 1992.

8 Family Law Council, *Choices: A Paper on Superannuation*, 1992.

9 Australian Law Reform Commission, *Collective Investments: Superannuation*, Report No. 59, 1992.

the time of the court hearing; that the Court be empowered to split a superannuation interest; that the split interest be portable and that the division be in proportion to the length of cohabitation.¹⁰

- 1995: the Senate Select Committee on Superannuation recommended that, in view of the lack of progress, the resolution of the treatment of superannuation assets on marriage breakdown be dealt with as a priority.¹¹
- 1998: the Treasurer and the Attorney-General expressed the Government's (then) preferred position in *Superannuation and Family Law*:

The focus of reform will be on the parties taking responsibility for agreeing on their own arrangements for dealing with superannuation. If they are unable to agree, however, the Court will apply a presumption that superannuation interests referable to the period of cohabitation by the parties are to be divided equally. This is because a superannuation interest in the name of one spouse is usually built up during a marriage through the joint efforts of both spouses. Superannuation contributions made by one party mean that the household has foregone current use of money so as to save for future retirement. If the parties had not separated they would have had a reasonable expectation that they would equally share in the superannuation interest at retirement.¹²

- 1999: the Government's discussion paper *Property and Family Law: Options for Change* contained various options impacting on superannuation which received insufficient support. In their stead, the Attorney-General announced the current proposals, put forward in the Family Law Amendment Bill 1999 and the Bill which is the subject of this Report.

Separate property regime

1.13 The proposed legislation will operate against the background of a separate property regime as opposed to a community of property regime. The Attorney-General's Department explained that the fact of marriage does not create any special property rights in the partners. The Department added:

Each party to the marriage retains, until otherwise decided by the court or until the parties agree otherwise, whatever property he or she may have had prior to the marriage and any property acquired in separate names during the marriage.

Following marriage breakdown, the court then has a discretion to alter interests in that property—that power is provided under section 79 of the Family Law Act—but it must not make any such orders unless it is just and equitable to do so. In making its orders, the court takes into account a range of factors. Those factors include the contributions, both financial and non-financial, that any spouse has made to the marriage—and that includes the acquisition, conservation and improvement of the property—as well as to the welfare of the family.

10 Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *Report*, AGPS, Canberra, November 1992.

11 *Super and Broken Work Patterns*, Canberra, November 1995, p. 141.

12 *Superannuation and Family Law: A Position Paper*, May 1998; CCH

In addition to that, the court determines whether a further adjustment is required having regard to factors set out under subsection (2) of section 75 of the Family Law Act. The court is required also, as far as practicable, to make an order that will end the financial relations between the parties, and that is referred to as the ‘clean break principle’. However, it should be noted that the court does have an overriding discretion to do justice and equity between the parties.¹³

1.14 A separate property regime has an effect on how superannuation may be divided. The Court could not be limited in its jurisdiction only to some amount of superannuation accumulated during the period of cohabitation-marriage. As with all other property the Court has to be given a broad discretion over all superannuation. As the Attorney-General’s Department pointed out, the Court has to be given two essential matters so that the proposals can operate successfully:

firstly, jurisdiction in relation to the subject matter, superannuation; and, secondly, the power to bind third party trustees so that the court’s orders could operate successfully. The legislation before this committee was drawn on that basis and is now consistent with a separate property regime.¹⁴

What the legislation proposes

1.15 **This Bill is a continuation of the reform of family law.** Under the proposed legislation, couples will be able to divide their superannuation interests on marriage breakdown in the same way as they can divide their other assets.

1.16 **The Bill will amend the *Family Law Act 1975* to include superannuation within the definition of property and to allow superannuation to be divided on marriage breakdown in one of two ways: either by agreement of the separating couple or by court order. The Bill will permit separating couples to make binding agreements about how to divide their superannuation interest or interests. This gives people the flexibility to settle their own financial affairs wherever possible, and therefore to avoid costly and protracted litigation.**

1.17 A person holding a superannuation interest may be nearing retirement, or another condition of release, at which time the actual value of the interest will become known. In such circumstances or for other reasons, couples may want to defer an agreement about how their superannuation interests are to be divided. **The Bill, therefore, enables couples to make an agreement to ‘flag’ their superannuation interest.** This agreement would prevent the superannuation trustee from dealing with the flagged superannuation interest until the flag has been lifted either by further agreement or by court order.

1.18 **The Bill also provides that, when a superannuation agreement is in force, the trustee of the relevant fund will be required by law to give effect to the agreement.** Where a couple has separated but not yet divorced, the Bill requires that at least one of them will have to sign a document called a breakdown declaration. This declaration will state that the couple is still married but that they have separated at the time of the making of the declaration. If the value of the superannuation interest is greater than the eligible termination payment threshold determined under the *Income Tax Assessment Act 1936*, then an additional

13 Committee Hansard, p. 3.

14 Committee Hansard, p. 4.

declaration will be required. The aim of these provisions is to ensure that people do not enter into contrived arrangements to evade taxation. Significant penalties will apply where these are detected.

1.19 For people to be able to make agreements about dividing their superannuation, they will need information about the fair value of any superannuation interests to be taken into account upon marriage breakdown. For this reason, **the Bill provides that a superannuation trustee must provide information to the spouse of a member so that both parties are aware of the details of superannuation interests that are involved.**

1.20 **Valuation is a particularly important issue for defined benefit schemes** where there is a vested benefit and an unvested value. The unvested value is generally not accessible until the fund member satisfies certain requirements specified by the fund. The value of an interest in such a plan is typically based upon years of service with an employer and salary levels prior to retirement, as well as contributions and investment earnings. As the final benefit is dependent on future events, the full value of the retirement benefit cannot be predicted with certainty at the time of marriage breakdown.

1.21 **The value of an accumulation plan is more easily ascertained.** For this reason, **the Bill provides for different methods of valuing a superannuation interest, depending on the type of interest.** The details of how the value is to be calculated, including actuarial information, is to be set out in the regulations. This will ensure that people are aware of the value of the interest they are dealing with in the agreement, and will also ensure that there can be no dispute about how the value is to be calculated.

1.22 It is preferable that people are able to make their own arrangements for dealing with superannuation interests. However, if they are unable to agree, **the Bill provides for the Family Court to have the jurisdiction and power to make an order to divide superannuation interests.** Such orders will usually be made as part of a broader court order dealing with all of the property of the parties that has not been dealt with in a financial agreement. These orders will bind the relevant third party superannuation trustee. As with superannuation agreements, the court will be able to make an order either to split a superannuation interest or to ‘flag’ an interest and deal with it later.

1.23 **The amendments to the Family Law Act, as proposed in the Bill, will apply to all marriages, including those that were dissolved before the amendments commence. The amendments will not apply, however, where a property settlement has been finally concluded, whether by formal agreement or by court order.**

Consultation draft regulations

1.24 As mentioned above, the Bill provides for some issues to be dealt with by regulations. These include regulations under the Family Law Act and the SIS Act.

1.25 The matters covered by the consultation draft regulations to be made under the Family Law Act, include the following:

- valuation of interests of parties;
- the calculation of the growth factor for base amounts allocated to non-member spouses under agreements or court orders;

- fees payable to trustees for splitting superannuation interests; and
- some other miscellaneous matters (eg. unsplittable interests and payments, the identification of trustees in some cases, provision of information by trustees, prescribed forms, how the total withdrawal value of a person's various superannuation interests is calculated).

1.26 The proposed amendments to the *Superannuation Industry (Supervision) Regulations 1994* ('the SIS Regulations') provide for consequential changes to the superannuation regulatory regime. These will accommodate the splitting of superannuation interests on marriage breakdown and make amendments to enable a non-member spouse who has the benefit of a payment split under the Family Law Act to instead take an interest in the member spouse's superannuation interest. The standards set out in the proposed regulations would apply to the operation of regulated superannuation funds and approved deposit funds.

1.27 The matters dealt with under the consultation draft regulations under the SIS Act include:

- new definitions: member spouse and non-member spouse;
- creation of a new interest for a non-member spouse;
- duties of trustees in giving notices;
- disclosure to non-member spouse;
- lump sum option for non-member spouse;
- preservation of non-member's benefits;
- power of non-member spouse to select a fund to which the benefits would be rolled over; and
- portability.

Acknowledgments

1.28 The Committee acknowledges the considerable effort that went into the preparation of submissions within a tight timeframe. It particularly thanks those who not only prepared submissions but who also made time to appear as witnesses. The Committee is grateful for this assistance.

CHAPTER 2

OVERALL RESPONSES

Introduction

2.1 There was almost universal support in the evidence to the inquiry for the policy objectives of the Bill of enabling a separating couple to make an agreement that could include a division of a superannuation interest. However, there was considerable concern expressed about the detail in the Bill and draft regulations, especially about the methods of valuation to be used, particularly for defined benefit schemes, and the associated costs to industry of implementing the proposals.

2.2 A few submissions disapproved of the Bill or of a major part of the proposed regime. Others proposed alternative arrangements to reduce the complexity. Others drew attention to the need to consider the implications for the family home in whatever regime was being considered. Whatever the response, the need for an education campaign, access to information and access to legal aid were regarded as essential. Also regarded as essential was the need for an appropriate and ongoing consultation process.

2.3 These issues are discussed in turn below.

Support for the principles and policy objectives

2.4 In evidence to the inquiry, there was almost universal support for the principles and policy objectives of the Bill. For example, the Family Court of Australia broadly supported the principles of the Bill in that the separating couple themselves or the Court (in absence of agreement) would be able to divide superannuation interests upon marriage breakdown.

2.5 Others supporting the principles and policy objectives of the Bill included the Institute of Actuaries of Australia (IAA), Jacques Martin Industry Funds Administration (JMIFA), CPA Australia and Investment and Financial Services Association (IFSA). For example, the IAA indicated its broad support for the objective of ensuring that parties are given the opportunity to split a superannuation interest in the event of a marriage breakdown,¹ while JMIFA commended the policy intent of the Bill.²

2.6 CPA Australia highlighted its broad support for this initiative calling it ‘a long overdue change, reflecting the importance of superannuation to the wealth of many Australians and the modern reality of marriage breakdown’. Further, CPA Australia expressed its appreciation of the lengthy and considered consultative process, which recognised the complexity of this issue. Many of CPA Australia’s earlier concerns had already been addressed throughout this consultative process.³

1 Submission No 9, p. 1.

2 Submission No 3, p. 1.

3 Submission No 16, p. 1

2.7 IFSA too expressed its support for the policy intent of the Bill, in particular the changes to enable separating couples to divide their superannuation interests between them as best suits their circumstances.⁴

2.8 Also supporting the principles of the Bill were the Lone Fathers Association, the Association of Superannuation Funds of Australia (ASFA), the NRMA, the National Network of Women's Legal Services (NNWLS) and William M Mercer Pty Ltd (Mercer).

2.9 In evidence to the inquiry, the Lone Fathers' Association of Australia agreed with the objective of the Bill to allow superannuation to be divided in cases of marriage breakdown either through agreement of the separating couple or by order of the court.⁵ ASFA expressed support for the objective of assisting people whose marriage has broken down to deal equitably with the division of property, including any superannuation interest held by either party to the marriage.⁶ The NRMA supported in principle the provision for the division of superannuation interests on marriage breakdown and endorsed an approach that assists parties to a divorce to deal equitably with the division of property.⁷

2.10 The NNWLS indicated its general support of the legislation and the underlying policy objective and commended 'the government for listening to the community and changing its preferred position from that which was set out in the *Superannuation and Family Law Position Paper* in 1998'.⁸ Mercer advised the Committee that it 'fully support[ed] the need to introduce better arrangements to handle superannuation benefits in the unfortunate event of divorce.'⁹

The 'devil is in the detail'

2.11 Most submissions and witnesses, however, took the opportunity to raise issues about the 'devil in the detail' of the Bill and the consultation draft regulations, pointing to aspects of the proposals that were either unclear, still needed to be included, posed problems or were preferable options.

2.12 For example, although there was general support for the principal provisions of the Bill where the superannuation interest lay in an accumulation scheme, affecting some 84 per cent of superannuation fund members, there was less support in respect of the measures proposed for defined benefit schemes affecting some 16 per cent of fund members. The major areas of concern were the details in the regulations regarding the valuation methods to be used to calculate the superannuation benefits, and the cost to industry of implementing the proposed regime. These issues are discussed in more detail in chapters 3 and 6.

