

Superannuation Splitting Scheme : Assessing Contributions and s 75(2) Factors

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Introduction

The ability to split superannuation as part of adjusting property interests between the parties at the end of a de facto relationship or marriage offers opportunities and challenges to family lawyers and clients. This paper first gives a general overview of the superannuation splitting scheme and then looks at applying s 79(4) of the *Family Law Act 1975* (Cth) (FLA), including the s 75(2) factors, to superannuation. The paper ends with an outline of the most recent cases on superannuation splitting.

Outline of the scheme

Under Pt VIII B of the FLA, superannuation interests can be divided on the breakdown of a marriage or a de facto relationship. In reality, it is the payment from an interest in an eligible superannuation plan which is split, not the interest itself.

An "eligible superannuation plan" is defined in s 90MD to be any of the following:

- (a) *a superannuation fund within the meaning of the Superannuation Industry Supervision Act 1993;*
- (b) *an approved deposit fund;*
- (c) *a retirement savings account within the meaning of the Retirement Savings Accounts Act 1997;*
- (d) *an account within the meaning of the Small Superannuation Accounts Act 1995;*
- (e) *a superannuation annuity within the meaning of the Income Tax Assessment Act 1997.*

Superannuation is not defined as "property". It is, however, "treated" as property for the purposes of para (ca) of the definition of "matrimonial cause" in s 4 FLA and para (c) of the definition of "de facto financial cause" in s 4 (s 90MC).

The superannuation interests of the parties can be dealt with:

- (a) By a court dealing with the adjustment of their non-superannuation interests after separation by giving the party with more superannuation, less of the non-superannuation than otherwise;
- (b) By splitting a superannuation interest so that the non-member spouse obtains a dollar amount or a percentage of the other party's superannuation either immediately or upon the member becoming entitled to it;
- (c) By a court flagging a superannuation interest so that the trustee cannot make any payments from the fund;
- (d) By a financial agreement (including an agreement which is solely a superannuation agreement) dealing with one of the matters in (a) to (c) above;

- (e) By a financial agreement setting out how superannuation will be dealt with in the event that the parties separate.

A payment flag can be imposed on a superannuation interest by a superannuation agreement or a court order. A payment flag prevents the trustees of the superannuation fund from making future payments. The parties can, by agreement, “lift” the payment flag to enable a split to occur (s 90MN(1)) or the court can order that the agreement imposing the flag be set aside (s 90MN(4)).

Superannuation agreements and orders bind trustees of superannuation funds if they have been afforded procedural fairness. Most, but not all, schemes allow for a split to be made promptly rather than wait until the member meets a condition of release and a payment is actually made to the member. This allows the trustee of the fund to discharge its obligation to the non-member spouse immediately.

Contributions and s 75(2) factors

Commonly, the Court takes a global approach to contributions¹ but an asset by asset approach may also be appropriate.²

The Full Court majority in *Coghlan & Coghlan*³ said that superannuation can be included with non-superannuation in one pool if one of the following applies:

- the parties agree; or
- the court is satisfied that the interest is property within the definition in s 4(1); or
- the interest is not within that definition, but it is of relatively small value in terms of the other property; or
- there are features about the interest which lead the court to conclude that this is an appropriate approach.

However, the majority also said that the preferred approach was to deal with superannuation separately from property as defined in s 4(1) FLA. This approach, known as the “two pools approach”, means that the direct and indirect contributions by either party to superannuation are more likely to be given proper recognition, and “the real nature” of the superannuation interests can be taken into account. It is relevant to “the real nature” of a superannuation interest, that an interest “may be no more than a present or future periodic sum, or perhaps a future lump sum, the value of which at date of receipt is unknown.”⁴ The majority said that all matters in s 79(4)(a)-(g), including the factors in s 75(2), had to be considered in relation to a superannuation interest regardless of whether or not there was a split.⁵

Warnick and O’Ryan JJ gave separate minority judgments. Warnick J said that the trial judge was in error in departing from *Hickey* and not treating superannuation as if it was property. He disagreed with the majority’s interpretation of s 90MC:

However, my reasons differ from those of the majority, primarily in that, not only do I consider, as does the majority, that the trial Judge was in error in not applying the provisions of s 79(4) ... to assess contributions to the parties’ superannuation interests, and in failing to give proper consideration to the impact of superannuation entitlements

¹ e.g. *Mallet v Mallet* (1984) FLC 91-507

² e.g. *Norbis v Norbis* (1986) FLC 91-712

³ (2005) FLC 93-220

⁴ At para 68

⁵ At paras 58, 69-70

*when considering adjustment under s 75(2), but also that he was in error in failing to treat the superannuation interests of the parties as if they were property. Contrary to the majority view, this, I consider, he was obliged to do.*⁶

O'Ryan J agreed with Warnick J's view of the effect of s 90MC.

In practice, the courts often focus on direct contributions when dealing with superannuation, rather than indirect financial contributions, homemaking and parenting contributions, and s 75(2) factors. This issue is discussed later in this paper.

Valuing superannuation

Section 90MT(2) FLA requires the court to value a superannuation interest which is being split. The valuation must be in accordance with the *Family Law (Superannuation) Regulations 2001 (Cth)* (FLS Regulations). An interest not being split can be valued another way (e.g. by relying on a recent member's statement or using an agreed figure). An interest being dealt with in a financial agreement can also be valued other than in accordance with the FLS Regulations. An example of a case where the valuation of the superannuation interest under the FLA did not accord with its "real" value arose in *BAR & JMR (No 2)*⁷ but the issue was not a ground of appeal in the Full Court decision of *BAR & JMR*.⁸

The valuation provisions do not apply to self managed superannuation funds (FLS Regulations, reg 22(2)(b)). The contents of a self managed superannuation fund must be valued (e.g. shares, real property). Specialist advice may be needed about a self managed superannuation fund and how best to effect a split. If capital gains tax rollover relief is required, certain conditions need to be satisfied and must be addressed before the orders/agreement are made.⁹

Many self managed superannuation funds are non-compliant. A party who is leaving a fund will want to be protected from future penalties with respect to actions and decisions which occurred while that party was a trustee. An indemnity from the other spouse offers some protection but cannot be absolute as it does not protect against third parties such as the Australian Taxation Office. Penalties can be imposed by the Australian Taxation Office on each trustee personally.¹⁰

Superannuation interests occur more frequently in accumulation funds than in defined benefit funds. The value of an accumulation interest is much more transparent than a defined benefit interest as it reflects the value of the investments in the fund. An accumulation interest grows if the employer or employee contributes to the fund and the contributions and return on the investments are greater than the member's share of the fees or expenses of running the fund. A recent member's statement and/or a completed Superannuation Information Form is sufficient to value an accumulation interest.

