

# ASFA SUBMISSION TO HREOC: SAME SEX COUPLES and SUPERANNUATION

## Contributions Splitting

### ISSUE

- Recent Government legislation allows splitting of superannuation contributions between spouses, including de facto spouses. This applies to contributions made from 1 January 2006, although the actual splitting of contributions does not occur until after the end of each financial year. The way splitting works is that it allows a fund member to split their compulsory and personal super contributions with their spouse, to enable them to receive part of the contribution. Up to 100% of personal contributions can be split with a spouse, while 85% of deductible contributions (such as employer contributions) can be split reflecting the fact that such contributions attract tax at the rate of 15% when received by a fund. Existing account balances and rollovers of existing account balances cannot be split, only contributions made after 1 January 2006.
- **Same sex couples are unable to split contributions.**

### IMPACT

- The main advantage of contributions splitting to couples is the ability to benefit from having two tax-free thresholds. The lump sum tax-free threshold on superannuation is currently \$129,751. As a general example, if a heterosexual couple's collective superannuation sum is under \$259,502, then, through splitting, the total amount can be tax free. For same sex couples, where splitting is not possible, amounts over \$129,751 will be taxed at 15%.
- Splitting super contributions can also lessen the likelihood of problems that can occur when superannuation balances exceed what is known as the Reasonable Benefit Limit (RBL). The RBL is the amount of concessional tax superannuation a person can have in a lifetime i.e. reduced tax rates apply to lump sums and pensions with the RBL. A person whose benefit exceeds the RBL will have the excessive portion taxed at the highest marginal rate. An individual in a heterosexual relationship who is likely to exceed their RBL can choose to divert future contributions to their spouse if the spouse is not facing a similar RBL issue. This strategy is not available to same sex couples.
- The ability to take advantage of two tax-free thresholds by dividing contributions between spouses is likely to assist the retirement savings of a large number of couples. Given that the Reasonable Benefit Limit in 2005-06 for lump sums is \$648,946 and for pensions it is \$1,297,886 this is an issue that applies to only a relatively small proportion of the population.
- The recent Budget included a proposal that from 1 July 2007, lump sums and pensions paid to a person over 60 will be tax free and there will be no RBL. For those retiring before age 60 the issues here are still relevant even if the proposals are made law.

## **RECOMMENDATION**

- There are two possible approaches that could be adopted:
  1. Amend Division 6.7 (Spouse Contributions-Splitting Amount) of the SIS Regulations by inserting into SIS Regulation 6.40 an extended definition of 'spouse' to include de facto couples of the same sex. The extended definition would only apply for the purpose of Division 6.7
  2. Amend Division 6.7 (Spouse Contributions Splitting Amount) of the SIS Regulations by replacing 'spouse' with the words 'spouse or a person with whom they are in an *interdependency relationship*'.

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### Spouse Co-Contributions and Spouse Rebate

#### ISSUE

- Any person may make an after tax contribution on behalf of another person. A person in a heterosexual relationship (married or defacto) with a low-income spouse (earning less than \$10,800 p.a. but a partial rebate applies up to \$13,800p.a.) can make after-tax contributions on behalf of that spouse and receive an 18% income tax rebate for contributions up to \$3000p.a made on behalf of that spouse. Note that the rebate is **not** available in respect of “a person who lives separately and apart from the taxpayer on a permanent basis”.
- **A person in a same sex relationship is not eligible to receive a spouse tax-rebate for contributions made.**

#### IMPACT

- A person in a same sex relationship with a low-income partner (earning less than \$10,800 p.a. but a partial rebate applies up to \$13,800p.a.) can make after-tax contributions on behalf of that partner but is not eligible to receive an 18% income tax rebate for contributions up to \$3000p.a. made on behalf of that partner.

#### RECOMMENDATION

- Amend the definition of ‘spouse’ in Section 159TC of Subdivision AACA (Rebate for superannuation contributions made on behalf of a low income or non-working spouse) of the Income Tax Assessment Act 1936 to include a person with whom the taxpayer is in an *interdependency relationship*.