2.13 Amongst the details to be addressed, the IAA pointed to such matters as:

- trustee discretion to split a defined benefit interest while in the accumulation phase;

4 Submission No 29, p. 1.

5 Submission No 17, p. 1.

6 Submission No 19, p. 3.

7 Submission No 23, p. 1.

8 Submission No 7, p. 2.

9 Committee Hansard, p. 113.

- the treatment of partially vested accumulation interests;
- whether the definitions of accumulation phase and payment phase adequately cover the field;
- problems relating to trustee responsibilities with respect to providing information and the absence from the regulations of the option of developing alternative valuation factors;
- order of deductions from members' benefit components;
- some implications of the treatment of surcharge liability;
- the appropriate index to adjust the base amount in defined benefits schemes; and
- the application of the vested benefit minimum.¹⁰

2.14 In relation to those areas in which it was felt that the lack of guidance in the Bill would make it difficult to administer, the Family Court drew attention to its overall concern with the Bill, namely that the new Part VIIIB would operate in a vacuum in that it was not clearly subject to the principles which the Family Court used in matrimonial matters and which are expressed in sections 79 and 75 of the Family Law Act. The Family Court, in its submission, was concerned that the proposed reform gave no guidelines to the parties or the Family Court on how to deal with superannuation interests.¹¹ At the public hearing, however, the Family Court advised the Committee that discussion with officers of the Attorney-General's Department had disclosed that:

it was clearly the intention of the legislation that the assets would be divided in accordance with the principles set out in section 79 of the Family Law Act. My concern as expressed in writing is perhaps alleviated to some degree by that, but I would think it would be preferable for it to be made clearer in the bill that the principles to be applied are those in section 79 and section 75 of the act, which of course is the provision that governs all other property distribution.¹²

Contrary views

2.15 A few submissions disapproved of the Bill or of a major part of the proposed regime. For example, Mr Andrew Dolphin of WA advocated a policy change to give the same income splitting opportunities to those still married and not just to separating couples,¹³ while the Institute of Chartered Accountants in Australia recommended passing those sections of the Bill relating to accumulation funds but had reservations about the treatment of the defined benefit funds.¹⁴ Mr Kevin Seppanen of QLD was of the opinion that any reform of the property settlement regime should take into account the child maintenance regime and

10 Submission No 22, pp. 1-7.

11 Submission No 30, p. 1.

12 Committee Hansard, p. 137.

13 Submission No 1, pp. 1-2.

14 Submission No 8, p. 1.

particularly address the possibility that the child might change residence to live permanently with the other parent.¹⁵

2.16 Mr Colin Grenfell of VIC submitted that an alternative valuation method would be simpler. He suggested that the value of both accumulation and defined benefit interests be equal to the retrenchment benefit unless the trustees of a particular plan obtained the agreement of the Australian Government Actuary that its retrenchment benefit would produce an unfair or unreasonable value.¹⁶

2.17 In expressing its concerns about the proposed legislation, Mercer indicated a preference for a radical change to the overall scheme of the Bill because the draft proposals failed to satisfy three tests which, in its opinion, any reform in this area must meet. The three tests of the proposed legislation outlined by Mercer were as follows:

First, it must be easy to understand for the parties to the divorce and for those assisting them to sort out their financial arrangements. We consider that the draft proposals fail this test because of their extreme complexity. Second, the system must be easy to establish and operate in the future so that the time and cost for the parties directly involved, the funds, and their administrators and advisers are acceptable. Again, the draft proposals fail because of the high costs and time which we consider would be involved in their implementation and their ongoing operation. Third, the system needs to be fair and equitable to the two spouses and as close as possible to revenue neutral to the government. The draft proposals are not equitable in a number of respects. In one respect, the government seems to be seeking some windfall tax revenue.¹⁷

Mercer's alternative scheme

2.18 Mercer proposed two changes which would significantly reduce the complexity of the proposed legislation:

First, we have proposed that you eliminate the different treatment of defined benefit interests and accumulation interests. We consider that, in all cases, the split should be based on the amount or value of the withdrawal benefit at the operative time. The design of the fund should not affect the treatment. That particular proposal introduces a lot of complexities which could be avoided.

Second, we would suggest that one eliminates completely the provisions proposing the splitting of pension benefits where payment has already commenced. Pension benefits are not really a problem at the present time. They are accessible income and they are currently treated as a source of income, the same as salary. We think that should continue rather than introducing complex provisions to split those benefits.¹⁸

2.19 These two steps, in Mercer's view, would reduce high establishment costs and high operating costs by reducing the complexity of the proposed legislation. Mercer also indicated

15 Submission No 18, p. 1.

16 Submission No 2, pp. 1-2.

17 Committee Hansard, p. 113.

18 Committee Hansard, p. 114.

its concern with the ‘unrealistically low limits’ proposed in the regulations on the extent to which costs can be recovered from the parties to the divorce.

2.20 Mercer advised the Committee that:

The end result would be that the bulk of the costs would have to be borne by the members as a whole, rather than by the members who were divorcing. One has to ask whether that is really fair.¹⁹

2.21 On the third test, that of fairness, Mercer, in evidence, noted a number of areas where the proposed treatment is not fair and equitable, including the preservation rules, pre and post 1983 tax arrangements, liability for the surcharge, and access to death and disability insurance. These areas will be dealt with later in this report. Mercer also pointed to the need to give consideration to more equitable treatment of couples not divorcing. In relation to the pre and post 1983 tax arrangements Mercer advised.

For tax purposes benefits are split into pre-1983 and post-1983 components, with much higher tax applying to the post-1983 component. This split is based on the period since the eligible service date. It is not proposed that the existing eligible service date be transferred when part of a benefit is transferred from one partner to the other. So in most cases the receiving spouse will eventually pay a lot more tax than they would have paid if the benefit had remained with the member spouse. That is extremely unfair and seems to be an attempt to increase government revenue. It does not seem to make any other logical sense.²⁰

Response to Mercer’s alternative scheme

2.22 In responding to the Mercer proposal about splittable payments where the payments have already commenced, the Attorney-General’s Department pointed out:

It is true at the moment that the court has power in relation to superannuation in the payment phase to make an order *in persona[m]*²¹—and that is against an individual who is a party to the marriage and who is receiving the superannuation—and can order that part of it be transferred to the other party to the marriage. However, that also then raises issues in terms of non-compliance. What these proposals will do is enable the court to make an order against the third party trustee so that the pension payment is split at source rather than transferred from one party to the other.

2.23 The Department further pointed out:

The second issue that the committee needs to take into account is the family law context in which that all happens. When a party to a marriage is before a court and there is an income stream which is payable to one of those parties, the court may,

19 Committee Hansard, p. 114.

20 Committee Hansard, p. 114.

21 Duhaime’s Legal Dictionary explains in personam: ***In personam*** Latin: All legal rights are either *in personam* or *in rem*. An *in personam* right is a personal right attached to a specific person. *In rem* rights are property rights and enforceable against the entire world.

for reasons arising out of the circumstances of the case, not wish to make an order so that part of that income stream is payable to the other. It may wish to transfer other property because of the circumstances between the parties and it may mean that the relationship between the parties were such that such an order was not appropriate. If the court were then to be in a position where it could do justice and equity between the parties, it would need to know the value of that income stream. That is the primary purpose of the valuation. It puts the court in a position where it knows the complete value of all assets which are before the court.

2.24 The Attorney-General's Department added that going through the valuation exercise put the Court in a much better position where they would be able to understand what the parties have by way of assets. At the end of it, the Court may decide to split the income stream or it may not, but, in the view of the Department, it would give flexibility to the Court to tailor its orders according to the circumstances of the case.²²

2.25 As mentioned above, the issue of the valuation methods and the associated cost to implement them are discussed in chapters 3 and 6 respectively.

Implications for the family home

2.26 Evidence to the inquiry suggested that there was a need to consider the implications for the family home in whatever regime was being considered. For example, the NNWLS was concerned at the effect that splitting superannuation interests might have on the retention of the family home in the hands of the parent with whom the children reside. The NNWLS advised the Committee that:

In relation to the issue of the retention of the family home, for many women the retention of the family home after separation provides them with both economic and emotional security, especially if they are caring for children or are older women who have been out of the work force for some time. Although the bill does not limit women's ability to negotiate around the retention of the home, unintended consequences can flow from legislative reform. Therefore, we believe it is absolutely essential that the effects of this legislation in practice are monitored so that, if there are any unintended consequences flowing that result in more family homes being sold, changes can be immediately put in place.²³

2.27 The Australian Institute of Family Studies raised the same issue, submitting that:

... we would like to caution that, although we support this particular reform, we have to be aware that it may modify or affect the way in which property transfers are currently undertaken. For example, the wife might get a higher percentage of the house or get the family home in lieu of the husband taking the superannuation. If a reform of this nature comes through, it may change the way in which people negotiate those transfers. There is a concern that, in doing this, you may actually reduce the benefits of the reform for women if in fact it jeopardises the resident parent taking the home or the family home staying in one person's name for the sake of the children.²⁴

22 Committee Hansard, p. 125.

23 Committee Hansard, p. 129.

24 Committee Hansard, p. 20.

2.28 The Attorney-General's Department commented on the tension between the family law regime and the superannuation regime, citing the issue of the family home as an example:

In terms of the effect on negotiation behaviour, ... the bill now does provide a general discretion for the court, so that in circumstances where there are current housing needs, the provisions allow for those housing needs to be dealt with by means of a trade-off with the superannuation. It does create a tension between long-term needs and present-day needs. That is a tension which arises today and it is a tension which will continue. What I think is before the committee is, in effect, two legal regimes: the family law regime attempting to do justice and equity between the parties, and a superannuation regime which is designed primarily for retirement. When those two systems interact in the way that we see them here, you will see those tensions arising, and we have dealt with them in particular ways and drafted the provisions in the bill having regard to those tensions.²⁵

Education, information and access to legal aid

2.29 A number of submissions commented on the need for a comprehensive campaign of education in order to raise awareness and ensure that the parties involved understood the issues to be considered when dividing superannuation assets.

2.30 The Australian Institute of Family Studies emphasised the very limited extent to which separating couples currently take superannuation into account when dividing property. The Institute related it to a lack of understanding or awareness of superannuation and its value as a form of property to which both spouses have contributed (directly or indirectly). The Institute strongly recommended a general education campaign to enable the proposed changes to be effective.²⁶

2.31 The IAA also urged that the education campaign associated with the Bill and regulations clearly explain the various options available to separating couples.²⁷

2.32 Besides general education, there was strong support for the need for specific education about the implications of splitting or not splitting a superannuation interest and easy access to relevant information. ASFA, for example, advocated education and information programs for defined benefit fund members:

ASFA agrees that separating couples should be encouraged to make their own arrangements in relation to the superannuation interests that either party may hold. ASFA does not oppose the parties or the court being permitted to split superannuation benefits whose value is subject to whether future events occur. However, ASFA believes that flagging of benefits would be a safer road. Care must be taken to ensure that any division prior to benefit payment happens only when the parties and or the court are fully informed of the risks and probabilities that apply. Education and information programs for defined benefit fund members would be important in achieving this. As most couples would probably attempt negotiated settlements in the first instance, it is ASFA's view that they have easy

25 Committee Hansard, p. 91.

26 Submission No 5, pp. 1-2

27 Submission No 22, p. 6.

access to useful information in written or electronic forms to enable a fair and just settlement.²⁸

2.33 ASFA further submitted that, in its view, not only should the parties be given the opportunity to be informed but also those giving the information should be knowledgeable. The Association indicated that those offering advice, counselling, mediation, conciliation and arbitration services should have sound knowledge of the particular characteristics of superannuation in general and the specific fund.

2.34 Mercer raised the related issue of comprehensibility of the scheme and the difficulty which would be faced by people with little or no experience of superannuation:

Generally the whole approach to pensions appears to be complicated and could present problems when being applied by people with little or no superannuation expertise. The methods outlined in these regulations would be impossible to explain to a divorcing couple.²⁹

2.35 ASFA raised the same need for information, especially with regard to making a decision about whether to split or even flag a defined benefit interest. In its view the question of advice to the parties was going to be very important.³⁰

2.36 The NNWLS on the other hand doubted the effectiveness of an education campaign. Its representative advised the Committee that:

We would not be against education but we would certainly think that is not going to be the answer in relation to women's access to these provisions. Even with education, ... when it comes to the next stage of actually implementing something, of actually negotiating something, especially in circumstances of domestic violence, it is impossible for many women to negotiate with their husband along those lines. They absolutely need a lawyer. Even just for women in general, even if there were not domestic violence issues involved, just in relation to the complexity of this legislation they are going to have to have legal advice. They are not going to be able to pick up this legislation and flick through it, even with an education program, and find out what their entitlement is.