The value of an interest in a defined benefit fund depends, not only on contributions made by the employer and employee, but also on factors such as the length of employment and the member's salary at retirement. Many defined benefit funds are closed to new members. They are mainly government schemes or associated with large companies. For defined benefit interests, the first step is to have the fund complete a Superannuation Information Form. Depending on the fund, the trustee may provide a valuation as part of this process. If it does not, an expert in superannuation will need to be engaged to value the interest. The

⁶ (2005) FLC 93-228 at para 75

⁷ (2005) FLC 92-231. See more recently, *Fitzgerald-Stevens & Leslighter* [2015] FCWA 25

⁸ [2005] FamCA 1097

⁹ s 126-140(1) *Income Tax Assessment Act 1997*

¹⁰ For example, *Linder & Linder* [2013] FamCA 988

impact of taxation is not frequently in issue in the valuation of superannuation interests, but was considered by the Full Court in *Semperton & Semperton*,¹¹ discussed later in this paper.

Procedural fairness

Parties to proceedings and those affected by orders have a legitimate expectation that they receive procedural fairness before orders are made. The right of a trustee to procedural fairness is reinforced by s 90MZD FLA. The court cannot make an order which binds a trustee (not a secondary government trustee) without according procedural fairness to the trustee (s 90MZD(1)). A “secondary government trustee” is a trustee that is the Commonwealth, a State or Territory and is a trustee only because of the operation of s 90MDA.

The *Family Law Rules 2004* (FLR) set out how procedural fairness is provided to a trustee before a court order is made. If an order is sought by consent in the Family Court which is intended to bind the trustee of an eligible superannuation plan, not less than 28 days before lodging the draft consent order or filing the Application for Consent Orders, a party must notify the trustee in writing of:

- the terms of the order that will be sought to bind the trustee;
- the next court event (if any);
- that the parties intend to apply for the order sought if no objection to the order is received from the trustee within 28 days;
- that if the trustee objects to the order sought, the trustee must give the parties written notice of the objection within 28 days.¹²

If the matter is proceeding to trial, a party seeking an order to bind the trustee of an eligible superannuation plan must, not less than 28 days before the date fixed for the first day of the trial, notify the trustee in writing of the terms of the order that will be sought at the trial and bind the trustee, and the date of the trial.¹³

In proceedings in the Federal Circuit Court, the procedural fairness requirements in the Rules of that Court are far less stringent than in the FLR. If, in an application, response or reply, a person:

- (a) *seeks a flagging order or splitting order in relation to a superannuation interest under Pt VIIB of the FLA; or*
- (b) *applies under S 79A or 90SN of the FLA for an order to set aside an earlier order in relation to a superannuation interest.*

*that person must immediately after filing the application, response or reply, serve a sealed copy of that document on the trustee of the fund.*¹⁴

There are many instances where parties do not apply for a split of superannuation and therefore do not afford the trustee procedural fairness. If an order is made regardless, the parties are at risk of having an order which the trustee of the fund refuses to enforce. Sometimes the trustee's objections may seem pedantic. The requirement to provide procedural fairness does not mean that the trustee can veto orders although the trustee may

¹¹ [2012] FamCAFC 132

¹² R 10.16(2) FLR

¹³ R 14.06(1) FLR

¹⁴ R 24.07(1) and (2) *Federal Circuit Court Rules 2001*

assume that this is the case. However, it is usually easier to abide by the preferences of the trustee and use wording approved by the trustee.

The FLA and the Rules of either court do not require procedural fairness to be given to a trustee with respect to provisions in financial agreements which affect the trustee. However, if the parties do not give the trustee reasonable notice of the terms of the agreement which it is proposed will affect the trustee, before executing the agreement, the trustee may say it is unable to put the provisions dealing with superannuation into effect.

Assessment of contributions

The main issues which arise with respect to the assessment of contributions to superannuation are:

1. How to take account of the superannuation of the parties at the commencement of cohabitation?
2. How to take account of contributions to superannuation during the relationship? The preferred approach of the majority in *Coghlan* of separate pools enables contributions to be assessed differently to superannuation and non-superannuation. But should they always be assessed differently?

In the past, some cases¹⁵ took the approach that an initial contribution of property lost value or was eroded by effluxion of time. The Full Court rejected this approach in cases such as *Pierce & Pierce*:¹⁶

*In our opinion it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution.*¹⁷

The timing of the contribution is arguably less important than the weighing of contributions. As Kay J, in a minority judgment said in *Aleksovski v Aleksovski*:¹⁸

What his Honour had to assess by way of contribution was 18 years where each party provided their labours towards the acquisition, conservation and improvement of assets, and towards the welfare of the marriage generally. Additionally, late in the marriage, the wife received a large capital sum arising out of a motor car accident. In my view whether the capital sum was acquired early in the marriage, in the midst of the marriage or late in the marriage, the same principles apply to it. The Judge must weigh up various areas of contribution. In a short marriage, significant weight might be given to a large capital contribution. In a long marriage, other factors often assume great significance and ought not be left almost unseen by eyes dazzled by the magnitude of recently acquired capital. A party may enter a marriage with a gold bar which sits in a bank vault for the entirety of the marriage. For 20 years the parties each strive for their mutual support and at the end of the 20 year marriage, they have the gold bar. In another scenario they enter the marriage with nothing, they strive for 20 years and on the last day the wife inherits a gold bar. In my view it matters little when the gold bar entered the relationship. What is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the

¹⁵ e.g. *Money & Money* (1994) FLC 92-485; *Bremner & Bremner* (1995) FLC 92-560

¹⁶ (1999) FLC 92-844

¹⁷ (1999) FLC 92-844 at para 28

¹⁸ (1996) FLC 92-705

*marriage relationship. Just as early capital contribution is diminished by subsequent events during the marriage, late capital contribution which leads to an accelerated improvement in the value of the assets of the parties may also be given something less than directly proportional weight because of those other elements.*¹⁹

The two pool approach outlined in *Coghlan* allows courts to consider the possibility that contributions to superannuation be assessed differently than to non-superannuation. Usually, this is to the disadvantage of the non-member. Sometimes it occurs because one spouse came into the relationship with more superannuation than the other. Sometimes it occurs because the court gives more weight to the direct financial contributions of the member and the member's employer to the superannuation rather than the indirect financial contributions or home-making and parenting contributions of the non-member. This approach is contrary to the accepted approach in relation to non-superannuation property that non-financial or home-making and parenting contributions are given similar weight to financial contributions, but the assumption of equal contributions cannot be the starting point.²⁰

The Full Court rejected a formulaic approach to the assessment of initial contributions²¹ in *M & M*²² but the quarantining of initial contributions to superannuation still occurs frequently. For example, the Full Court approved the quarantining of initial contributions to superannuation in *Palmer & Palmer*.²³ The Full Court allowing the appeal, said that an option for the trial Judge (which the Full Court adopted in the re-exercise of its discretion) in dealing with the husband's initial contributions to his superannuation was to deduct the value at cohabitation (\$92,450) from the value as at the date of separation 17 years later. The difference would have provided a trial Judge with a figure for the growth of the fund during the marriage. He could then have assessed the parties' respective contributions and superannuation under s 79(4) as he had done with the non-superannuation asset.