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### Death Benefits

#### ISSUE

- Prior to 30 June 2004, the law defined dependants as a spouse, child and any other person financially dependent on the fund member. This meant that fund trustees were prohibited from paying death benefits directly to a member's surviving same sex partner, unless it could be demonstrated that they were financially dependent on the deceased member.
- From 1 July 2004, the surviving partner in a same sex relationship can receive the death benefit from the deceased fund member as long as they satisfy the conditions of an interdependency relationship.
- Two people are now defined as having an interdependency relationship if they:
  - have a close personal relationship;
  - live together;
  - one or each of them provides the other with financial support; and
  - one or each of them provides the other with domestic support and personal care.If each of these conditions is met, a benefit may be paid by the trustee of the superannuation fund and taxed as a death benefit paid to a dependent.
- **This legislation is enabling legislation only and there are some funds that have not amended the statutes or rules that govern their operation to include the provision. This is more likely to occur where the fund pays pensions to the spouses of deceased members or where a reversionary pension is payable on the death of a person who was already receiving a pension from the fund. The latter is often a lower amount eg 5/7 of the primary pension.**
- **The Commonwealth has not amended the statutes governing the following schemes, among others, to allow payment of pensions to the same sex partner of a deceased member:**

**Commonwealth Superannuation Scheme (CSS)**

## **Public Sector Superannuation Scheme (PSS)**

### **The PSS Accumulation Plan (PSSap)**

### **Military Benefits and Superannuation Scheme (MSBS or Military Super)**

### **Defence Forces Retirement & Death Benefits Scheme (DFRDB)**

### **Parliamentary Contributory Superannuation Scheme (closed to new members since 9 October 2004)**

## **IMPACT**

- Looking only at the CSS, the following discrimination is found in respect of same sex partners of a scheme member

### **Member dies in service**

Where the defined benefit member dies in service, their spouse (being a person they were legally married to or a person with whom, at the time of death, they were in a long term de facto relationship) would receive an indexed pension and the option of a lump sum or a non-indexed pension. The same sex partner of a defined benefit member who dies in service does not receive a pension in the event of the death of their partner. If there is no eligible beneficiary a lump sum will be paid into the estate of the deceased person. If the deceased person's will so specifies this may be distributed to the same sex partner.

- The lump sum paid from an estate may be taxed unless the recipient can prove financial dependency under the ITAA
- The lump sum may not be sufficient to purchase an annuity or other income generating product from a commercial provider with annual payments, security and fees comparable to the CSS.

### **Example**

A 55 year old CSS member (with a spouse aged 55), dies in service after 20 years service. The member has a member financed benefit of \$100,000 and an SG component of \$20,000 and was on a salary of \$70,000 at date of death. The member's spouse may have the option of an indexed pension of \$23,450 and a lump sum of \$100,000 or a pension of \$32,830 (\$23,450 indexed and \$9,830 non-indexed)

If the member instead had a same sex partner, there would have been no benefit entitlement, but a lump sum of

\$120,00 would be payable to the member's estate. This lump sum, would purchase a lifetime indexed pension/annuity of approximately \$5,690 from a commercial provider.

### **Death of a pensioner**

Where the defined benefit member dies in the pension phase, their spouse would receive a reversionary pension equivalent to 67% of the deceased member's pension. If there is no spouse or eligible child reversionary beneficiary, there is no benefit payable to any other person or to the estate.

A same sex partner has no entitlement to a residual benefit. The Commonwealth's liability in respect of the member is extinguished

### **Example**

On retirement, a CSS pensioner member aged 65, with 30 years service and on a final salary of \$70,000 took their whole entitlement to a lifetime pension as a part indexed and part non-indexed pension. The annual pension is \$49,000 (\$35,000 indexed pension plus \$14,000 non-indexed pension). On their death, their spouse would receive a lifetime pension of \$32,830 (part indexed and part non-indexed pension), or 67% of the entitlement the pension was receiving at their death.

If the pensioner has a same sex partner, that partner would receive no entitlement and no residual benefit would be payable to the pensioner's estate.