Access to legal aid

2.37 The NNWLS, supported strongly by the Family Court, stressed the importance of access to legal aid for the reforms to be effective:

If some of the most disadvantaged women in our community are going to benefit from these changes, they need to have access to legal aid for court representation and legal advice to understand their rights. Access to legal aid is critical because of their weaker financial position as compared with men. Unfortunately, for many women the introduction of this bill will have little meaning unless they are able to enforce their rights in the Family Court.³¹

28 Submission No 19, p.22.

29 Submission No 12, p.6.

30 Committee Hansard, p. 46.

31 Committee Hansard, p. 129.

2.38 The Chief Justice, in support, advised the Committee :

There are, we see, quite significant legal aid implications involved in this exercise, because the reality is these days that women just do not get legal aid in property proceedings—no-one gets legal aid in property proceedings—and that means that they are very much on their own. That, again, is a problem. I think when you have got complex legislation of this sort it is something that needs to be born in mind: that there may well be a real need for some assistance to people in dealing with it.³²

Consultation

2.39 A number of bodies reported that they were satisfied with the level of consultation which had been undertaken thus far by the Attorney-General's Department and Treasury. For example, the Institute of Actuaries of Australia noted with approval the consultation process that had assisted in the development of the Bill and pleaded for the continuation of consultation with respect to the regulations.³³

2.40 ASFA also stressed the need for further consultation to achieve workable legislation.

... we urge the government to honour its intention to provide time for consultation and implementation. So far I think we have done very well, but your own experience here this morning will show that there is need for more work on this legislation.

The consultation process with industry must continue over the next few months to ensure that the legislation that is finally set in place is workable.³⁴

2.41 However, several groups were unhappy with the extent of the consultation to date. For example, at the public hearing Mercer disclosed that they had not been involved heavily in the consultation,³⁵ while the Australian Council of Public Sector Retiree Organisations (ACPSRO) regretted the lack of consultation with them:

It would have been important to have consulted with organisations such as ours or the staff associations representing the beneficiaries under these schemes, because the public sector super schemes—whether Commonwealth, state, territory or military—are an integral part of conditions of employment, as they were in the cases of we people who are now retired. It always has been that way. If one goes back into the history, the parliamentary records reveal very clearly the negotiations which took place in the early seventies in setting up the various schemes with those who were to be affected. In the consultation clause in the explanatory memorandum we get no mention at all. The only people consulted, according to the consultation statement on page 15 of the EM, were the Family Court of Australia, the legal profession and the superannuation industry. I would have thought that we might have been considered to be reasonably important.³⁶

32 Committee Hansard, p. 143.

33 Submission No 22, p 1.

34 Committee Hansard, p. 44.

35 Committee Hansard, p. 118

36 Committee Hansard, p. 52.

Issues to be addressed

2.42 As discussed above, despite the almost universal support for the thrust of the Bill there were a number of concerns expressed about aspects of the Bill itself or the devil in the detail of the associated regulations. The main issues appeared to be:

- the jurisdictional and other legal uncertainties about the power and operations of the Family Court of Australia;
- perceptions about the constitutional validity of the Bill;
- other legal issues; and
- the cost to revenue and industry of implementing the Bill and associated regulations, together with the impact on trustees.

2.43 These and other issues are discussed in the next chapters of the report.

Conclusion

2.44 Despite the almost unanimous support for the principles and policy objectives of the Bill, evidence to the inquiry suggests that there are still some general concerns about the Bill itself and the ‘devil in the detail’ of the proposed regulations.

2.45 Alternative approaches were canvassed by witnesses with a view to reducing the perceived complexity of the proposals. Also canvassed was the need to consider the implications for the family home in whatever regime was being considered.

2.46 While general support was expressed for the need to conduct an education campaign to raise awareness and improve understanding of the issues involved in dividing superannuation interests, witnesses also pointed to the need to have access to legal aid for the reforms to be effective.

2.47 Those parties commenting on the issue of consultation generally commended the Government on the consultation process which had already been undertaken, but it was also indicated that some groups were not involved in that consultation and that much more consultation needs to occur to resolve the outstanding issues.

CHAPTER 3

CONCERNS OF THE FAMILY COURT

Introduction

3.1 As mentioned in the previous chapter, the Family Court of Australia broadly supported the principles of the Bill in that the separating couple themselves or the Court (in absence of agreement) would be able to divide superannuation interests upon marriage breakdown. However, the Court drew the Committee's attention to a number of particular concerns it had with the proposals. These concerns related primarily to:

- the complexity of the proposed legislation and, in particular, the complexity of the valuation proposals;
- some jurisdictional and other issues relating to the power and operations of the Court;
- the privacy implications of the Bill; and
- some issues associated with the commencement date.

3.2 The Court also drew attention to a number of other issues, including some technical drafting matters. The issues raised by the Court are discussed below, together with the evidence of other witnesses on these issues.

Complexity of the valuation proposals

Unnecessary complexity of the proposals

3.3 One of the principal concerns of the Family Court of Australia was the complexity of the proposed legislation, in particular the complexity of those provisions incorporating the various methods of valuing a superannuation interest, especially those in a defined benefit scheme.

3.4 The Family Court suggested that unnecessary complexity could be avoided by introducing reforms to treat superannuation interests as a separate matrimonial asset and allowing these to be divided on marriage breakdown pursuant to the principles contained in subsection 79(4) of the Family Law Act. In the opinion of the Family Court, the proposed legislation was potentially unwieldy and likely to be unintelligible to most members of the community.¹ At the public hearing the Family Court advised:

About a third of litigants in the Family Court now are unrepresented, and in those circumstances I am troubled that such a complex piece of legislation may be very difficult for the ordinary person to understand. It might be difficult even for some of the lawyers to understand. That is one of the matters that trouble me.

My colleague and I were giving some thought to this, and we wondered whether it might have been better to take a simpler approach and simply provide that superannuation is property—which has been the problem in the past—and give the

1 Submission No 30, p. 1.

court a discretion to divide it, in the same way as the court has discretion to divide other property, without going into the complex details of valuation that are contained in this legislation.²

3.5 At the public hearing, the attention of the Family Court was drawn to the alternative proposals for simplified arrangements put forward by William M Mercer Pty Ltd (Mercer), which has been discussed in chapter 2. The Family Court, invited to consider these proposals from a Family Court point of view, expressed appreciation of the opportunity to do so.³

Valuation procedures to be used by the Family Court

3.6 The Bill proposes that, before making any splitting order in relation to a superannuation interest, the Court must determine the overall value of the interest by one of the methods set out in the regulations.

3.7 Submissions and witnesses raised two related issues with respect to the relevant clause 90MT. First, whether or not the Court should have discretion to obtain evidence of the value in any manner it thinks fit. (It has a similar discretion in respect of the value of other property.) Secondly, having to go through this process in every case was seen to impose an unnecessary impediment to the procedures involved in obtaining orders by consent.

3.8 The Family Court alluded to other submissions which contrasted the ease of valuing a superannuation interest in an accumulation fund with the difficulty of doing so in a defined benefit fund. Adopting a suggestion in the submission from Jacques Martin Industry Funds Administration (JMIFA)⁴, the Family Court proposed that superannuation interests in defined benefit funds be valued by the Court in accordance with the ordinary valuation principles on the basis of expert evidence.⁵

3.9 The Law Council of Australia supported the idea of discretion and opposed having to go through the valuation process prescribed in the regulations in every case. The Council submitted that clause 90MT said that, in all situations where a court would be making an order under the Family Law Act under this legislation, before it could make the order, it would have to determine what the value of the superannuation fund was under the regulations. The Council continued:

That is totally at odds with how we treat all other property in negotiations in family law where we are reaching consent orders between the parties. The parties will agree on an estimate of the value of the house, they will agree on estimates as to the value of the furniture and the motor vehicle; why can't we agree between the parties on an estimate as to the value of superannuation without having to go to the super fund and have actuaries calculate what the interest is worth under the regulations? We do not see any reason to have a mandatory requirement to do that.⁶

2 Committee Hansard, p. 138.

3 Committee Hansard, p. 143.

4 Submission No 3, p. 3.

5 Committee Hansard, p. 138.

6 Committee Hansard, p. 30.

3.10 The Council recommended that, in the event that the orders were being made by consent, the court only needed to have regard to the overall value or estimated value of the party's interest in the superannuation fund.⁷

3.11 Clayton Utz supported the Law Council of Australia agreeing that, in terms of consent agreements, the proposed provision requiring that the Court 'must determine' the overall value in accordance with the regulations could really hold up proceedings and cause some problems.⁸

3.12 On the other hand, ASFA supported the proposals in the Bill to mandate the valuation in all cases even though some people might have to do things quickly and might like to just guess at it. ASFA submitted that:

We would support the need for valuation for the simple reason that, for most accumulation cases, it is going to be a fairly simple process. For anyone contemplating either trading off or even a flagging situation, you want to know what you are talking about. It has probably been difficult even for the courts not to know what the value is of something that they are going to be dealing with. We would support the need for a proper valuation.

3.13 Even in relation to consent arrangements ASFA believed that a valuation would be needed especially for the non-member who would be at the greater risk. :

It has been one of those areas where the nonmember is probably at risk if you do not allow for a valuation to be publicly available from another party. Yes, in some cases you may have the last member statement, which might tell you what was in your accumulation fund, but there are cases where there are vesting and various other things about the fund which either party—but particularly the nonmember spouse—may not be aware of. The valuation does more than just tell you the number; it, in fact, gives you an opportunity to see what the situation is in full. I think that is going to be important.⁹

Concerns about the valuation factors

3.14 While the complexity of the valuation provisions in the consultation regulations attracted much comment, witnesses also emphasised that they were as yet incomplete. ASFA was concerned that the valuation factors, as contained in the consultation draft regulations, might need more work. Particularly, ASFA saw the need for the valuation factors for accumulations schemes that are not fully vested:

From ASFA's point of view, we would have to say that getting those factors right and also getting into the legislation factors to deal with not fully vested accumulation schemes—they are not even there at all at the moment—need to be given priority by the Australian Government Actuary, so that we can actually get the industry to comment on what is going to be there.

7 Committee Hansard, pp. 30-31.

8 Committee Hansard, p. 75.

9 Committee Hansard, p. 46.

3.15 The Institute of Actuaries of Australia (IAA) understood that it was intended that partially vested accumulation interests were to be treated in a similar manner to defined benefit interests. That is, an actuarial valuation method using appropriate factors would be applied to ensure that account was taken of any unvested entitlement when valuing the interest. In IAA's view, the legislation as currently drafted did not achieve this.¹⁰

3.16 ASFA also pointed out that the Bill lacked a provision to enable funds to have fund specific valuation factors approved:

We also understand that it is the intention to allow funds to have their own valuation factors approved by the Australian Government Actuary, and we support that flexible approach. But there is absolutely nothing in the bill at the moment about that, and it has to be there—it is as simple as that.¹¹

3.17 IAA was similarly concerned at the lack of such a provision:

We note that the explanatory memorandum indicates that funds will be able to apply for their own valuation factors if the standard factors in the regulations are felt to be inappropriate. We would also note at this point that there is more work needed to be done by the government actuaries, in consultation with us, on those standard factors. We think that does need to be given priority. However, the provision for funds to apply for their own valuation factors is not yet in the draft regulations and, from our perspective, it is critical that that is addressed before the regulations are finalised. In essence, the institute's support of the bill and regulations is contingent on having that flexible provision in there.¹²

3.18 The Law Council of Australia, however, raised a further problem in that the Court would have no discretion to go behind the valuation if some of the factors relied on were patently incorrect or were in dispute. The Council wished to retain for the Court the discretion to admit evidence or otherwise rely on agreement as to value where there were factors that would call into question the validity of the value reached via the prescribed methods. The example was given that the valuation might have assumed a likely retirement date but the Family Court might have been aware that the person was terminally ill and would never receive the benefits which the valuation anticipated. The Law Council of Australia suggested that the Bill should provide a mechanism to verify and challenge the information used by the trustee in making a valuation.¹³

Powers and operations of the Family Court

Jurisdictional issues

3.19 In addition to its concerns about the complexity of the proposals, the Family Court also raised two issues with respect to jurisdiction. First, the Family Court queried whether the

10 Committee Hansard, p. 80.

11 Committee Hansard, p. 47.

12 Committee Hansard, p. 80.

13 Submission No 21, pp.12-13.

Magistrates Court might deal with superannuation interests, and if so, whether the \$300 000 limit on their jurisdiction was appropriate.¹⁴

3.20 The second issue was the extent of the Family Court's power to set aside superannuation agreements. The Bill provides, in clause 90MH, that a superannuation agreement may be a part of a binding financial agreement made under Part VIIIA of the Family Law Act. Part VIIIA has just been inserted in the Family Law Act by the recently passed *Family Law Amendment Act 2000*. Under section 90K in Part VIIIA, the Family Court may set aside a financial agreement in certain circumstances. These include where an agreement was obtained by fraud, is void, is now impractical by reason of supervening circumstances. Further, the Court may set the agreement aside where circumstances have changed in relation to the welfare of a child and hardship would ensue if the Court did not set the agreement aside.

