13 January 2020

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator

Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019

The Family Law Section of the Law Council of Australia appreciates the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee with respect to the proposed Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Bill 2019 (**the Bill**).

The Law Council of Australia is the peak national organisation of the legal profession representing approximately 60,000 practitioners across the country. The Family Law Section is the largest of the Law Council's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2,500 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The Family Law Section supports the Commonwealth accepting the limited referral of power provided for by Western Australia's *Commonwealth Powers (De facto Relationships) Act 2006* (WA).

The proposed amendments to the *Family Law Act 1975* (Cth) (**FLA**) and the *Bankruptcy Act 1966* (Cth) to enable separating de facto couples in Western Australia to have the same rights as all other separating couples in Australia, either those who were married or those who were in a de facto relationship, is welcomed by our members (particularly those who practise family law in Western Australia) and by the community.

In circumstances where superannuation is a significant asset for many couples, it is only proper that Western Australian de facto couples are able to split their superannuation at the end of their relationship, like de facto couples in every other State and Territory of Australia.

This legislation will give separating de facto couples in Western Australia more options when deciding how to divide their assets at the end of their relationship, and in particular, will have the effect of both partners being able to provide, at least in some part, for their retirement, by allowing an equitable division of superannuation.

The Family Law Section also supports the increase in the jurisdiction of the Family Court of Western Australia (**FCWA**), to enable separating de facto couples in Western Australia, involved in both family

law and bankruptcy proceedings, to have their matters dealt with in only one court (like all other couples in Australia) thus saving these particular de facto couples time and money.

The Bill is supported by the Family Law Section subject to two matters.

1. Applications filed before the legislation takes effect

The commencement date is to be fixed by proclamation and it is clear that the FCWA will be able to split superannuation between de facto spouses if an application is made to the FCWA after that date.

It is unclear if the FCWA will be able to make Orders splitting superannuation for couples who come before the Court after the legislation takes effect, in circumstances where they filed an application for alteration of property interests before the commencement date. For many parties, Court delays beyond their control mean that their application is yet to be determined on a final basis.

Pursuant to subsection 205ZB(1) of the *Family Court Act 1997* (WA) (**FCA**):

> *A de facto partner whose de facto relationship has ended may apply for an order under this Division in relation to the relationship only if the application is made within 2 years ("the application period") after the relationship has ended.*

The current state of the law with respect to the splitting of superannuation for de facto couples in Western Australia has had significant media attention in recent times.

There are undoubtedly people who are waiting for the change in the law to come into effect so they are able to apply to the FCWA to split their spouse's superannuation as superannuation is in some cases the major asset at the end of the relationship.

However, the time limit imposed by subsection 205ZB(1) of the FCA may force applications to be made prior to the commencement date, which may mean that some couples will not be able to take advantage of the changes to the legislation.

It is noted that the section 5 of the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) which provided for superannuation splitting between married couples applied to all marriages, including those that were dissolved before the start up time unless a final section 79 FLA Order or an approved section 87 Maintenance Agreement was already in force and had not been set aside.

It is therefore submitted that the Bill should be amended so that it is not the date upon which an application is filed which determines if superannuation of de facto couples can be split, but instead the date upon which the relevant final order is made.

This will mean that all de facto couples who have not already had a final determination of their matters on the date the legislation commences will be able to take advantage of the changes to the legislation.

2. Financial agreements

Given the limited nature of the referral from Western Australia when the FCWA is determining matters for separated de facto couples, the FCA will continue to apply to all other non-superannuation assets and liabilities, and the FLA will apply to superannuation.

The Bill provides for parties to enter into financial agreements including binding superannuation agreements.

Division 3 of Part 5A of the FCA also enables parties to enter into financial agreements before entering into a de facto relationship (section 205ZN), during the de facto relationship (section 205ZO) or at the end of that relationship (section 205ZP).

Many such financial agreements already exist pursuant to this Division.

It is noted that subsection 5(5) of the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) provided that Part VIIIB of the FLA did not apply in relation to any financial agreement that was made before the start up time.

In circumstances where the FCWA will now deal with property of Western Australian de facto parties under Part 5A of the FCA and superannuation under Part VIIIC of the FLA, if an existing de facto couple's financial agreement does not definitively deal with each party's superannuation interest (as a financial resource) then a party may be able to apply under the FLA for a division of superannuation, notwithstanding an existing financial agreement under the FCA.

If that is indeed the case, there may be a number of applications to set aside existing de facto financial agreements, if they are ambiguous with respect to superannuation or possibly if parties to the agreement were not advised, at the time of signing of the agreement, of the effects of the new legislation and the possibility of applying to the Court pursuant to the FLA, given the original referral was made in 2006.

It is therefore submitted that the new power of the FCWA to split superannuation of de facto couples should not apply if the parties have already made a financial agreement pursuant to Division 3 of Part 5A of the FCA and that agreement is determined as binding and is not set aside.

Thank you for your consideration.

Please contact Paul Doolan, Chair of the Family Law Section of the Law Council of Australia on (02) 9265 0124 and email paul_doolan@famlaw.com.au if we can assist further.

Yours sincerely

Paul Doolan
Chair
Family Law Section