### **RECOMMENDATION**

- Amend the definition of 'spouse' in each statutes governing the Commonwealth schemes to include a person with whom the member is in an *interdependency relationship*.

## ASFA SUBMISSION TO HREOC: SAME SEX COUPLES and SUPERANNUATION

### Definition of Spouse

#### ISSUE

- There is still some discrimination in relation to reversionary pensions for life expectancy or market linked pensions (Regs 1.06(7) & (8)). The term of these pensions can be determined on the life expectancy of the member or the member's spouse (or until the primary pensioner reaches age 100). "Spouse" still excludes same-sex partners.

#### IMPACT

- Members with same-sex partners don't have the same options for structuring their pensions as heterosexual couples.

#### RECOMMEDATION

- Amend SIS Regulations 1.06(7) & (8) to enable the term of the pension to also be determined on the life expectancy of a younger same-sex partner.
- Alternatively, this issue could be considered in changes made to implement Budget proposals in relation to pensions.

## ASFA SUBMISSION TO HREOC: SAME SEX COUPLES and SUPERANNUATION

### Death Benefits - Refund of Contributions Tax (Anti detriment)

#### ISSUE

- When a death benefit is paid to a dependent beneficiary, the amount of the payment which is less than the members RBL is excluded from the definition of an ETP and is not subject to tax in the hands of the dependent beneficiary.
- Under Section 279D of the *Income Tax Assessment Act 1936* a superannuation fund may claim a deduction in respect of a payment made to a **dependent** beneficiary which is effectively a reimbursement of the contributions tax. (In the Act the amount paid to the beneficiary is referred to as the “notional payment reduction due to contributions tax” reflecting that the beneficiary had received a lower death benefit because of the 15% contributions tax introduced in 1988.) The payment is referred to as an anti-detriment payment by the superannuation industry.
- The *anti-detriment payment* is designed to ensure that the total taxation treatment of death benefits received prior to and after the introduction of the 15% contributions tax in 1988 are equivalent. The term ‘anti-detriment’ is used to reflect the Government’s wish that the introduction of the contributions tax did not act to the disadvantage, or detriment, of dependent beneficiaries.
- **Superannuation funds are unable to claim a tax deduction for an anti-detriment payment (and thus will not make such a payment) to a same sex partner unless the partner also meets the definition of dependant.**

#### IMPACT

- A same sex partner of a deceased member will receive a lesser lump sum death benefit payment than had they been recognised by Section 279D as a dependant.

#### RECOMMEDATION

- Section 279D of the *Income Tax Assessment Act 1936* be amended to recognise a deduction for additional death benefits paid to both dependants and persons in an interdependency relationship.

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### Family Law (divorce) and superannuation

#### ISSUE

- For married heterosexual couples, from 28 December 2002, superannuation became treated like any other property in the event of a marriage breakdown. Under the system, superannuation assets can be valued and the couple (or the court) can decide how they want to deal with them. The law gives rights to a spouse to find out directly from fund(s) about the size and nature of their divorced or separated partner's superannuation, to make agreements on the division of superannuation in the event of marriage breakdown and a court can order the splitting of a superannuation interest.
- **Family and superannuation law does not apply to same sex couples or de facto heterosexual couples as the Australian Constitution currently only allows the Commonwealth to make laws in relation to marriage.**
- **There has been some progress in moves to include heterosexual de facto couples within the system by referral of powers from some states and by enactment of similar state legislation and subsequent amending of Commonwealth law to reflect this. This action is unlikely to include consideration of same sex couples.**

#### IMPACT

- Same sex partners (and currently de facto heterosexual partners) have no right of access to information about their ex-partner's superannuation assets or to splitting of superannuation assets under Commonwealth law. Access to benefits through state property laws may apply, see <http://www.austlii.edu.au/databases.html>. Property laws vary from state to state in their coverage and operation.
- It is difficult to see how any amendment to state law could provide identical rights to information and splitting of a superannuation interest when a relationship breaks down. Some improvement to the current state provisions may be possible

#### RECOMMENDATION

- One option would be the development of consistent and appropriate law across all states that deals with the division of property.