3.21 The Family Court raised the issue of whether the power to set aside under section 90K of the Family Law Act could be used on superannuation agreements made under Part VIIIB. The Family Court suggested that the drafting could be clarified to ensure this. The Law Council of Australia also raised this issue and recommended a drafting amendment.¹⁵

3.22 The Family Court drew attention to the limitation on its power to alter or set aside a superannuation agreement which is in force (clause 90MO) other than on one of the grounds listed in section 90K of the Family Law Act. The Court suggested that an additional ground should apply in respect of superannuation agreements. The Court should be able to alter or set them aside if they were unfair or unjust. The Family Court advised in respect of superannuation agreements:

We consider that the circumstances in which they should be set aside should also include those which have arisen since the making of the agreement that would result in unfairness or injustice to one or both of the parties.

...

I accept the broad proposition that you want a degree of certainty in relation to the making of agreements so that they should not be easily walked out of. But, at the same time, one would imagine that a number of them would have been made many years before they came into effect and they may well, at that stage, produce an unconscionable result, even though no-one behaved unconscionably at the time they were made. For that reason, again, we see it would be desirable to have a somewhat broader power to attack those agreements. Again, I appreciate that is probably a matter of policy, and no doubt it is being considered and was considered in relation to 90K; but we still express our concerns about that.¹⁶

3.23 The Family Court, at the invitation of the Committee, agreed to provide a form of words to be considered for insertion in the Family Law Act to address the issue.¹⁷

¹⁴ Committee Hansard, p. 139.

¹⁵ Committee Hansard, pp. 138-139.

¹⁶ Committee Hansard, p. 144.

¹⁷ Committee Hansard, p. 145.

Limitation on the powers of the Family Court

3.24 One of the key areas which the Family Court identified was the limitations which the proposed Bill would put on its powers. The Family Court argued for a discretionary power under clause 90MU which enables the court to make flagging orders and which reads in part:

(2) In deciding whether to make an order in accordance with this section, the court:

(a) must take into account the likelihood that a splittable payment will soon become payable in respect of the superannuation interest;

3.25 The Court contrasted this mandatory provision with the absence of such a mandatory direction to the parties who make a flagging agreement. The Family Court advised the Committee that it should not be constrained in this fashion when making a flagging order and should have as broad a discretion as the parties.¹⁸

3.26 In its submission the Family Court suggested that clause 90MO, as drafted, was confusing and that it implied that the Court could make orders under section 79 in respect of superannuation interests which the Court thought was not the intention of the Bill. At the public hearing, however, it became clear that it was the intention that section 79 be source of power for making such orders and the Family Court did not proceed with this point.

3.27 The Family Court also suggested that the application of the old section 85 (now section 106) to the new Part VIIIB should be made clear. This section is the source of the Court's powers to look behind sham arrangements which a party might adopt to defeat the legitimate interests of the other party. These arrangements may be varied and complex and the Court was concerned that if such arrangements included superannuation agreements, there should be no doubt that the Court had the power to deal with them.

Privacy implications

3.28 The provisions in the Bill at section 90MZB requiring the trustee to provide information to non-member spouses raised the issue of the need for greater awareness of privacy implications. The Family Court stressed how important privacy was in the area of domestic violence and that privacy protocols should be developed and implemented. The Family Court stated that:

... privacy and violence protocols should apply to the divulging of information from trustees. It would be a matter of great concern if people were able to find out the address and whereabouts of persons when they are in fear of them.¹⁹

3.29 The National Network of Women's Legal Services (NNWLS) also emphasised the need for privacy protocols to prevent the inadvertent disclosure of an address. They pointed out that many of their clients do not have the luxury of a post office box address or an accommodation address with a solicitor or accountant.²⁰

18 Submission No 30, p. 3.

19 Committee Hansard, p. 143.

20 Committee Hansard, pp. 130-132.

3.30 At the Committee's suggestion, the Attorney-General's Department undertook to consult with the Privacy Commissioner on the matter.

Commencement and application

3.31 The Bill provides for the commencement of the proposed changes on the anniversary of the date of Royal Assent. The Explanatory Memorandum indicates that this would allow a suitable period for the changes to be implemented. Concerns were expressed in submissions and in evidence before the Committee at the public hearings whether this period would be sufficient. This doubt arose because the regulations - which contain a lot of the detail that computer systems changes would be implementing - would not necessarily be complete at the time of Royal Assent and may not be gazetted for some time after that.

3.32 The Family Court had a different concern, a different perspective. The Court wanted the possibility explored of the legislation allowing the Court to use the proposed arrangements in its case work, even before Royal Assent. The Court feared a 'deluge of cases' if there were not some way of dealing with the desire of some litigants to make use of the fairer arrangements promised by this Bill.²¹ The Court commented:

what would probably happen is that you would be invited to deal with [the case before the Court] on the basis that the bill was in force and the orders would be delayed until royal assent. I think that is the most probable outcome.

...

But you could do what the Chief Justice is suggesting. That is, in part, what happened in the case of Van Essen but the trial judge adjourned it. But it may have been open to him or her to have actually made orders which would be implemented upon the appropriate event happening in the future. That can happen.²²

3.33 The superannuation industry was concerned at the lag time it would have to implement the changes. ASFA, for example, foresaw a need for at least a year between the gazetting of the final piece of regulation and when these provisions commenced to operate, because it would take as long as that to get systems changes:

Systems changes for superannuation funds are one part of it, but I think for the community to come to understand what this is all about and for superannuation fund trustees to understand their obligations, let alone their systems, we will need that period of time.²³

3.34 The IAA in its evidence to the Committee also supported a commencement date 12 months after the gazettal of the regulations.²⁴

3.35 The Family Court raised the question of the appropriate application of the legislation.²⁵ The Bill provides that the new regime would apply to those property settlements

21 Committee Hansard, p. 140.

22 Committee Hansard, p. 141.

23 Committee Hansard, p. 44.

24 Committee Hansard, p. 88.

25 Committee Hansard, p. 142.

that are made after the first anniversary of the day on which the Bill receives Royal Assent. The Family Court queried why matrimonial settlements made prior to that date but subsequently set aside should be excluded.

3.36 The Law Council of Australia and Kevin Munro & Associates also opposed the exclusion of people from the benefits of the legislation where settlements, made before the commencement of the new regime, have been set aside after it begins. The Council advised the Committee:

... the advantages of this legislation will only apply to people who have not already had a final property settlement or their property dealt with by way of an approval of a section 87 agreement, as it then was. There are circumstances where, because of miscarriage of justice and other reasons, the court orders that original property orders are set aside. The Law Council's position is that, if that happens, what the court does is start all over again and look at the values of things as at the date they are doing the rehearing. Our point is: why in those circumstances shouldn't those parties be entitled to the advantages of this new legislation? Under the way it is drafted at the moment, they will not be able to get the advantages of the legislation.²⁶

3.37 The Munro submission also suggested that many separating couples may delay final settlement until the start date, suffering hardship themselves and perhaps causing a sudden influx of applications to the Family Court. The submission also argued for full retrospectivity for those couples who agree to the application of the amendments to their property settlement.²⁷

Technical drafting matters

3.38 The Family Court commented on the wording used in clause 90MP which refers to a 'breakdown declaration' and suggested that 'separation declaration' might more accurately reflect its content and purpose and to ensure consistency with the use of 'separation' in section 48 of the Family Law Act.²⁸ This declaration is given in some cases to the trustee of a superannuation scheme to bring a superannuation agreement into effect. The 'breakdown declaration' requires parties to state that they are now separated. The Law Council of Australia also made this suggestion.²⁹

3.39 Subsection 79(2) of the Family Law Act provides that the Court shall not make an order under section 79 unless it is satisfied that, in all the circumstances, it is just and equitable to do so. For greater clarity, the Family Court suggested that the drafting be reviewed to ensure either that a 'just and equitable' provision would be inserted in the new PartVIII B or that the Bill clearly stated that the 'just and equitable' provision in subsection 79(2) applied to Part VIII B.³⁰ As mentioned in chapter 2, the Family Court also sought to ensure that the guidance and principles which it currently used in determining matrimonial

26 Committee Hansard, p. 29.

27 Submission No 11, pp. 2-4.

28 Submission No 30, p.2.

29 Submission No 21, p. 7.

30 Submission No 30, p. 2.

matters (which are expressed in sections 79 and 75 of the Family Law Act) would be available under Part VIIIB.

3.40 The Family Court raised a further technical issue of legal interpretation. Section 90KA of the Family Law Act, provides for the Court's powers in relation to the validity, enforceability and effect of financial agreements. As a superannuation agreement will be part of a financial agreement, section 90KA will apply to a superannuation agreement. The Family Court queried what part of the section meant:

It is the expression that 'they must have the same regard to the rights of third parties as the High Court has' or may grant. We just could not quite work out what that meant. We could say 'must have regard to the rights of third parties'. We would have no problem with that. But we do not understand what having 'the same regard to the rights of third parties as the High Court has' means. In any event, that is something that Mr Bourke may be able to assist us with when he deals with the matter. As I say, it has been in the act for a long time but that interpretation has not arisen as far as I am concerned.³¹

3.41 Other suggestions to improve the technical drafting of some sections of the Bill were made by groups like the Law Council of Australia. These suggestions are discussed in chapter 5. In most cases, the Family Court supported these suggestions.

Other issues

3.42 The Family Court raised the issue that the early release provisions should be re-considered to ensure that one party was not unfairly disadvantaged by the preservation rules. The basis for the Court's concern was that the consultation draft regulations prescribe that the non-member's interest should be drawn first from the member's unrestricted non-preserved benefits, then from any restricted preserved benefits and finally any preserved benefits. The Bill provides that the whole of the non-member's interest is preserved.

3.43 Other submissions noted the financial hardship that sometimes arises on marriage breakdown and the need for access to unpreserved moneys. The Court commented that '[o]ften in these cases it is very important to a person to be able to access moneys'.³²

3.44 The Court supported the introduction of provisions to ensure capital gains tax rollover relief which would protect small funds from paying unnecessary tax in achieving a split of a superannuation interest.³³

Conclusion

3.45 The Family Court has raised a number of issues in relation to the Bill, highlighting its complexity, especially regarding the valuation proposals, some jurisdictional and other legal issues, including limitations on its powers, which in its view require further clarification or consideration in order to make the legislation more workable. It has also drawn attention to some important privacy issues which, in its view, require the development of protocols.

31 Committee Hansard, p. 145.

32 Committee Hansard, p. 144.

33 Submission No 30, p. 3.

These privacy issues are essential to protect the interests of parties, especially in cases where domestic violence is involved.

3.46 The Court also drew attention to some other issues associated with the Bill which it felt could be improved, such as some technical drafting amendments and to some issues requiring further clarification and consideration, including an amendment to ensure that the guidance for the Court contained in sections 75 and 79 apply to the new Part VIIIB.

3.47 The concerns of the Family Court were in many cases shared by other groups, including the Law Council of Australia, the National Network of Women's Legal Services William M Mercer and Jacques Martin Industry Funds Administration. Their evidence on these issues has been reflected in this chapter and elsewhere in the report.

CHAPTER 4

CONSTITUTIONAL VALIDITY

Introduction

4.1 In addition to the concerns about the Bill raised by the Family Court, one of the other issues raised with the Committee during the inquiry related to the need for assurances about the constitutional validity of the proposed legislation.

4.2 This matter is discussed below.

Constitutional validity

General considerations

4.3 A number of submissions raised the issue of whether all aspects of the proposed legislation were within the constitutional power of the Commonwealth. They pointed out that the constitutional power of the Commonwealth in relation to marriage breakdown is not without limits and that what those limits were had been the subject of various High Court judgements and legal debate.

