



The ALSO Foundation

ACN 006 130 650 ABN 18 006 130 650

1st Floor, 6 Claremont St South Yarra 3141 Phone: (03) 9827 4999 Fax: (03) 9827 1622
Email: also@also.org.au Homepage: www.also.org.au

SUPERANNUATION AND SAME SEX COUPLES – LEGISLATIVE OVERVIEW

A) Dependents – Access to benefits and taxation rate on death benefits

Payment of death benefits

Trustees of super funds are permitted to pay benefits on the death of a member only to:

- a) one or more dependant of a deceased member; and/or
- b) the legal personal representative of the deceased (usually the executor of the deceased member's estate).

The definition of a dependant in the law includes spouses (including de facto spouses), children of the deceased and through changes to the law with effect from 30 June 2004, persons in "interdependency relationships".

"Interdependency relationship"

The meaning of the word "dependent" was widened with effect from 30 June 2004 to include a person living in an "interdependency relationship" with another person. Often this will include people living in same-sex relationships.

The legal criteria for an "interdependent relationship" are:

- a) a close personal relationship;
- b) living together;
- c) one or each of them provides the other with financial support, and
- d) one or each of them provides the other with domestic support and personal care.

As a result of these 30 June 2004 amendments, trustees of superannuation funds may pay benefits to a person whose same-sex partner has died in there was an "interdependency relationship" and hence the person was a dependent of the deceased.

Tax concessions are also typically available to such payments under the new laws, as a result of other changes to the law which occurred at the same time.

Action of members of super funds.

Superannuation fund members should request the payment of their benefits to be made to their same sex partner, in the event of their death. This is even where they have no other "dependents", and where the same-sex partner is named in the deceased's will to receive these moneys. If a payment is made to the deceased's estate, the will of the deceased may be challenged by the family members. Also, moneys in an estate are accessible to the creditors of the deceased, whereas moneys paid directly by a fund to your partner are not accessible by your creditors. Finally, there probably is more chance of delay in a payment going through your

estate, rather than being paid directly to your partner. This situation also highlights the importance of having a clearly defined will.

B) Splitting of superannuation contributions

Recently enacted law allows a person's super fund contributions to be directed to his or her spouse. With the consent of the trustee this may occur and be advantageous for a person:

- a) who pays tax at a higher rate than their spouse;
- b) whose spouse does not work and is unable to contribute to the super system; and/or
- c) who has, or is likely to meet their "reasonable benefits limits" ("RBL") and whose spouse is not.

However, this proposed benefit is only available to a member's spouse. This is defined as a husband or wife, and does not include an "emotional interdependent".¹

C) What is a de facto couple or spouse?

The [Marriage Legislation Amendment Act 2004](#) inserted a definition into the *Marriage Act* that reads:

"Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".²

Despite this apparently clear exclusion of same-sex couples from the definition of legal couples, it remains to be tested whether a same-sex partner will fit within the definition of "spouse" in the superannuation laws.³ It has not been tested in a court whether under the common law the definition of a "spouse" or "husband" or "wife" has evolved with new social acceptance of same-sex couples in modern Australia.⁴

Jonathan Wilkinson
ALSO Project Volunteer
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& *Robert Niemann*
Barrister-at-Law

¹ Section 10 of SIS: "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 s5(1) of the *Marriage Act 1961 (Cth)*

³ Section 10 of SIS.

⁴ See *The Grain Pool of WA v The Commonwealth* [2000] HCA 14, at 127 per Kirby J. Justice Kirby raises an argument by Justice McHugh that "arguably, 'marriage' now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others." He also states that the meaning of words in statutes are not fixed to the meaning at the time they were enacted. In other words, the meaning of "spouse" today might not be the same as it was in the 1920's.