In the writer's view it is unlikely that the Full Court would have adopted an approach where equity of \$92,450 in real estate owned at the commencement of cohabitation was effectively quarantined for the benefit of that party at the end of the 17 year period of cohabitation. This may be explained by the court on the basis that the other party made contributions to the real estate through preserving it or improving it, but this approach seems to put a higher value on initial contributions to superannuation and on superannuation, than on contributions during the relationship and to non-superannuation property.

It is not essential that the contributions were made by the non-member at a time when the superannuation existed. As Finn J said in *Farmer & Bramley*:²⁴

*an issue has arisen...as to whether an entitlement based on contributions made to the welfare of the family can only be satisfied out of property available to the parties at the time the contribution was made. In my view, there is nothing in s 79(4)(c) or indeed elsewhere in the Act, or in the authorities to date, which would justify such a limitation.*²⁵

The management of investments in a self managed superannuation fund may also be an issue. The Full Court in *Kane & Kane*²⁶ considered whether the husband's contributions to a self managed superannuation fund were a "special" contribution. The Full Court found that

¹⁹ (1996) FLC 92-705 at p 83,443

²⁰ e.g. *Mallet v Mallet* (1984) FLC 91-507

²¹ e.g. *West & Green* (1993) FLC 93-395

²² (2006) FLC 93-281

²³ (2012) FLC 93-514

²⁴ (2000) FLC 93-060

²⁵ (2000) FLC 93-060 at para 56

²⁶ (2013) FLC 93-569

they were not. Although not the decisive factor, all three judges, in two separate judgments, said that it was relevant that the husband would not have agreed that he bear all the losses if his investments had made losses.

Similarly, Benjamin J in *Idoni & Idoni*²⁷ refused to take into account the husband's extra contributions to a self managed superannuation fund or his losses on the investment in the fund in his assessment of the parties' contributions. The husband had transferred his superannuation of about \$166,000 into the fund and the wife had only transferred \$40,000. The fund fell from an asset base of between \$200,000 and \$300,000 to about \$22,000. The husband had effective control of the funds and oversaw what Benjamin J described as its "decimation". Benjamin J said:

*The husband could have at any time taken steps to sell the options and reduce the losses. He did not, as he did with the other investments, draw a line in the sand. He stood mute while the fund was reduced to where it is now.*²⁸

Benjamin J ordered that the balance of the fund be transferred to the wife. He said:

*I have considered the superannuation fund both in the context of contribution and s 75(2)(o) factors. As to contribution the husband put aside a relatively large sum and the wife a lesser sum. That arose from the different, but agreed, paths the parties took during their relationship. As indicated earlier I have treated those, as part of a holistic approach, as equal. As to the disastrous post-separation superannuation investments, it was open for the husband to discuss this fund (in which the wife had a significant interest) with her. He did not do so. It was also open for the wife to become involved in the management of the fund, she did not do so. I have not made an adjustment in favour or against either party in the context of contributions. I have included a modest percentage (3 per cent) in the overall adjustment in favour of the wife under the s 75(2) factors.*²⁹

In the total pool of \$575,207 the husband received \$171,886 or 32%. Their contributions were assessed as equal but the wife received a s 75(2) loading of 15% (including 3% for the husband's wastage of the fund) plus an adjustment of \$12,500 for half of the legal costs drawn down by the husband.

What about s 75(2) factors?

The Full Court majority in *Coghlan* said that the preferred approach to superannuation was to deal with it separately to non-superannuation. This enables its "real nature" to be looked at, as well as direct and indirect contributions to it. Both the majority and the minority judges also considered it necessary to make an adjustment for s 75(2)³⁰ factors. Under s 79(4)(e) the Court must consider the s 75(2) factors to the extent that they are relevant when considering what order to make in property settlement proceedings. Section 75(2) includes two factors which refer to superannuation:

- (b) *the income, property and financial resources of each of the parties ...*
- (f) *... the eligibility of either party for a pension, allowance or benefit under: ...*
 - (iii) *any superannuation fund or scheme, whether the fund or scheme was established or operates, within or outside Australia; and the rate of any such pension allowance or benefit being paid to either party ..*

²⁷ [2013] FamCA 874

²⁸ [2013] FamCA 874 at para 35

²⁹ [2013] FamCA 874 at para 147

³⁰ The equivalent section in Pt VIIIAB of the FLA, which applies to de facto couples, is s 90SF(3).

Sections 75(2)(n) and (naa) require a consideration of orders made or proposed to be made under s 79 or Pt VIIIAB about the property of the parties, thereby indirectly requiring a consideration of superannuation.

Before the superannuation-splitting scheme commenced, superannuation was usually considered to be a financial resource rather than property.³¹ Although it is generally treated as property for the purpose of Pt VIIIAB, the introduction of the superannuation splitting regime did not change its nature. It is only "treated" as property for the purposes of Pt VIIIAB, and in some circumstances, such as where a party has satisfied as a condition of release, it is property.³²

Sections 75(2) (b) and (f) were in the FLA before Pt VIIIAB was inserted and were not removed at that time.³³ They remain relevant when, for some reason, superannuation is not being split, but they may also be relevant if superannuation is split but one party has significantly more.

As superannuation is "treated" as property, not only must direct and indirect contributions be assessed in relation to it but s 75(2) factors (whether or not post *Stanford*³⁴ the "four-step approach"³⁵ still exists).³⁶ An overview of recent cases suggests that the s 75(2) factors are often ignored in relation to superannuation or, at least not given as much weight as they are in relation to non-superannuation.

Some courts refuse to make a s 75(2) adjustment because of a concern about double-dipping. As the Full Court said in *Craig & Rowlands*:³⁷

In this case, as in Semperton and the decision in McKinnon, the wife had been found to have a contribution based entitlement to the DFRDB interest. Therefore, as we will explain, the Federal Magistrate fell into error also by having regard to the interest at the s 75(2) adjustment phase when considering the other assets. The better course would be to have commenced with the other assets.

The issue of double counting is not clear cut despite the Full Court's view in *Craig & Rowlands*. For example, the majority in *Coghlan* considered that s 75(2) factors were relevant to the assessment of the appropriate split of superannuation to be made.

Recent decisions

Mayne and Mayne (No 2) (2012) FLC 93-510

This was a 23 year marriage with 2 adult children. At trial, the parties had been separated for at least 3 years. The Federal Magistrate gave the husband between 38% and 48% of the pool and not 22% as the Federal Magistrate said he was giving him. The Federal Magistrate let each party retain their own superannuation. The wife had \$25,000 of superannuation and the husband had \$260,000.

Justices May and Strickland, in separate judgments (and Justice Faulks agreed on this point), said that in circumstances where the superannuation interests constitute a significant portion of the parties' property, it may be appropriate to adopt a two pool approach and that was appropriate in this case. However, the Federal Magistrate failed to consider the

³¹ *Crapp & Crapp* (1979) FLC 90-615 at p 78,181

³² *Wunderwald & Wunderwald* (1992) FLC 92-315; *Todd & Todd* [2014] FamCA101

³³ *Family Law Legislation Amendment (Superannuation) (Consequential Provision) Act 2001*

³⁴ *Stanford v Stanford* (2012) FLC 93-495

³⁵ e.g. *Hickey & Hickey & Attorney General for the Commonwealth* (2003) FLC 93-143

³⁶ (2013) FLC 93-535

³⁷ (2013) FLC 93-535 at para 57

contributions by either party to each other's superannuation although he noted the wife had made direct contributions to the husband's superannuation.

