

## CHAPTER 2

### THE LEGISLATION

#### Current legislation

2.1 The payment of a pension or benefit by a superannuation fund to a member's spouse or dependant is determined according to the provisions of the fund's trust deed or, in the case of Commonwealth and State funds established for public servants, Acts of the relevant Parliaments. However, the trustees of regulated superannuation funds must also comply with the conditions specified in the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) to attract concessional tax treatment under Part IX of the *Income Tax Assessment Tax 1936* (the Tax Act).

2.2 Section 62 of the SIS Act requires the trustees to maintain the fund solely for one or more of a number of listed core or ancillary purposes. These purposes include:

The provision of benefits in respect of each member of the fund on or after the member's death, if...

(A)...; and

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's **dependants**, or to both;<sup>1</sup>

2.3 **Dependant** is defined in section 10(1) of the SIS Act as:

- 'dependant', in relation to a person, includes the spouse and child of the person.

2.4 Spouse is defined in the same section as:

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

2.5 The phrase 'husband or wife of the person' is viewed by trustees and fund administrators as being gender specific and therefore effectively excludes a partner of the same sex. Accordingly, the surviving partner of a same sex couple does not enjoy the same automatic access to superannuation benefits as does the surviving partner in couples of the opposite sex who are married or in a de facto relationship.

2.6 Superannuation funds can become non-complying either through choice or through failing to meet the necessary standards and conditions required under the SIS Act to qualify

---

1 Sections 62(1)(a)(iv) and (v) and 62(1)(b)(iii) and (iv), emphasis added.

for tax concessions.<sup>2</sup> Under the current legislation therefore, it appears that trustees of a superannuation fund may be risking their fund's complying status and hence, concessional tax, status should they pay a death benefit to a same sex partner.

2.7 This has serious tax implications for all the members of such a superannuation fund or Retirement Savings Account (RSA). The investment earnings of a complying fund or RSA are taxed at a rate of 15 per cent and this can be further reduced through the use of imputation credits. However, non-complying funds are taxed at a rate of 47 per cent.

2.8 In its report on *Super and Broken Work Patterns*, in 1995, the Senate Select Committee on Superannuation noted that the Gay and Lesbian Rights Lobby group claimed that most fund trustees interpret sections 10 and 62 of the SIS Act as excluding the payment of death benefits to a same sex partner, even if that partner had been named as the nominated beneficiary by the deceased.<sup>3</sup>

2.9 Section 52(2) of the SIS Act lists the covenants to be included in a fund's governing rules. The covenants bind the trustees to various undertakings concerning the exercise of their duties on behalf of fund beneficiaries.

### **Provisions and purpose of the Bill**

2.10 The purpose of the Bill is to amend the *Superannuation Industry (Supervision) Act 1993* (SIS ACT) to remove discrimination against same sex couples in respect of superannuation benefits. Its provisions would:

- repeal the definition of 'spouse' in subsection 10 (1) of the SIS Act;
- repeal the definition of 'dependant' in subsection 10(1) of the SIS Act and substitute the definition so that 'dependant' in relation to a person would include 'the spouse, de facto partner, and any child of the person or of the person's spouse or de facto partner;'
- insert into subsection 10(1) of the SIS Act a definition of 'de facto partner' so that in relation to a person , 'de facto partner' means 'a person who, whether or not of the same gender as the person, lives with the person on a genuine domestic basis as a partner of the person;'
- add to subsection 52(2) of the SIS Act a provision to prevent discrimination in relation to a beneficiary 'on the basis of race, colour, sex, sexual preference, transgender status, marital status, family responsibilities, religion, political opinion or social origin.'

2.11 The Bill exempts Commonwealth public sector and defence force superannuation schemes established under the *Superannuation Act 1976*, the *Superannuation Act 1990*, and the *Military Superannuation and Benefits Act 1991* from the application of the above amendments.

---

2 Superannuation Ready Reckoner: Taxation and Preservation Rules for 1999-2000, Department of the Parliamentary Library, Information and Research Services, Current Issues Brief No. 2 1999-2000, pp. 3-4.

3 Senate Select Committee on Superannuation, *Super and Broken Work Patterns*, Parliament of the Commonwealth of Australia, Canberra, November 1995, p. 145.

---

2.12 According to Mr Albanese, MP, the Federal Member for Grayndler who originally introduced the Bill into the House of Representatives, the areas of discrimination which gave rise to the Bill included:

On retirement of the contributor, refusal to pay a joint pension for the contributor and his or her same sex partner;

On retirement of the contributor, refusal to pay a lump sum benefit in respect of a same sex partner;

On the death of the contributor, failure to investigate or acknowledge the claim to dependency of a child of a same sex couple when the contributor is not the biological parent of the child; and

On the death of the contributor, payment of death benefits to the estate of the contributor rather than to the same sex partner as a dependant.<sup>4</sup>

2.13 In his submission to the inquiry, Mr Albanese noted that the purpose of the Bill is to give equality to all:

This bill is not asking for same sex couples to be given any special treatment. Rather, it seeks to bring equality to the legislation. At present, same sex couples can only access the same benefits as heterosexual couples through loopholes in the legislation. This is not good enough. Real equality is not about knowing where to find the loopholes in existing legislation. Equality is about legislation that treats all people the same ... regardless of their race, colour, sex, sexual preference, transgender status, marital status, family responsibilities, religion, political opinion or social origin.<sup>5</sup>

2.14 He emphasised that 'this is not an issue about special rights for same sex couples; this is an issue about equal rights for all.'<sup>6</sup>

---

4 Explanatory Memorandum, Superannuation (Entitlements of same sex couples) Bill 1998, House of Representatives, The Parliament of the Commonwealth of Australia, 1996-97-98, p. 1.

5 Submission No. 4, p. 2.

6 Committee Hansard, p. 13.