4.4 CPA Australia, for example, pointed out that concerns about constitutional limits included whether the Family Court could direct a party other than the party of a marriage breakdown or whether splitting entitlements represented the acquisition of property by the Commonwealth on unjust terms.¹

4.5 William M Mercer Pty Ltd (Mercer) raised the issue of overseas funds, as the definition of ‘eligible superannuation plan’ would include overseas funds, other non-resident or non-complying funds. The company queried the constitutional power to legislate for such funds and questioned whether provisions such as those requiring a trustee to provide information could be enforced or penalties imposed on them.²

4.6 ASFA indicated the need to have constitutional and legal issues fully resolved so that trustees of superannuation funds, in particular, and the community, could have full confidence in the robustness of the legislation. ASFA sought clarification on a number of issues so that trustees could implement with confidence the provisions without fear of breaching their duty to members and thus be subject to challenge. Some areas where ASFA thought information was needed about the measures taken to ensure the soundness of the approach included:

- power of the Family Court to order the trustee;
- application of section 51 (xxxi) of the Constitution (acquisition of property on just terms);

1 Submission No 16, p. 2.

2 Submission No 12, p. 1.

- power to reduce member's accrued benefit; and
- power to create new interests.³

4.7 ASFA advised the Committee that the Attorney-General's Department and Treasury had advised the Association that the Government is confident that there are no unresolved constitutional issues. ASFA believed, however, that the arguments supporting the legality of the approach taken in the Bill should be made available as it was important to allow confidence across the industry before they put new systems in place. ASFA further submitted that it would be unfortunate for Government and industry if any legislation was later challenged.⁴

4.8 CPA Australia also pointed out the need for assurance of constitutional validity:

We are concerned that in the explanatory memorandum of the bill, and in terms of our discussions with both Treasury and the Attorney-General's office, we have not received any clear and conclusive clarification regarding the constitutionality of this measure and to what degree any earlier constitutional concerns have been addressed.

We have been told that constitutionality is not an issue; however, we feel that for all the parties involved any such advice or further detail on the decisions regarding the constitutional rightness of this measure would probably assist the parties who are intended to implement this feel somewhat more confident when they undertake the reforms and changes required.⁵

4.9 Clayton Utz addressed the constitutionality of the Bill:

As to the constitutionality of it, the Attorney-General and his department apparently are of the view that there are no constitutional problems with it and that it will survive any challenge. That may well be the case but I think that is not entirely clear.⁶

Constitutional power to direct trustees

4.10 The impact of the proposed legislation on trustees was a major issue raised in evidence to the inquiry. Referring to the issue of directing trustees of superannuation funds, Clayton Utz pointed out:

that is the kind of issue that will arise where, in a contested case—and most property cases in family law are contested cases—somebody will seize on that and take the point that there is a lack of constitutional validity in some provisions in the legislation. I am not sure that that possibility can be overcome entirely, but I think the risk of it happening could be reduced by taking a different approach. When I say 'the risk' of it, I think the risk is quite considerable in the sense that if, in five years time, a decision is made by a court that some of these provisions directing trustees to do things are constitutionally invalid, then there will have been a whole

3 Submission No 19, pp. 10-11.

4 Submission No 19, p. 10.

5 Committee Hansard, p. 59.

6 Committee Hansard, p. 71.

host of invalid orders made prior to that date that will have been acted upon which will be very difficult to reverse. That is why I think as much thought as possible needs to be given to the constitutional aspects of it before this legislation is put in place because of the difficulties in unwinding situations that will have occurred if some parts of it are held to be invalid ultimately.⁷

4.11 Clayton Utz went on to suggest that the risk of invalidity could be reduced and validity could be tightened by:

amending the SI(S) Act to state in there that a regulated superannuation fund which is governed by the SI(S) Act must comply with any agreement or order under the Family Law Act. That would then, in my perception, take it outside just relying on the marriage power. What would then be able to be pointed to is the corporations power on which the regulated funds provisions are based where the trustee is a company or on the old age pension power where the trustees of funds are individuals. That part is a little more dodgy, I think, than the corporations power part of the SI(S) Act. Nevertheless, it is there, and could support this act.⁸

4.12 The Attorney-General's Department commented on this suggestion:

[Clayton Utz] ... sets out two possible ways of dealing with that to make it more constitutionally secure. One is to rely on the heads of power underpinning the SIS regime—the corporations power and the pensions power—to require trustees to observe court orders. What that would do is then create two classes of superannuation funds. There would be the regulated class, which had to observe court orders, and the other class, which is outside the regulated net, to which the provisions would not apply.

[Clayton Utz] then set out an alternative which is to amend the SIS law, to require trustees to create an interest. ...

On our view, that is in the SIS law as we have drafted it and it applies only, of course, to accumulation plans; it does not apply to defined benefit plans because of the just terms requirement. The way it operates is that, if the court makes an order to split a superannuation payment in its accumulation plan, that can then be taken to the trustee of the accumulation plan and a new interest created. The trustee must create that interest and there are options about how the trustee then deals with that interest—can roll the member out or can retain the member. So in some ways we have actually gone part of the way to the second option that [Clayton Utz] was setting out in [its] paper. Our view is that we could not do the first one because that would create two classes of superannuation. We would not then be covering all superannuation.

4.13 The Attorney-General's Department further explained that, in its view, the Commonwealth's constitutional power over marriage was wide enough to give the Family Court power to make orders in relation to all superannuation.

We based that on a long-held proposition that the Commonwealth has powers to make laws in relation to circumstances which arise out of the marriage. If you have a look at the definition of 'matrimonial cause' in section 4 of the Family Law Act,

7 Committee Hansard, p. 71.

8 Committee Hansard, p. 72.

you will see that phrase ‘arising out of the marriage’. The marriage power, on our advice, goes far enough to cover all superannuation in all its forms and enables the court to make its orders to cover the lot. As I said, we have actually added that module on under the SIS, which is, I think, [Clayton Utz’s] second option.⁹

4.14 While supporting the view that the legislation should be drafted in a way that was as sound as it could be constitutionally, the Law Council of Australia shared the Attorney-General’s Department’s opinion:

Clearly under the marriage power and the divorce power, orders are currently made involving and against third parties in certain circumstances. The Family Law Section’s view is that this legislation falls within the ambit of that constitutional power. Obviously, we agree that as much as can be done to cure any constitutional doubt should be done before the legislation is introduced.¹⁰

Acquisition of property on unjust terms?

4.15 As mentioned above, CPA Australia raised the issue of whether there might be acquisition of property on unjust terms by the Commonwealth.

As has been noted in many of the earlier discussion papers regarding such reform, the issue of the constitutionality of such an initiative has been raised, most recently in the government’s own 1998 position paper on superannuation and family law ...whether or not splitting of entitlements represented acquisition of property by the Commonwealth on unjust terms.¹¹

4.16 Clayton Utz touched on splittable payments, explaining to the Committee that:

In relation to benefit splits, the bill adopts the concept of splittable payments. The main operative provision is in proposed section 90MT, which says that a court can make an order that ‘whenever a splittable payment becomes payable’, the split can be made. Then the nonmember spouse becomes entitled to an amount and there is a corresponding reduction in the entitlement of the member. The key words there are that an order can be made ‘whenever a splittable payment becomes payable’. It is not clear to me why the words ‘whenever a splittable payment becomes payable’ are in there.

4.17 The Attorney-General’s Department explained the scope of the ‘just terms’ provision of the Constitution:

[the just terms requirement under 51(xxxi) of the Constitution] acts as a prohibition on the Commonwealth making a law for the acquisition of property other than on just terms. That applies not only to acquisitions of property by the Commonwealth—that was certainly its primary design—but it also applies when the Commonwealth makes a law for the acquisition of property between private party A and private party B. So it has application in this context. To make it clear, that provision does not necessarily require that the Commonwealth acquire the property. Of course, under a family law settlement, the Commonwealth does not

9 Committee Hansard, p. 95.

10 Committee Hansard, p. 35.

11 Committee Hansard, p. 59.

acquire a property. It is the Commonwealth making a law to regulate the transfer of property between the two parties to the marriage.¹²

4.18 The Attorney-General's Department further explained that it was the 'just terms' requirement that had led to the formulation in clause 90MT on which Clayton Utz had commented; that to be sure that the splitting order operated only on the member's share of a defined benefit fund, it was necessary to wait until the benefit became payable.

Under the proposals, there is no new interest per se which is created in a defined benefit fund—and I have had discussions with [Clayton Utz] about this in one of the breaks. Again, that is primarily because of the just terms requirement. A defined benefit plan has a vested and a non-vested component and, if the Commonwealth made a law to divide that form of superannuation, we could never be sure that what we were dividing was that which was ultimately due and payable to the member and that we were not taking funds from accounts of other members; hence the just terms requirement.¹³

Conclusion

4.19 The evidence to the inquiry suggests that there is still much work to be done in clarifying the issues associated with demonstrating the constitutional validity of the Bill. In particular, there appears to be a need to provide further assurance that the constitutional power of the Commonwealth in relation to marriage breakdown is sufficient to support the constitutional validity of the Bill, particularly in directing the trustees of superannuation funds to act in accordance with superannuation agreements and Family Court orders. Further, assurance is needed that the splitting of interests does not breach the constitutional prohibition on the acquisition of property on unjust terms, and that there is no breach of the constitution with regard to directing third parties to split interests.

12 Committee Hansard, pp. 89-90.

13 Committee Hansard, p. 89.

CHAPTER 5

OTHER LEGAL ISSUES

Introduction

5.1 In addition to the concerns about the Bill raised by the Family Court, and the need for some assurances about the constitutional validity of the Bill, a number of other issues were raised with the Committee. These related to:

- various other legal interpretations and uncertainties which require clarification or further consideration; and
- the interaction of the proposed legislation with other benefits.

5.2 These issues are discussed below.

Legal interpretation and uncertainties

5.3 A considerable number of submissions and witnesses raised issues as to the meaning of various provisions and whether the drafting achieved the policy objectives or the meaning ascribed to them in the Explanatory Memorandum. It was suggested that amendments were needed for a number of clauses in the Bill either to change their meaning or clarify their effect. In particular attention was drawn to the costs involved in administering accounts where there was not a clean break. The issue of cost to industry is also discussed further in chapter 6.

Clean break and the timing of splittable payments

5.4 The clean break principle is in section 81 of the Family Law Act which says that the Court should try to end financial arrangements between the parties as far as practicable. A number of submissions and witnesses drew attention to this principle. It was emphasised that without the clean break principle, administrative systems and procedures would have to be changed which would increase administrative costs significantly.

5.5 In evidence to the Committee, Jacques Martin Industry Funds Administration (JMIFA) advised that:

The way the legislation is drafted at the moment, the valuation is done at the point of separation or court orders and a base amount is determined for the nonmember spouse. What we would like to see happen ... is that, at that point when the amount of the nonmember spouse's entitlement is determined, a separate account should be created. We acknowledge that it may have to be treated differently from normal superannuation accounts.¹

5.6 JMIFA also advised that, in order to implement the proposal as currently drafted, they would have to 'do a complete overhaul of our admin systems and procedures, not only to create data fields to capture information ... but also to capture actual financial figures' and

1 Committee Hansard, p. 6.

that ‘it will be in the millions for our company to basically build a new system.’² In the view of JMIFA:

It would be significantly easier for us and, we also advocate, much more equitable for the members if the interest was set up as a separate account which could either stay in the fund or roll over to another fund.³

5.7 JMIFA used the clean break principle to advocate advancing the time for splitting the superannuation interest to the time of the Court order or the agreement.⁴

5.8 ASFA believed that there was provision for a clean break within the legislation in relation to accumulation interests, but thought there was a need to look at whether it was a little more complicated than it needed to be. In ASFA’s view, there was definitely provision for the separating couple to go for a clean break.⁵

5.9 The NSW Government regarded the clean break approach as the desirable one, although it recognised the difficulties of implementing it in respect of defined benefit schemes.⁶

5.10 Clayton Utz⁷ and JMIFA⁸ both drew attention to the uncertainty in interpreting clause 90MT which enables the Court to order a payment split but appears to make the date of effect of the split, that date when a payment becomes payable. As mentioned above, the Attorney-General’s Department, however, pointed out that constitutional constraints prevented a split from occurring earlier than a date for payment in relation to defined benefits.⁹

5.11 On this basis, JMIFA argued that, as there is no clause in the Bill other than clause 90MT which authorises the Court to order a split, clause 90MT would prevent splits of superannuation interests in accumulation schemes ordered by the Court coming into effect until the interest became payable. JMIFA submitted that this would prevent the creation of a new interest for the non-member spouse or the transfer of the non-member spouse’s interest to another fund any earlier than the payout date.¹⁰

Enforced delay in obtaining the benefit of a splitting agreement

5.12 The Law Council of Australia opposed elements of clauses 90MP and 90MQ which would enforce a delay of up to 12 months to give effect to an agreement where the superannuation interest exceeded the Eligible Termination Payment (ETP) threshold:

2 Committee Hansard, pp. 7 and 9.

3 Committee Hansard, p. 7.

4 Submission No 3, p. 1.

5 Committee Hansard, p. 44.

6 Submission No 24, pp. 1-2.

7 Committee Hansard, p. 75.

8 Submission No 3, p. 1.

9 Committee Hansard, p. 89.

10 Submission No 15, pp. 1-3.

The more important part of this, however, is the decision that has been taken in the legislation to make certain couples have to wait 12 months after they have separated before they can get the advantage of the legislation. We do not see any logic in that at all. Obviously, the intention was to make it as difficult as possible for parties who are separating in circumstances where the ETP threshold was exceeded to have to wait 12 months after they had separated before they can finalise things. We do not see that there is any logic in that because section 90MP requires a breakdown declaration or a separation declaration. That declaration is on oath and it has the parties swearing to the fact that they are separated. If they perjure themselves in that declaration, the penalty under this act is imprisonment for 12 months. We do not see why, given that that is the sanction, there should be an additional requirement—just because parties might get better tax benefits potentially out of it—to make them wait another 12 month.¹¹

Splittable interests and minimum amounts

5.13 The Superannuation Industry (Supervision) Regulations prescribe that amounts under \$1000 must be protected from erosion by fees and charges. The cost of protection is borne by the fund as a whole (and therefore by the other members). The Bill provides that a superannuation interest below a minimum amount will not be able to be split and leaves that amount to be set by regulations. The consultation draft regulations prescribe \$1000 (reg 78 of the draft Family Law Amendment Regulations). This amount attracted considerable criticism in the submissions and from witnesses at the public hearings, the general view being that the amount was too low. JMIFA asked that consideration be given to having a minimum of \$2500 as the interest of each of the parties after the split.¹²

[It] should be looked at from the end result and that the minimum amount left in either account should be \$1,000, which is the member protection level and what is deemed to be the self-sustaining amount. Given the nature of super and family law, we actually think the amount could be higher than that, and we initially attempted to advocate a higher figure on the theory that carving off \$1,000 makes a negligible difference to someone's retirement income down the track—but certainly no less than \$1,000. Unfortunately, the legislation actually looks at it from the other end and says that as long as the original account is \$1,000 or more it can be split. So there is a potential to generate two accounts in the hundreds. We would rather the legislation looked at it from the end result, to make sure that nothing is generated that is less than \$1,000, or possibly even contemplate a higher figure.¹³

5.14 The Institute of Actuaries of Australia (IAA) also supported the view that both entitlements after a split should be sufficient to avoid the need for member protection.¹⁴

Non-member spouses' rights to death and disability benefits

5.15 A related issue to the interpretation of clause 90MT is the position of non-member spouses with respect to insurance payments relating to death and disability. The policy framework appears to be that in accumulation schemes a splitting agreement or order is

11 Committee Hansard, p. 28.

12 Submission No 3, p. 7.

13 Committee Hansard, p. 15.

14 Committee Hansard, p. 80.

meant to create a separate interest in the scheme for the non-member spouse with the option for transfer out of the fund to another fund. The non-member spouse would have no entitlement to any extra payment by way of insurance for the subsequent death or disability of the member.

5.16 With respect to defined benefit schemes the policy framework appears to be that an adjusted base amount for the non-member spouse is determined but remains in the fund attracting interest at the prescribed Treasury bond rate, although the non-member spouse does not become a member. This amount cannot be withdrawn or rolled over or transferred until a benefit becomes payable under the scheme. The policy intention is that the non-member spouse not attract any entitlement other than the adjusted base amount.

5.17 Doubts were raised in evidence about whether the drafting of the Bill achieved this policy intent. For example, Clayton Utz advised that the policy intention that the non-member spouse not become a member of a defined benefit fund may be frustrated by the rules of some funds. Under those rules, any person with an entitlement to a benefit from the fund becomes a member. Clayton Utz pointed out:

it appears the intention is that that person does not become a member at all, but rather just has limited rights. An issue with that is that many trust deeds or governing rules of superannuation funds contain a provision somewhat along the lines of: if a person has an entitlement to a benefit from the fund, that person becomes a member of the fund. So we will have a situation in relation to some funds where the legislation is saying that the nonmember spouse does not become a member, but the governing rules of the fund will be saying that the person does become a member of the fund.¹⁵

5.18 On the issue of whether the non-member may receive a share of death and disability entitlements, Clayton Utz pointed out:

Most defined benefit funds operate on the basis that death and disability benefits are also defined, so that if a person does become a full member of the fund that person is entitled to whatever the defined death or disability benefit is. If the trust deed states, for example, that the death benefit is three times salary and the disability benefit is three times salary, however salary is defined, then that becomes the entitlement of the nonmember spouse if the nonmember spouse becomes a full member. The trustee will generally want to insure against that liability.¹⁶

5.19 The IAA agreed with the policy intent on this issue but agreed that the legislation should be drafted more clearly to ensure there is no problem with its meaning. The IAA advised:

I think there is a potential issue there, and I think that stems from it not necessarily being clear whether the nonmember spouse becomes a full member of the fund. Our view would certainly be that that is not the intention and should not be the case, and that the nonmember spouse should only ever be entitled to their adjusted base amount, not any other insured benefits.

15 Committee Hansard, p. 73.

16 Committee Hansard, p. 74.

...

[death and disability payments] should not be an issue as long as the legislation restricts the entitlements of the nonmember spouse to the adjusted base amount, excluding any insurance entitlements that might arise in future after the split.¹⁷

Multiple splitting

5.20 William M Mercer Pty Ltd (Mercer) suggested that clause 90MX needed re-drafting to achieve its purpose in multiple splitting of a payment. Mercer cited the example given in the legislation which seemed to confirm that the amount of the reduction in the payment should be the sum of all amounts already allocated under earlier splits rather than just the amount of the next earlier split.¹⁸

Irrevocable agreements and waiver provision

5.21 ASFA raised the issue of whether a superannuation agreement is irrevocable. It was not clear to ASFA whether the Family Law Act provides for the parties or the Court to make changes to the amount or the proportion during the period after the operative time and before an amount becomes payable. In ASFA's view once a trustee has acted on the instructions of a payment splitting agreement or a Court order, it would be inappropriate to allow the parties to change their minds and alter those instructions to provide for a different split of the interest.

5.22 ASFA also noted that section 90MZA provides for the non-member spouse to waive rights under a payment split. It was unclear to ASFA whether the intention is to allow for a change of mind or whether it is merely a technical requirement where a non-member spouse has taken a lump sum and has no further call on the assets of the fund. In ASFA's view, it did not achieve the former and needed clarification if it were the latter.¹⁹

Relationship between trustees and non-member spouses

5.23 As mentioned above, the impact of the proposals on trustees was a major issue raised in evidence to the inquiry. Earlier in the report attention was drawn to concerns about the constitutionality of the proposed Bill and the burden of uncertainty that this may place on trustees. In addition, the uncertainties associated with the legal relationship between the trustee and non-member spouse attracted some comment during the inquiry.

5.24 The Law Council of Australia was doubtful about the nature of the legal relationship between the trustee of the fund and the non-member spouse.

But the concern we had was: what is the general law duty of the trustee here? Is it a fiduciary duty? Is it a reduced fiduciary duty? Is it more in the nature of the duty which a trustee might have in a debtor-creditor relationship, such that, if the fund has an obligation to make a payment at a point of time when the splitting payment

17 Committee Hansard, p. 86.

18 Submission No 12, p.2.

19 Submission No 19, p.17

can in fact be made, is that really just an obligation to make a payment, to provide the information the statute requires and no more?²⁰

...

On a normal analysis of a trust fund you would then say the trustee has a full range of fiduciary responsibilities to that nonmember spouse. What we are asking for is clarification of what the true range of responsibilities of the trustee is going to be at that stage.

5.25 The Law Council of Australia concluded that it appeared that the interest was almost like a debtor-creditor relationship.²¹

5.26 In response to these concerns, the Attorney-General's Department pointed out:

that in circumstances where the nonmember spouse has a base amount which is adjusted and growing within the scheme, which when a splittable payment becomes payable is then first call on the splittable payment, the duty owed by the trustee to the nonmember is set out in the terms of the statute and those requirements do appear at different points. ... As I mentioned earlier, the family law policy on this is fairly straightforward but, when you apply that family law policy to a complex industry, and, as I said, we have been broad in our application, you will get a degree of complexity. ... The duty owed by the trustee to the nonmember spouse in the legislation is clear at a number of points, but I think people are having difficulty at this point unearthing that.²²

Technical drafting improvements

5.27 The Law Council of Australia suggested the need for a number of technical drafting improvements that would clarify the legislation and/or ensure that the policy intent as set out in the Explanatory Memorandum was incorporated in the Bill. The Law Council of Australia suggested the need to:

- insert a 'just and equitable provision' in the new Part VIIIB;
- ensure that proceedings could be commenced where there was no property other than a superannuation interest;
- clarify that the Court can take into account in other orders with respect to property or spousal maintenance the fact that a splitting or flagging order has been made;
- clarify whether under section 79A the Court can vary a splitting order;
- make the language of clause 90MP more apposite by changing 'breakdown declaration' to 'separation declaration'.²³

20 Committee Hansard, p. 34.

21 Committee Hansard, p. 41.

22 Committee Hansard, p. 98.

23 Submission No 21, p. 3-13.

5.28 The Family Court of Australia, in its submission, was in agreement with the Law Council of Australia with respect to these technical improvements.²⁴

Interaction with related benefits

5.29 The Bill will have an effect on benefits payable under other legislation, such as the *Social Security Act 1991*, and on the various Acts under which public sector superannuation schemes, both Commonwealth and State, are paid. Several submissions queried the effect of the Bill on matters such as reversionary interests of surviving spouses/former spouses.

5.30 For example, the Australian Council of Public Sector Retiree Organisations (ACPSRO), supported by the Regular Defence Force Welfare Association (RDFWA),²⁵ commented that the Bill and Explanatory Memorandum covered splitting of superannuation in the case of ‘multiple marriages’ but did not ‘cover death of the contributor and any reference or change to existing provisions under superannuation Acts for a surviving spouse benefit.’²⁶ The RDFWA in particular was concerned that the impact on the legislation governing military superannuation schemes was quite significant and had to be carefully walked through.²⁷

5.31 The Superannuated Commonwealth Officers Association also queried how the death of the contributor affected other interests.²⁸

5.32 ACPSRO also raised the issue of the relationship of the Bill with the Heads of Government Agreement with regard to State public sector superannuation schemes.²⁹ On this issue, the Small Independent Superannuation Funds Association (SISFA) raised the need to work with the States and Territories to ensure that a similar superannuation splitting regime becomes available for de facto couples who separate.³⁰

5.33 In relation to the complex issues of pensions and reversionary interests, the IAA advised that this area required much more work. The IAA advised:

In terms of the issues to do with the pensions and the reversionary interests and whether it is 50 per cent of 67 per cent or 50 per cent of 100 per cent, there has been a reasonable amount of discussion about those issues in the consultation process. It is probably fair to say that pensions and reversions are one of the most difficult issues that we have had to grapple with. My suggestion would be perhaps having Attorney-General’s, Treasury and the committee have a discussion with public sector and pension funds generally to talk about those issues some more to try and see if some of those concerns can be resolved.³¹

24 Submission No 30, p. 2. Committee Hansard, p. 142.

25 Submission No 14, p.1.

26 Submission No 13, p. 2.

27 Committee Hansard, p. 56.

28 Submission No 10, p. 1.

29 Committee Hansard, p. 57.

30 Committee Hansard, p. 150.

31 Committee Hansard, p. 86.

Conclusion

5.34 From the evidence to the inquiry, it appears that witnesses and submitters seek much more clarification about aspects of the proposed Bill and associated regulations in order to overcome the present levels of legal and other uncertainty associated with such matters as the provisions for splitting interests and payments, non-member spouse rights and the relationship between trustees and non-member spouses.

5.35 Witnesses also drew attention to the need to consider some suggested drafting improvements, for example, changing ‘breakdown declaration’ to ‘separation declaration’ to more accurately reflect the policy intent of the Bill.

5.36 In particular, witnesses emphasised the importance of the clean break principle, as without it, there would need to be complex administrative arrangements in place, and the costs of maintaining superannuation interests for both member and non-member spouses could be high.

5.37 Also, because the Bill will have an effect on benefits payable under other legislation, witnesses urged the Government to examine the interaction of the Bill with other legislation.