There was an absence of evidence as to the nature of post-separation growth in the husband's superannuation but that was a contribution argument. His superannuation had grown substantially in the 6 years since separation.

In the re-exercise of the court's discretion, the wife proposed that from a total pool of about \$1.2 million, excluding an add-back and the agreed values of superannuation, that she receive 78%, thus requiring the husband to split about \$114,000 of his \$376,000 of superannuation to her. Alternatively, she included the add-back and superannuation in the pool and sought 81%, thus requiring a split of the husband's superannuation of about \$116,500 to her. Both options left the husband with only a small amount in shares, an aged vehicle and superannuation he could not access for at least 7 years.

The husband argued for a two pool approach and sought 35% of the non-superannuation assets including the add-back and 60% of the superannuation assets.

A s 75(2) adjustment was not made to the superannuation but was made in favour of the husband on the non-superannuation. The Full Court divided the non-superannuation 70%/30% in favour of the wife and the non-superannuation 35%/65% in favour of the husband. The wife was required to make a cash payment to the husband of about \$227,000 and the husband had to make a superannuation split to the wife of about \$105,000.

Semperton & Semperton [2012] FamCAFC 132

The Full Court considered whether a DFRDB interest should be treated differently from other superannuation.

After 38 years of cohabitation the parties had accumulated tangible assets worth \$822,467. They also had superannuation and pension entitlements of \$520,250, almost all of which were held by the husband. The complicating factor was that 68% of this was the capitalised value of the husband's Defence Force Retirement and Death Benefit (DFRDB), which was a non-commutable pension, paid at the rate of \$900 per fortnight.

The effect of the Federal Magistrate's decision was to leave the husband with \$196,348 in tangible assets (23.9% of the non-superannuation pool) and \$401,784 in superannuation and DFRDB entitlements (77.2% of the superannuation pool).

The husband, aged 59 years, received \$598,132, or roughly 45% of the combined pools. However, nearly 60% of his entitlements (\$354,098) was in the form of the DFRDB pension, and a further 8% (\$47,686) was superannuation which he could not immediately access.

The wife, aged 56 years, received entitlements worth \$744,585, all of which was "tangible", as she could immediately access the \$118,466 she received by way of superannuation because she had met a condition of release.

The Full Court majority said:

We accept it is arguable that the distribution here resulted in an outcome that was unduly favourable to the wife. However, for appellate intervention to be warranted, it would be necessary to establish that the Federal Magistrate failed to have regard, at some relevant stage, to the fact that the DFRDB was only an income stream.

There can be no doubt that the Federal Magistrate appreciated the special nature of the DFRDB. This is because he referred to it as having a "different character" at an early stage in his reasons when commenting on the fact the parties had adopted a

two pool approach, when his Honour considered three pools may have been more appropriate.

However, we consider his Honour should also have paid regard to the “different character” of the DFRDB when he came to the s 75(2) adjustment. The “different character” of the DFRDB required attention not only when constructing the pools, but at each other point in the process, most especially at the s 75(2) stage and when assessing the justice and equity of the outcome.

Had his Honour again turned his mind to the “different character” of the DFRDB at those latter stages of the process, it is possible that he would have decided justice did not require the wife to receive so much of the Fund A superannuation. Although leaving the husband with more of that fund would not have given him greater access to capital immediately, such an outcome would have ensured he had more capital available when he ultimately retired.

We conclude that whilst the overall approach adopted by the Federal Magistrate was open to him, the failure to consider the different character of the DFRDB at the final stages of the process constituted appellable error.³⁸

May J, in a minority judgment, concluded that the appeal had to be allowed as the husband had established that:

the treatment of the DFRDB as though it is an available capital sum was an error, and secondly that the orders made are not just and equitable. In my view, in the circumstances of this case, where the prescribed value included in the property pool was then divided, it led to a distorted result.³⁹

The majority was also concerned that taxation in relation to the superannuation had not been dealt with properly by the parties and this, although not a ground of appeal, made it impossible for the court to re-exercise the discretion. The majority said:

The DFRDB was valued by reference to a formula that pays no regard to the fact that the payments are taxable in the hands of the veteran. In some circumstances, the pension will be taxed at the highest marginal rate, while in other circumstances it will be tax-free. No formula can determine the real value to an individual recipient because of the myriad factors that would impact on the tax treatment of the benefit. But the fact remains that for so long as the husband continues to enjoy a high income, a proportion of his DFRDB will be lost to tax, albeit the burden should be reduced when he turns 60.

The tax on the DFRDB is an important issue because his Honour clearly proceeded on the basis that the husband would be likely to continue to earn other income for some time. The apparent inequity of the tax on the DFRDB pension being seemingly ignored is highlighted by the fact that the wife too receives a pension, but this is not taxed and its value has (properly) not been capitalised for the purposes of these proceedings.

A further matter that concerns us relates to the position of the husband when he retires. Although the DFRDB payments will probably then fall below the tax-free threshold, the amount of the payments will be taken into account in determination of the quantum of the husband’s aged pension. The net effect will be a significant

³⁸ [2012] FamCAFC 132 at paras 193-7

³⁹ [2012] FamCAFC 132 at para 97

reduction in his aged pension entitlement, whilst the wife will be eligible for a full aged pension. This too is a matter that is not taken into account by the formula used to calculate the value of the DFRDB.

It is unsurprising the Federal Magistrate failed to place any emphasis on the fact that the DFRDB would adversely impact on the husband's current taxation and his future aged pension, since neither party asked his Honour to take those matters into account. However, the evidence disclosed that tax was being paid on the DFRDB. In any event, the fact that tax would be payable is a matter of law. Similarly, it is a matter of law that a DFRDB will impact on a means tested pension, which was one of the reasons the wife did not want any part of the DFRDB...

We do not suggest this value could ever have been calculated with precision, since it would still depend on variables, such as the period the husband was likely to remain in employment. We also do not underestimate the likely expense associated with obtaining expert evidence on this difficult topic. It may be that the parties ultimately would elect not to call such evidence, given the expense and complexity, but on any redetermination of the matter they should be offered that opportunity, and should be required to make submissions about how these matters might be taken into account in the absence of such evidence.⁴⁰

In relation to the comparison of superannuation dollars and non superannuation dollars the Federal Magistrate considered that his approach resulted in just and equitable orders:

The Federal Magistrate then discussed whether it was fair to assume that "one superannuation dollar" equalled "one cash dollar". He found this was probably appropriate in the case of the wife, since she was unable to work and could access her superannuation. However, his Honour said the husband "does not have the same benefits" because "the funds he would be entitled to receive for the wife to retain the home unit, will be 'locked' up in superannuation".