CHAPTER 6

MONETARY AND TAXATION IMPLICATIONS OF THE LEGISLATION

Introduction

6.1 The complexity of the legislation, in particular the complexity of the valuation methods proposed to calculate the value of the superannuation interest for defined benefit schemes was discussed in chapter 3. Achieving a balance between the complexity required to taken into account constitutional constraints with the inescapable costs of doing this is a challenge for legislators.

6.2 A number of issues associated with the costs and monetary implications of the Bill and its associated draft regulations were highlighted in evidence to the inquiry. In particular witnesses and submitters pointed to:

- the high costs of implementation of the proposals;
- concerns about the prescription of fees;
- concerns about prescribed benefits and the order of deductions; and
- the additional burden on trustees associated with the implementation of the proposed legislation.

6.3 Other issues with a monetary implication were also raised, in particular the taxation issues associated with the Bill and the impact on the Superannuation Complaints Tribunal.

6.4 These issues are discussed below.

Costs

6.5 The cost to revenue, to industry and to individuals was raised in a number of submissions and by witnesses at the public hearings.

6.6 In relation to cost to revenue, the Small Independent Superannuation Funds Association (SISFA) considered that, in its view, the cost to revenue arising from:

- More potential access to the low tax rate ETP threshold
- Any reduction in income tax as a result of splitting an income stream
- The access of non-member spouse to their own RBL

will be outweighed by the long term benefits of consumer certainty and the potential reduction in age pension outlays.¹

1 Submission No 20, p. 2.

6.7 In relation to cost to industry, a number of submissions commented on the cost of reprogramming computer systems. There was special concern for the waste of resources and for further costs if a constitutional challenge were to be successful. For example, William M Mercer Pty Ltd (Mercer) listed areas where the trustee will incur additional costs:

- Preparing information to provide to non-member spouse's under division 2.3 – either generic material if this is possible or specific information on a case by case basis;
- Creation of or alteration to standard forms and documentation to cater for requirements;
- Changes to computer systems(may require changes to source code not just records database) to cope with;
- Flagging member spouse records if required;
- Addition of new “benefit” option to determine split benefits if a non-member spouse's entitlement is to be transferred or a new interest created;
- Recording the above split on the member's record;
- Splitting the relevant tax components;
- In pension funds, setting up and maintaining non-member spouse records.²

6.8 The CSS and PSS Boards also drew attention to similar costs, dividing them into establishment costs and on-going administrative costs.³

6.9 The Investment and Financial Services Association (IFSA)'s concern was that the processes introduced by the SIS regulations did not impose undue administration or cost burdens upon superannuation providers or the separating couples. IFSA also raised the equity issue: that other members of superannuation funds were not saddled with an additional cost burden for which they received no benefit.⁴

6.10 As mentioned in the previous chapter, Jacques Martin Industry Funds Administration (JMIFA) also thought that, without some modification, the cost to industry would be high. According to JMIFA, this would be particularly so in the circumstances of administering an account generated out of a family law separation which would be subject to continuing interest.⁵ However, when asked about the quantum of administrative costs per separation, it found it difficult to be specific:

It is a bit difficult to say. We think it would be something similar to what the surcharge cost, which ended up being across our number of funds probably something like \$4 million. That is what it cost us to do the surcharge. We think this

2 Submission No 12, pp. 10-11.

3 Submission No 6, pp.2-3.

4 Submission No 29, p 1.

5 Committee Hansard, p. 7.

is in the same sort of ballpark. It might be \$1 million more or \$1 million less, but it is of that order of magnitude.

...

We think that if you spread that \$4 million cost amongst a very small number of people who actually want to split superannuation accounts rather than other assets, the price per unit would be extremely high. It would be relatively small if you spread it across the membership of the whole fund, but is that fair on the other membership that are not involved?

...

... the issue is that, even if you have got 200 people to reconfigure the system for, there is still that base cost, whether it is for 200 people or 200 million people. The cost of changing the system to do thing A is still the same, whether 200 people or 200 million people use it.⁶

6.11 The Law Council of Australia was concerned with the costs to individuals where either they or their lawyers were required to obtain a valuation, especially in relation to defined benefits.

In defined benefit funds [the cost] could be quite large, and I think it is clear that the parties are going to bear the costs. In accumulation funds—Senator Conroy is right—it is a far simpler process, but still it is another step that has to be gone through, and it will cost parties who have lawyers extra money to go through the step.⁷

Fees

6.12 The issue of prescribing fees, and the amount of fees payable attracted significant comment in the inquiry. This appears largely to be because of the inconsistency which would be introduced between the family law regime and the SIS regime. Under the proposed family law regime as outlined in the Bill, trustees would be empowered to set fees in respect of a payment split. The draft family law regulations set the fee at \$100. Under the SIS regime, there is no such limitation.

6.13 CPA Australia disagreed with prescribing fees, advising the Committee that there was little precedent within superannuation law for prescribing such fees and no rationale was provided either for the setting of fees or the choice of \$100 per transaction. CPA Australia also foresaw administrative costs in the collection of fees directly from people for funds that normally deduct costs from the members' accounts.⁸

6.14 Several groups queried the fairness of spreading across all members the considerable cost of implementing the reforms for the benefit of those separating, especially for those members of defined benefits schemes.

6 Committee Hansard, pp. 8-9.

7 Committee Hansard, p. 32.

8 Submission No 16, pp. 3-4.

6.15 A number of submissions noted that fees were payable only in relation to a payment split; that no fees could be charged for the considerable administrative work of providing information that may not result in an agreement for a payment split. Mercer pointed out that clause 90MY provides for payment at the operative time which may be a long time after the provision of the information or not at all.⁹

6.16 IFSA argued for the market to set the rate of fees, adding that the fiduciary duty of a trustee to act in an appropriate and prudent manner would avoid excessive fees being charged. IFSA pointed out:

You are entitled to be compensated for expenses that you incur in administering the assets of another person. That compensation is never legislated. That compensation is the actual cost that you incur in performing that task. By capping it at \$100, you may be disadvantaging trustees that have administration systems that are more complex, where it is more costly to split a benefit, as opposed to smaller funds that may be able to absorb the costs a lot easier.¹⁰

6.17 ASFA was not convinced that the legislation identified all costs and provided for their recovery or that the amount of \$100 prescribed was sufficient to cover those costs currently identified in the legislation or other costs identified in this consultation period.¹¹ The Institute of Actuaries of Australia (IAA) too doubted the usefulness of the fee regime proposed. In its view in a number of instances \$100 is not likely to be sufficient. The IAA advised the Committee that:

We did a little bit of ad hoc research on that and we were advised that, where you involve benefit payment processing and the like and the setting up of records, the cost may be more of the order of \$200 to \$300. I can understand why there is a desire to cap the level of fees that would be able to be charged. If that is the case, then our suggestion would be that probably a number higher than \$100 should be considered. But you may wish to phrase the legislation so that it is an amount up to whatever the set dollar limit is rather than just saying it is the set dollar limit.¹²

6.18 The Treasury advised the Committee at the public hearing on the issue of fees. The Treasury indicated that \$100 fee was the fee for the initial setting up of the account and that for SIS funds it would be possible for the trustees to deduct additional amounts from the member's account to fund the arrangements put in place. The Treasury further pointed out that SIS funds currently had a capacity to deduct their reasonable fees and charges from the trust to fund their expenses incurred in running the trust, and they would be able to include in that amount the expenses they would have incurred in administration. They would be able to charge a higher amount in relation to members' accounts where they had been subject to a payment splitting arrangement. The Treasury advised:

Trustees in the ordinary way they run their business have a capacity to charge fees and charges for the service they provide. In setting the amount of those fees and charges, they will be able to take into account their costs incurred in managing a

9 Submission No 12, p. 2.

10 Committee Hansard, p. 68.

11 Submission No 19, p. 19.

12 Committee Hansard, p. 87.

payment split. The amendments to the SIS regs will allow them to deduct a greater amount from accounts that are subject to a payment split than the other accounts to take account of additional expenses they will have to incur in managing those accounts. I think the \$100 is probably going to be of most relevance to funds that are not SIS regulated where the trustee will not have the capacity.¹³

6.19 On the issue of the quantum of the \$100 fee the Attorney-General's Department advised that it was arrived at in the Department's consultations with the industry and was a proposal that was put to industry. The Attorney-General's Department pointed out:

At the time it seemed like a reasonable proposal, although I would think that trustees have had some time to reflect on that and so now we are hearing about a different picture. As I indicated at the close of my remarks, we are always happy to listen to better information.¹⁴

Preservation and order of deductions

6.20 Another issue with monetary implications raised in evidence to the inquiry related to the rules associated with preservation and the order of deductions. The basis for concern is that the consultation draft Regulations prescribe that the non-member's interest should be drawn first from the member's unrestricted non-preserved benefits, then from any restricted non-preserved benefits and finally any preserved benefits. The Bill provides that the whole of the non-member's interest is preserved.

6.21 Submissions and witnesses were generally against the proposal in the Bill that the interest of the non-member spouse should be subject to the preservation rules. Most recognised that preservation was in accord with retirement income policy but had reservations about using this legislative proposal as the occasion for increasing preservation.

6.22 CPA Australia, for example, advised the Committee that:

our major issue regarding preservation had to do more with the fact that the Commonwealth needs to find a balance between the desire to preserve superannuation for retirement purposes and the fact that divorce obviously creates financial pressures on the parties and whether or not we review the early release provisions, particularly for severe financial hardship. We are not necessarily saying that that needs to be done; we are saying that we would hope that the Commonwealth would keep that in mind when pushing forward.¹⁵

6.23 Clayton Utz submitted that to a significant extent unpreserved benefits were members' own personal contributions that were non-deductible pre 1 July last year:

It seems to me to be inherently unfair to use divorce as the means of converting unpreserved benefits into preserved benefits. It also seems to me to be unfair to require the benefit being split to be firstly split out of the unpreserved benefits. I think a fairer way to do it would be, firstly, for the preserved benefits to get applied to the split so that the member who has made the undeducted contributions retains the benefit of those to the extent possible. So the two elements of it are: firstly, I

13 Committee Hansard, p. 99.

14 Committee Hansard, p. 99.

15 Committee Hansard, p. 64.

think it should be preserved benefits that are split and, secondly, to the extent that unpreserved benefits do get split, they should not be converted to preserved benefits because of it. I think divorce is the wrong reason to be bringing about a conversion.¹⁶

6.24 IFSA not only commented on the equity issue of taking away non-preserved benefits but also added a funds administration perspective. The order for deductions in the proposed legislation is inconsistent with the order of deductions for fees and charges and inconsistent with the order for the surcharge liability. IFSA pointed out:

Under the requirements of the bill, the order is reversed. We are concerned that this will place an unnecessary burden on administration systems and will require changes that ordinarily may not be required in that a trustee could easily modify their payment systems to allow for it from the previous components.¹⁷

6.25 The Attorney-General's Department advised that the legislative regime as drafted provided for benefits to be taken from unrestricted non-preserved, restricted non-preserved and then preserved, in that order. The Department pointed to a very powerful family law reason for the benefits to be deducted in that order: when both parties came out of the other side of the family law settlement, if they were to be deducted in that order they would both then have preserved benefits.¹⁸

Impact on trustees

6.26 Earlier in the report attention was drawn to concerns about the constitutionality of the proposed Bill and the burden of uncertainty that this may place on trustees as well as the uncertainties associated with the legal relationship between the trustee and non-member spouse.

6.27 In addition to such concerns, a number of submissions drew attention, not just to the expense involved, but to the added burden on trustees. IAA thought that ascertaining past data was an administrative burden.¹⁹ The CSS and PSS Boards listed nine additional responsibilities, including

- provision of information to non-member spouses;
- assisting the parties to arrive at a present day value of an interest in defined benefits schemes;
- examining agreements and court orders to see whether they can be implemented under the rules of the scheme; and
- reporting to the Taxation Office the benefit entitlements of non-members.²⁰

16 Committee Hansard, p. 76

17 Committee Hansard, p. 66

18 Committee Hansard, p. 91.

19 Submission No 22, Attachment p. 1.

20 Submission No 6, pp. 1-2.

6.28 The Law Council of Australia foresaw circumstances where trustees may need to think about whether they have to have regard to the interests of the non-member spouse. In self-managed funds, it might be in the context of investment. In larger funds, it may be issues relating to the transfer of benefits.²¹

6.29 The Law Council of Australia was also concerned about the onus put on the trustee relating to interpretation of orders and agreements and suggested a mechanism should be established for solving difficulties arising from an agreement which appears to be made in error or under a misunderstanding of the provisions.