His Honour therefore concluded it was "proper" to discount the \$119,146 the wife would otherwise have received from the husband's superannuation to the figure of \$110,000 that he ultimately ordered she should receive.⁴¹

The majority found that the above approach was not just and equitable as the Federal Magistrate did not consider the "different character" of the DFRDB pension.

Craig & Rowlands (2013) FLC 93-535

The Full Court considered an appeal by the husband from a decision of a Federal Magistrate. The facts and law were very similar to *Semperton & Semperton*.⁴² The Federal Magistrate treated the husband's DFRDB entitlement as if it were a capital sum capable of actual distribution and adopted a two pool approach when identifying the property for distribution.

The Full Court concluded that there was appellable error because the Federal Magistrate:

- failed to demonstrate an appreciation of the different character or real nature of the DFRDB in the final stage, together with the necessary assessment of whether the orders were just and equitable.

⁴⁰ [2012] FamCAFC132 at paras 159-162, 166

⁴¹ [2012] FamCAFC132 at paras 137-8

⁴² [2012] FamCAFC132

- double counted the DFRDB by determining the parties' entitlement to it in one separate pool, then having regard to it again as a s 75(2) factor in the division of the other pool.

As Strickland J said:

At the very least, having taken the benefit into account as its capitalised value (and allocating a percentage entitlement to the wife) it was double-dipping to then take it into account under s 75(2) of the Act.⁴³

In relation to the issue of a double count, May and Forrest JJ said:

This appeal is not unlike Semperton in many respects. The Federal Magistrate correctly used the capital "value" of the DFRDB fund and then discretely decided the entitlement to it by each party and the s 75(2) impact of such a finding in isolation. The Federal Magistrate then took the husband's DFRDB into account in deciding the s 75(2) considerations which might apply flowing from the property division of the other pool. There was a double count. As importantly, the Federal Magistrate failed to demonstrate an appreciation of the "different character" of the DFRDB in the final stage, together with the necessary assessment of whether the orders were just and equitable.⁴⁴

Robertson & Robertson [2012] FamCAFC 60

The wife failed to appear at the hearing and the trial Judge made final property orders in her absence. The trial Judge ordered that the wife receive the former matrimonial home and the husband retain superannuation in the payment phase which provided him with an annuity of approximately \$23,600 annually. The valuation of the husband's superannuation interests was 6 years old. The trial Judge's reasons for judgment were only 8 paragraphs in length.

The wife's challenges to the orders were that the Federal Magistrate:

1. Did not have a proper valuation of the husband's superannuation available and he failed to make relevant findings of fact as to the asset pool and its value.
2. Failed to make findings as to the parties' respective contributions.
3. Could not find that the proposed orders were just and equitable under s 79(2).

In relation to ground 1, being the valuation of the husband's superannuation, the Full Court found that it was not in dispute that the valuation of the husband's superannuation interest was six years old. The Full Court agreed with the wife that the absence of evidence and findings as to the valuation of the husband's superannuation interest constituted an error.

Grounds 2 and 3 were also made out and the matter was remitted for rehearing.

Paul & Paul [2012] FamCAFC 64

The husband was aged 54 and was employed as a project manager. The wife was aged 53 and was a school teacher. The parties had a relationship of 22 years.

The total asset pool was \$1,866,999, of which \$595,200 represented superannuation interests. Moroni FM (as he then was) divided the parties' assets (including their superannuation entitlements) as to 53% to the wife and 47% to the husband. The wife received \$68,088 of the husband's superannuation, leaving the husband with \$458,931.

⁴³ (2013) FLC 93-535 at para 123

⁴⁴ (2013) FLC 93-535 at para 70

Each party sought to retain more non-superannuation than superannuation and the trial Judge considered this in terms of the ability of each party to rehouse themselves. The husband was able to rehouse himself adequately under the proposed orders. The husband received \$418,559 in non-superannuation whereas the wife received \$921,421.

Contributions were assessed as equal. The wife received a 3% loading on the total pool (i.e. both superannuation and non-superannuation) but the Federal Magistrate said that the adjustment would have been higher if the form of division had been different.

The husband's grounds of appeal relating to superannuation were that the trial Judge:

- Failed to separate the superannuation assets from the other property when identifying the assets available for division.
- Failed to adequately consider the unfairness to the husband of retaining the bulk of his superannuation entitlements.
- Failed or refused to assess the husband's post-separation contributions to his superannuation fund. While the trial Judge was not mandated to follow the *Coghlan* approach, it was incumbent upon him to give reasons for not following the preferred approach.

The Full Court held that there was no appellable error. As to whether the trial Judge ought to have dealt with the superannuation and non-superannuation in separate pools it said:

The applicable legislation itself does not mandate a particular approach. The Full Court provides a suggested approach to be followed in cases involving superannuation interests. It is simply a suggested approach, although one which, in our view, has merit.

*Acknowledging that the approach has merit does not exclude other ways of dealing with the issue, especially when a case is presented and argued in such a way that another approach may be more appropriate.*⁴⁵

Each party presented their evidence on contributions to particular assets in an holistic way. The trial Judge acknowledged that the approach in *Coghlan* need not be followed. The trial Judge did not separate the superannuation interests from the other assets nor specifically address post-separation contributions to superannuation in his judgment, yet it was held by the Full Court that he did not fall into appellable error. The trial Judge made it clear he was aware that superannuation was different to non-superannuation property but appropriately, over a long marriage he dealt with them together.

Prantage & Prantage (2013) FLC 93-544

The wife was aged 40 years and the husband was aged 44 years. They separated after an 11 year marriage. There were two children. The wife worked part time as a teacher and the husband was employed by a multi-national corporation.

The trial Judge determined that the property available for division (excluding superannuation) totalled \$3.1 million and their superannuation interests were about \$240,000. The husband's superannuation at the start of the marriage was much greater than that of the wife. However, the wife's contributions during the marriage far outweighed the husband's initial contribution.

⁴⁵ [2012] FamCAFC 64 at paras 47-8

The trial Judge adopted a global approach and concluded that the parties' contributions were 65%/35% in favour of the wife. However, contributions to superannuation favoured the husband as to 55% (no arguments were made by the parties regarding post-superannuation contributions to superannuation). The trial Judge made a 5% adjustment in the husband's favour on account of s 75(2) factors. The wife had her half of the family trust (with her sister), an investment capacity and a limited capacity for work. The husband had security of tenure of work and the care of the two children.

The trial Judge did not consider that a superannuation splitting order met the current needs of both parties. The best way to achieve a just and equitable result was a cash adjustment of \$60,000 in favour of the wife.

The wife's entitlement to 60% of the non-superannuation assets required the wife to pay \$182,700 to the husband. The \$60,000 cash adjustment, and the wife's contribution to various litigation costs which he fixed at \$18,000, were offset against that amount. The wife was ultimately required to pay the husband \$140,000.

The husband appealed. The wife cross-appealed. The wife conceded one of the grounds of appeal of the husband being the overstatement of a liability by \$100,000. The wife's cross-appeal raised 4 grounds relating to superannuation:

- The trial Judge erred in his discretion when attributing 55% to the husband by way of contribution to the superannuation assets.
- The weight placed by the trial Judge on the \$27,000 contributed by the husband over and above that of the wife to superannuation was disproportionate to and inconsistent with the weight placed by him on the wife's contribution of \$2,023,000 over and above the husband to other assets.
- The trial Judge placed undue weight on the initial superior contribution to superannuation made by the husband of \$27,000 more than the wife.
- The trial Judge failed to provide any or any proper reason for his calculation of the wife's reduced superannuation adjustment and/or payment in lieu.

In relation to the first three of these grounds the Full Court said:

- The wife was attempting to establish that the trial Judge's approach to the assessment of contributions to superannuation was inconsistent with his approach to the assessment of contributions to non-superannuation. These submissions did not have any credence as they looked at the effect of the trial Judge's assessments rather than what he did.
- The parties had reached an agreement that the superannuation should be shared equally. The trial Judge erred in departing from that agreement without given any adequate reason for doing so.

The fourth ground related to the trial Judge providing a cash adjustment to the wife of \$60,000 in lieu of her entitlement to \$82,217 of the superannuation. The Full Court noted that the trial Judge explained why he was making the cash adjustment, but failed to explain how he arrived at the figure of \$60,000. This ground was successful, as were a number of grounds not relating to superannuation. The matter was remitted for rehearing.

Palmer & Palmer (2012) FLC 93-514

After a 17 year relationship the parties separated in 2009. There were two children aged 13 and 11, the younger of whom suffered health problems. The mother's child from a prior relationship lived with the parties during the relationship.

The trial Judge treated the non-superannuation and superannuation as separate pools. The net non-superannuation pool was \$358,300 (equity in the home and two motor vehicles). The wife had two accumulation superannuation schemes totalling \$26,988. The husband was a member of the Military Superannuation Benefits Scheme, to which he had transferred from a previous fund, the Defence Forces Retirement Benefit Fund. His interest was valued at \$854,386 as at the date of separation.

The trial Judge found that the parties made equal contributions to the property during their marriage, but that an adjustment of 3% for contributions should be made in the wife's favour, based on a lump sum contribution by her (of an unspecified amount at the time of the parties' marriage when the wife's employment was terminated) and her post separation contributions to the welfare of the family.

The trial Judge assessed s 75(2) factors as favouring the wife by a further 20%.

The trial Judge ordered that the wife transfer her interest in the home to the husband and that he pay her \$219,000. The wife received a split of the husband's superannuation using a base amount of \$260,000 (about 32% of the combined superannuation).

The wife successfully appealed. The grounds of appeal relating to superannuation which were upheld were:

- The trial Judge's finding that a significant part of the husband's superannuation was referable to a period both before and after the relationship was against the evidence and the weight of the evidence. The parties used the figure of \$864,386 as the current value of the husband's superannuation, but the valuation was at March 2009, being the date of separation and about 12 months before the date of the trial. There was no evidence as to value at the time of the hearing.
- The wife receiving 30% of the husband's superannuation entitlements was not just and equitable and was manifestly inadequate.
- The trial Judge erred in making a superannuation splitting order that resulted in the wife retaining only 32% of the superannuation when he had found that the wife's contributions to the date of the hearing in relation to the non-superannuation pool favoured her 53%/47% and s 75(2) matters favoured her by a further 20%.

In the re-exercise of its discretion, the Full Court quoted from *Coghan*⁴⁶ and said:

We intend to give effect to the valuation of the father's interest...and calculated in the expert report as being \$92,450 at a date close to the commencement of cohabitation of the parties. The further increase in value of the husband's interest took place during the marriage and in circumstances where both parties were making contributions His Honour made findings that recognised the wife's contribution to non-superannuation assets as being 53 per cent compared to the husband of 47 per cent. This disparity was due to a lump sum contribution by her and her post separation contributions to the welfare of the family. Otherwise he found that the

⁴⁶ (2005) FLC 93-220 at paras 65-7

contributions made by the parties during their cohabitation were equal. No challenge was made to that finding.

Applying that logic to the superannuation, there is no basis for a finding other than that the wife made equal contributions to all assets during cohabitation, including the husband's superannuation.⁴⁷

The Full Court referred to *M & M* (2006) FLC 93-281 where the Full Court rejected the use of a mathematical formula as not being helpful and referred to the potential for:

real injustice ... as there is frequently far less contributed to a fund in the early years of membership compared to later years. A formulaic approach does not take account of the years in which greater contributions were made, often later in a marriage, nor the effect of contributions over many years of marriage which may have diluted initial contribution⁴⁸

The Full Court in *Palmer* said:

There is thus in our view no justification in this case to find some relationship between years of fund membership and cohabitation as the husband submits. In a cohabitation of some 17 years where the husband was at all times in military service, it is inevitably going to be the case that the superannuation will be of considerably less value in the early stage of his career and will increase as he advances through the ranks. In our view there is no reason to apply a formula which prevents the wife's contributions from being given their full effect.

We do think it appropriate however to reflect the husband's initial contribution. We think that this can best be achieved in this case by application of the evidence of the value of the husband's superannuation in June 1993. That is done by deducting the sum of \$92,450 from the total value of the husband's superannuation as at 18 March 2009. This would leave a sum of \$771,936 as being the sum representing the husband's interest in the superannuation fund accumulated during the cohabitation of the parties. If the wife's equal contribution, as we have found it, is applied, the wife would be entitled to \$385,968.

The value of the husband's interest is not calculated at the date of hearing, but rather at the date of separation, and he will have the benefit of any further increase in value. In addition there is his Honour's finding, unchallenged, that the wife made contributions to her superannuation interests pre-cohabitation, which is otherwise unaccounted for. To reflect these matters which both benefit the husband, we propose to leave the wife with her modest amount of superannuation without making any adjustment to it.

Thus, when considering both non-superannuation and superannuation assets, the mother will be entitled to a total sum of \$647,527, inclusive of the value of her motor vehicle. From a combined pool of \$1,130,236, the wife will receive 57 per cent. Having regard to her contributions, her income earning capacity and her continuing obligation to support a disabled child, both financially and personally, as well as the relevant matters in s 79(4) and s 75(2), in our view, that outcome is a just and equitable one.

⁴⁷ (2012) FLC 93-514 at paras 71-2

⁴⁸ *M & M* (2006) FLC 93-281 at para 121

The nature, form and characteristics of the fund (the “real nature” described in Coghlan...do not require any further consideration as there will be an order in the wife’s favour which only takes effect when a splittable payment ...becomes payable on behalf of the husband...⁴⁹

The husband was given credit for the full dollar value of his initial contribution to his superannuation of \$92,450 although this was taken into account as a factor in favour of there being no off-setting of the wife's superannuation which was \$26,988. After a relationship of 17 years which produced two children, it is unlikely (in the writer's view) that a court would have dealt with an initial contribution of \$92,450 to a real property, even if they did not live in it, in the same way.