But it certainly has been my personal experience as a lawyer advising superannuation funds that, not so much with court orders, but when you are confronted with documents devised by parties—in this case the husband and wife or parties to the marriage—they can often do things which involve a misunderstanding of what is happening and things of that nature, where the trustee may well be confronted with difficulties.

The trustee is really obliged within four days to give effect to an agreement or an order. The trustee seems to be left in a position of just having to make the best judgment they are able to make of what is the outcome. But it is a little unclear to me as to what then happens if the trustee genuinely believes that there is a mistake in the document or an error or a misunderstanding. I am not sure that the legislature can do a lot about that, except perhaps provide some mechanism where those matters can be resolved.²²

Tax implications

6.30 Submissions and witnesses also raised a number of issues with regard to the taxation implications of the Bill. However, it should be noted that the taxation proposals contained in the explanatory statement accompanying the draft SIS regulations have not themselves been drafted. Treasury advised that, in order to make effective use of tax resources, it would be better to know what the tax arrangements are going to apply to before the tax rules are drafted.²³

6.31 Notwithstanding that the tax rules have not yet been drafted, most submissions and witnesses commented on one or more of the following issues:

- that CGT relief for transfers of superannuation interests as a result of a splitting agreement or order be included in the legislation;²⁴
- the unfairness of losing the tax benefit of pre 1983 components where these are transferred under a split;²⁵

21 Committee Hansard, p. 35.

22 Committee Hansard, p. 42.

23 Committee Hansard, p. 124.

24 Committee Hansard, p. 30, p. 47, p. 148.

25 Committee Hansard, p. 42. As mentioned in paragraph 2.21, Mercer advised the Committee on this issue (at p.114): For tax purposes benefits are split into pre-1983 and post-1983 components, with much higher tax applying to the post-1983 component. This split is based on the period since the eligible service date.

- the unfairness of leaving any surcharge liability with the member unless the value of the benefit is reduced by that liability when making splitting decisions;²⁶
- that being able to split a lump sum would result in lower tax where the eligible termination threshold would otherwise have been exceeded;²⁷
- that there could be advantages or disadvantages (depending on a couple's circumstances) from the proposed treatment of reasonable benefit limits;²⁸
- that the tax avoidance provisions in relation to sham divorces might not better be replaced by allowing non-divorcing couples the right to split superannuation interests.²⁹

Impact on the Superannuation Complaints Tribunal

6.32 As part of its review of the cost impact of the proposed legislation, the Committee considered the impact of the Bill on the workload of, and therefore ultimately the cost to, the Superannuation Complaints Tribunal. Although the Tribunal did not specifically give evidence to this inquiry, it advised the Committee during the course of another inquiry that it expected some increase in workload but no assessment had yet been carried out as to how much additional work would arise for the Tribunal.³⁰

Conclusion

6.33 The evidence to the inquiry suggests that industry will face increased administrative costs associated with the implementation of the proposed legislation and associated regulations. Much of this cost will be in reprogramming computer systems.

6.34 Witnesses and submitters also pointed to the concerns they have about not only the prescription of fees, but also the amount being prescribed. These concerns appeared to relate to the inconsistencies which would result between the family law and SIS regimes, where on the one hand the level of fees would be prescribed, while on the other there would be no such rule.

6.35 Most witnesses and submitters were concerned about prescribing that the interest of the non-member spouse be subject to the preservation rules and that the order for deductions was inconsistent with other regimes. These concerns appeared to stem from a perception that, in working out the preservation entitlement, the order of deductions would be inconsistent with other regimes and is the reverse of the order for payment of the surcharge liability.

It is not proposed that the existing eligible service date be transferred when part of a benefit is transferred from one partner to the other. So in most cases the receiving spouse will eventually pay a lot more tax than they would have paid if the benefit had remained with the member spouse. That is extremely unfair and seems to be an attempt to increase government revenue. It does not seem to make any other logical sense.

26 Committee Hansard, p. 47, p. 66.

27 Submission No 21, pp.7-8.

28 Committee Hansard, p. 43.

29 Committee Hansard, p. 114.

30 Prudential supervision, global financial services and superannuation guarantee charge, Committee Hansard, 9 June 2000, p.217.

6.36 The impact of the complexity of the proposed legislation on trustees was of major concern in evidence to the inquiry - not only because of the expense involved in complying, but the added burden on trustees in providing information, assisting parties and meeting reporting obligations.

6.37 It appears from evidence that there are also likely to be a number of taxation implications associated with the Bill which will need to be considered in the context of developing taxation regulations. While it is not yet costed, it also appears that there could be some further cost implications associated with an increase in the workload of the Superannuation Complaints Tribunal.

CHAPTER 7

COMMITTEE CONSIDERATIONS AND CONCLUSION

7.1 The Committee notes that there is strong support for the objectives of the Bill in providing a mechanism to assist people whose marriage has broken down to deal equitably with the division of superannuation as property.

7.2 The Committee is concerned to ensure that those most disadvantaged in the community, who may not necessarily understand the complex issues surrounding the division of superannuation interests, nor be in a position to afford legal advice on the matter, will still be able to benefit from the proposed legislation.

7.3 The Committee also notes that some of the issues involved in the inquiry are very complex, dealing as they do with both family law and superannuation. There are inherent tensions between providing appropriate property settlements which meet immediate needs and providing for retirement in the future. The Committee notes the concerns expressed during the inquiry that, taking the proposed Bill and draft regulations as a package, ‘the devil is in the detail,’ particularly those details applying to the methods of valuation of an interest in defined benefit schemes.

7.4 As outlined in chapters 2-6 of the report, the Committee was advised that some groups had suggestions to make to improve the comprehensibility and workability of the proposed legislation, others offered drafting suggestions to more accurately reflect the circumstances described in the Bill, others pointed to issues which were not specifically included in the Bill but which it was thought warranted inclusion in order to ensure that there were no misunderstandings, others raised even broader issues in relation to the Bill and the draft regulations on which they sought either clarification or further consideration. The suggestions offered were primarily aimed at ensuring that the package of reform – the bill and draft regulations – were easy to understand, easy to establish and operate and were fair and equitable.

7.5 In addition to the suggestions for reform made by key groups such as the Family Court of Australia, the Law Council of Australia and William M Mercer, to identify ways in which the objectives of the Bill could be achieved without the level of complexity which is currently proposed, these suggestions included:

- examining ways of removing the prescriptive processes and procedures for determining the value of certain superannuation interests;
- examining ways of applying the clean break principle in order to keep administration costs down and limit the costs on the general membership;
- ensuring that the issue of privacy is respected, especially for those troubled by domestic violence;
- ensuring that there are smooth and orderly transitional arrangements associated with the commencement date of the proposed legislation; and

- examining the issue of the order of deductions applying in respect of preserved benefits.

7.6 The Committee acknowledges (a) the tension which exists in achieving a balance between simplicity (that is having legislation which is easy to understand and administer) and the requirement for fairness and equity; and (b) that the Family Court of Australia has raised a number of concerns about the complexity of the proposals and the need to ensure that it has guidance on how to deal with superannuation interests.

7.7 The Government is aware of the tensions and has acknowledged that there were a number of concerns expressed during the inquiry. Officials from the Attorney-General's Department and Treasury indicated that, as part of their own consultation process on the exposure draft of the regulations, they will have regard for the issues raised in this report, that they will consult further and report back to the Committee with the outcome of those consultations, including any proposed amendments to both the Bill and the draft regulations.

7.8 As part of this consultation process, they also indicated that they would take into account the supplementary submissions from some groups, which, when available, will provide further guidance on the issues to be considered. The Committee expects that, with goodwill, the Attorney-General's Department and Treasury will be able to address the matters raised in the report to the satisfaction of most parties.

7.9 Once the response has been received from the Attorney-General's Department and Treasury about their position in relation to the proposed Bill and regulations to be issued under both the SIS Act and the Family Law Act, the Committee expects to be able to present its final report, possibly in February 2001. However, the Committee has indicated that it would be willing to hold a roundtable discussion with relevant parties early in the new year if there are any outstanding issues.

7.10 The Committee notes that the proposed reforms to family law will need to be seen in the broader context of additional consequential legislation and regulation, especially in the areas of social security and taxation, and that these proposals are yet to be developed.

7.11 The Committee also notes that the proposed legislation does not deal with de facto and same sex couple relationships. The Committee is seeking further advice on these issues.

7.12 The Committee therefore concludes that it would be premature to make a final report to the Senate at this time. The Committee considers that, by raising the issues which appear to require further consideration by the Government, there is an opportunity for the proposed legislation and proposed regulations to be enhanced to provide a more simple and equitable framework for the division of superannuation interests on marriage breakdown.

Senator John Watson

Committee Chair

APPENDIX 1

LIST OF SUBMISSIONS

1. Mr Andrew Dolphin, WA
2. Mr Colin Grenfell, VIC
3. Jacques Martin Industry Funds Administration Pty Ltd
4. Mrs Margaret Lukes OAM, NSW
5. Australian Institute of Family Studies
6. CSS and PSS Boards
7. National Network of Women's Legal Services
8. The Institute of Chartered Accountants in Australia
9. Institute of Actuaries of Australia
10. Superannuated Commonwealth Officers' Association
11. Mr Kevin Munro, Kevin Munro & Associates
12. William M Mercer Pty Ltd
13. Australian Council of Public Sector Retiree Organisations Inc
14. Regular Defence Force Welfare Association Inc
15. Jacques Martin Industry Funds Administration Pty Ltd (supplementary)
16. CPA Australia
17. Lone Fathers' Association
18. Mr Kevin Seppanen, QLD
19. Association of Superannuation Funds of Australia Ltd
20. Small Independent Superannuation Funds Association Ltd
21. Family Law Section, Law Council of Australia,
22. Institute of Actuaries of Australia (supplementary)
23. NRMA Insurance Group
24. New South Wales Government
25. William M Mercer Pty Ltd (supplementary)
26. Australian Council of Public Sector Retiree Organisations Inc and Regular
Defence Force Welfare Association Inc (supplementary)
27. Institute of Chartered Accountants in Australia (supplementary)
28. Clayton Utz
29. Investment & Financial Services Association Ltd
30. Family Court of Australia

APPENDIX 2

LIST OF WITNESSES

Monday, 13 November 2000, Canberra

Attorney-General's Department

Mr Stephen Bourke, Assistant Secretary, Family Law Branch
Ms Deborah Turner, Principal Legal Officer, Family Law Branch

Jacques Martin Industry Funds Administration

Mr Peter Downes, Manager Government Business
Ms Fiona Galbraith, Compliance Manager

Australian Institute of Family Studies

Professor John Dewar, Dean and Head of School, Faculty of Law,
Griffith University
Dr Grania Sheehan, Research Fellow

Law Council of Australia

Mr Terry Brigden, Member, Superannuation Committee
Mr John Morgan, Member, Superannuation Committee
Mr Garry Watts, Chairman, Family Law Section

Association of Superannuation Funds of Australia

Dr Michaela Anderson, Director, Policy and Research

Australian Council of Public Sector Retiree Organisations/Regular

Defence Force Welfare Association

Commodore Harold Adams (Retd), National President, Regular Defence
Force Welfare Association

Air Vice Marshal John Paule (Retd), National Secretary, Australian
Council of Public Sector Retiree Organisations; National Secretary,
Regular Defence Force Welfare Association

Mr Gordon Johnson, National President, Australian Council of Public
Sector Retiree Organisations

CPA Australia/Institute of Chartered Accountants in Australia

Mr Brad Pragnell, Superannuation Policy Adviser

Investment and Financial Services Association

Mr Richard Gilbert, Deputy CEO
Mr Dean Thomas, Chair, Superannuation Working Group

Clayton Utz

Mr Noel Davis, Partner

Institute of Actuaries of Australia

Ms Jane Ferguson, Director, Public Affairs
Mrs Helen Martin, Vice President
Miss Jenifer Walton, Member

Department of the Treasury

Mr Robert Patch

Tuesday, 14 November 2000, Canberra**Lone Fathers Association**

Mr James Carter, Consultant
Mr Barry Williams, National President

Attorney-General's Department

Mr Stephen Bourke, Assistant Secretary, Family Law Branch

Department of the Treasury

Mr Robert Patch

William M Mercer Pty Ltd

Mr Raymond Stevens, Manager, Technical Support, Mercer Financial
Planning
Ms Marie Sullivan, Principal

National Network of Women's Legal Services

Ms Angela Lynch, National Law Reform Coordinator

Family Court of Australia

Chief Justice Alastair Nicholson
Justice Stephen O'Ryan

Small Independent Superannuation Funds Association

Mr Graeme McDougall, Chief Executive Officer