Bishop & Bishop [2013] FamCAFC 138

Cohabitation commenced in 1982. The parties married in 1983, separated under the one roof in September 2006 and physically separated in October 2007. They were aged in their mid 50s at the time of trial and had three adult children.

The wife received inheritances of almost \$300,000 very late in the marriage. She lived in a property valued at \$450,000, purchased entirely by funds advanced by an aunt, who she was required to repay after the proceedings were completed. The parties' property otherwise totalled about \$1.134 million.

The husband had superannuation of \$34,507 and the wife had superannuation of \$96,650. The superannuation entitlements accrued by the wife were largely as a result of a clearing sale of plant and equipment in 2007. The net proceeds of sale were \$121,500, and of this, \$96,500 went to the wife and \$25,000 went to the husband. The wife placed approximately \$66,000 into her superannuation fund for CGT reasons. That contribution was about 2/3 of the current value of the wife's superannuation.

The trial Judge observed that it was "just and equitable" to deal with the superannuation interests separately. However, he only referred to the superannuation interests when determining that an adjustment should be made in favour of the husband on account of s 75(2), and not to otherwise take them into account. He allowed each party to retain their own superannuation interests

The trial Judge regarded the parties' respective contributions to the non-superannuation assets as equal. He made an adjustment of 5% in the husband's favour under s 75(2) on account of the wife's inheritance and her greater superannuation entitlement.

The husband's appeal was upheld in relation to the trial Judge's treatment of the parties' superannuation. The husband argued that the trial Judge erred in failing to give adequate reasons for any contribution findings or adjustments in relation to the superannuation and his discretion miscarried by failing to make any contribution findings regarding the superannuation pool and to consider the superannuation pool as part of the s 79(2) exercise.

The Full Court held that the "separate pool" approach used by the trial Judge was permissible under the Full Court decision in *Coghlan*. The Full Court said:

However, it was also held in Coghlan (at [65]) that where the “separate pool” approach is adopted, and even if a superannuation splitting order is not sought, it will be extremely prudent (in the interests of achieving just and equitable orders) to consider the contributions which have been made under ss 79(4)(a), (b) and (c) by both parties to both their superannuation interests and then to consider whether an

⁴⁹ (2012) FLC 93-514 at paras 75-9

adjustment (or further adjustment) to the interests is required on account of the other factors in s 79(4) (notably the s 75(2) matters).

In the present case his Honour did not, in his reasons, give any consideration to the parties' contributions to their respective superannuation interests...⁵⁰

The Full Court did not refer to the proviso placed by the Full Court in *Coghlan* on dealing with superannuation as a separate pool where it said (at para 61) that there was nothing to prevent a court from including a superannuation interest with the other property if, for example, the interest "is of relatively small value in the context of the value of the other assets in the case." This proviso seems relevant to *Bishop* where the non-superannuation pool was about \$1.135 million plus a sum of about \$200,000 which was the wife's inheritance and not included in the pool. It was received by her shortly prior to separation and not mingled with joint assets. The separate superannuation pool consisted only of the husband's superannuation of \$34,507 and the wife's superannuation of \$96,650.

The case was remitted for re-hearing.

Linch & Linch [2014] FamCAFC 69

The husband was aged 47 years at the time of trial and the wife was aged 43 years. They first cohabitated for 3 ½ years and at the end of that relationship had property orders made in 1999 under state de facto legislation. They resumed cohabitation in 2003, married in 2005, and finally separated in 2009. Their only child was aged five at the time of trial.

At the commencement of the second period of cohabitation in 2003 the wife was in full time employment earning approximately \$50,000 per annum and had \$27,300 in superannuation. The wife also had available to her approximately \$157,000 from the proceeds of sale of her G property, which she put towards the mortgage on the husband's L property and which the parties later withdrew in part for various purposes, including improvements to the L property.

In 2003 the husband was in full time employment with a government agency and had his L property. According to notations to the 1999 Orders, the L property was purchased by the parties in 1998 for \$315,000 with a mortgage of \$252,000, and as at the date of the 1999 Orders the agreed value of the property was approximately \$350,000. The husband had been accruing superannuation since 1984.

As at June 2009, shortly after the second separation, the "withdrawal benefits" payable to the husband from his two funds were \$196,573. However, circumstances changed and the agreed value of the husband's current pension as a future income stream was \$1,265,791 as at July 2011. Several years prior to separation, arising from the husband's work as a public servant there were a series of vexatious complaints against the husband. The wife was stalked. The husband conceded the wife suffered considerably from the stress, which caused the parties to sell their home, move twice and ultimately led to the parties' separation.

In 2009 the husband applied for sick leave and in 2011 he retired, assessed as suffering "chronic adjustment disorder with some elements of post traumatic stress disorder". He started to receive his pension of \$70,504 per annum and received lump sums being a non-preserved superannuation payment of \$50,875, along with accumulated long service and annual leave entitlements of \$74,630.

The husband had the ability to commute a "prescribed part" of his pension, the maximum of which was calculated in accordance with the workers compensation rates in effect at the date of his retirement pursuant to the *Workers Compensation Act 1987* (NSW). However, the

⁵⁰ [2013] FamCAFC 138 at paras 47-8

Federal Magistrate found the husband had a “limited expectation of any significant lump sum by way of commutation”.

The husband commenced in the fund in 1984, approximately 19 years prior to the commencement of cohabitation. The parties cohabited for less than six years, and then there were another two years or so of the husband being a member of the fund before, in 2011, he received the lump sum of non-preserved superannuation and started receiving his pension.

The Federal Magistrate noted that only the lump sum value of the husband’s pension scheme (not the income stream itself) could be the subject of a sum certain monetary splitting order. The pension payment was referable to an amount equal to 72.75% of the husband’s final salary. The husband could apply for that percentage to be increased by not more than 12.25% of his final salary.

The Federal Magistrate set out an extract from *Schmidt & Schmidt* [2009] FamCA 1386 in which Justice Watts discussed the difficulty of assessing contribution-based entitlements to a superannuation interest such as a pension. In *Schmidt* the wife was found not to have made any direct contribution to the part of the husband’s pension which related to him being hurt on duty. However, she had contributed to the level of salary which the husband received at the time that he was hurt on duty. She had made sacrifices to enable him to pursue his career (such as supporting him to move twice) and there were additional burdens imposed on her particularly around the time of the birth of the first child when the husband was away from home because of his promotion.

The Federal Magistrate assessed the wife’s contributions to the husband’s present pension entitlement at 15%, being \$189,868. However, given the increase in the wife’s superannuation during cohabitation and post-separation by approximately \$50,000, the Federal Magistrate determined that there should be a small reduction in the wife’s entitlement to reflect the husband’s contribution to the wife’s superannuation. Thus, on the basis of contributions he determined to make a splitting order in relation to the husband’s superannuation entitlement in the sum of \$175,000 in favour of the wife.

The Federal Magistrate noted the uncertainty about the husband’s future employment and said there was no basis for any adjustment to superannuation on account of s 75(2) factors.

The wife needed a payment of \$243,164 to make up \$275,092 (being 55% of \$500,168). Along with the superannuation splitting order in her favour, the Federal Magistrate considered such orders were just and equitable in the circumstances.

The Full Court said:

It must first be acknowledged that the pension that the husband now receives is different from the pension he would have received if he had not been retired from the Government Agency on the basis that he was. The pension he would have received was apparently valued at approximately \$500,000 when he was a contributing member and not in receipt of a pension...but became a pension valued at in excess of \$1,200,000 as a result of his retirement. Importantly, the latter is not primarily based upon the amount of time the husband has been a member of the Fund. As was referred to in the passage from Schmidt cited by his Honour at [114], it is based on three factors, namely:

- *the husband being [injured]*
- *the circumstances in which the husband was [injured]*

- *the amount of the husband [sic] salary at the time that he was [injured] ...*

However, as was also said in Schmidt, and applying that here, it is beyond doubt that “the amount of the husband’s salary has a significant connection to the amount of time the husband has been with the [Government Agency]”. Thus, the length of time that the husband was a member of the Fund, and particularly the length of the period pre-cohabitation as compared with the period of cohabitation, is still highly relevant.

There is no doubt that the wife made relevant contributions during cohabitation, and his Honour correctly referred to them. There is also no doubt that the wife was affected by the events post-2005 which led to the husband commencing sick leave in May 2009, but when that is balanced against the fact that it was the husband who was injured and the circumstances of that, and the husband’s total period of membership (and contribution) to the Fund, which included 19 years pre-cohabitation membership compared with less than six years of membership during cohabitation, it is difficult, if not impossible, to discern how his Honour arrived at 15% as the wife’s contribution-based entitlement to the husband’s pension entitlement.⁵¹

The Full Court noted that nowhere did the Federal Magistrate refer to, and, in its view, more importantly, take into account the impact on the husband of that finding of 15%. That impact was the permanent reduction of the husband’s future income. The Full Court said:

However, even if we are wrong about a lack of adequate reasons in making the finding of 15%, that finding becomes relevant to the assessment of the s 75(2) factors. As submitted by the husband, the effect of a 15% reduction in the value of the pension is to permanently reduce the fortnightly pension by a significant amount, thereby affecting the husband’s future income. However, to repeat, his Honour does not refer to this in his reasons let alone appear to take it into account.

Equally, there is a lack of any consideration by his Honour of the other side of the coin. In other words, the 15% entitlement of the wife (less an amount to take into account the husband’s contribution to the wife’s accumulated superannuation interest) results in the wife being entitled to \$175,000. There is no doubt that what the husband is receiving is in effect an invalidity pension in the payment phase and it is considered an unrestricted non-preserved fund.... As such, the husband submits, and this is supported by the evidence of Mr K... that the wife can receive her entitlement in “cash”, and the amount does not have to be paid into or, more importantly, be retained in a superannuation fund of her own. His Honour of course made a traditional splitting order, but this was explained by Mr K as a requirement of the trustee of the fund ... In any event, the fund is able to pay out the wife directly in “cash”, and the point is that the husband does not have the same opportunity; as his Honour found at [52] “... the husband has a limited expectation of any significant lump sum by way of commutation.”⁵²

The Full Court allowed the appeal and remitted the matter for rehearing.

Winn & Winn [2011] FamCA 501

The trial Judge refused to accept a valuation of the husband’s superannuation interests under the FLS Regulations. The valuation assumed that the husband, aged 58 years, would live to approximately 80 years and the pension would continue until that time. The medical evidence was that, at best, he would live until his seventies or perhaps a further five years. The valuation under the FLS Regulations was \$774,265. Johnston J took the mid-point of

⁵¹ [2013] FamCAFC 138 at paras 58-60

⁵² [2013] FamCAFC 138 at paras 63-4

the single expert's calculations based on age 65 and age 70 which gave a figure of \$383,534.

Johnston J declined to make a splitting order as:

1. There was ample non-superannuation property to do justice and equity without a splitting order.
2. The husband's pension was his only source of income and was reduced by a split.
3. The wife had significant superannuation and well-paid income.

It is useful to remember, although not stated by the Judge, that as the superannuation was not being split, using the valuation under the FLS Regulations was not mandatory.

Marello & Marello [2013] FamCA 254

The parties disagreed as to how the wife's interests in the parties' self managed superannuation fund ought be treated. Many years remained before either party's interest could vest. The wife sought that her interest be rolled-over to the husband and that she be removed from involvement in the fund. The husband sought that the fund remain as it was. There were no details in the judgment as to what the assets of the SMSF were and why the SMSF could not be split or the wife's interest rolled out.

Murphy J found that it was not just and equitable for the wife's superannuation interest to be split and transferred wholly to the husband and for the wife to receive tangible assets instead. Murphy J's reasons were:

...The wife's current superannuation interest cannot be accessed until she satisfies a vesting event - something unlikely to occur in the usual course of events for well over ten years. The same can be said of the husband's superannuation interest. Other statutory restrictions apply to the manner in which superannuation interests can be dealt with while they remain as superannuation. Tangible assets of similar amount can, of course, be dealt with as the legal and equitable owner of them might please. Further, it ought not necessarily be assumed that the valuation (or, more accurately, "amount") of a superannuation interest is represented by tangible assets of the same value (although no submissions were received on this point).

Thus, it can be seen how the husband would argue that it is unjust and inequitable for him to receive a superannuation interest with an attributed amount of \$137,220 in exchange for the wife receiving tangible assets to the same amount. There is validity in that argument.

However, the resolution of that issue is, as with all relevant issues within the s 79 process, to be determined by reference to what is just and equitable.

A number of factors inform that decision in this case. First, is the plethora of matters upon which the parties disagree and have since separation disagreed – many of which can, on any view, be seen as of the most trivial kind. There is high conflict between them and it seems unlikely to abate. There is a need, as s 81 dictates, to bring the financial relationship of the parties to an end. In this case that need finds acute representation in the self-managed superannuation fund and all the more so given the length of time until relevant vesting events can occur. The wife will, pursuant to my orders have the predominant care of the children, in particular, D. She has a need for tangible assets. I assess the husband's earning capacity to be greater. I assess the Husband to be in a better position to "earn his way out of" the financial

*consequences that separation brings. I assess the wife as having a greater need for immediate tangible assets than the husband.*⁵³

On contributions the wife was entitled to 55% of the assets. A further adjustment of 5% was made in her favour for s 75(2) factors.

Mortensen-Healy & Healy [2013] FamCA 378

The parties had net assets of \$43,774 and superannuation of \$331,900. The total net value of the parties' assets and superannuation was \$375,674.

The husband's overall entitlement to the pool was held to be 85% and the wife's was 15%. A division of 85% equated to \$319,323 and 15% equated to \$56,351.

Neither party sought superannuation splitting orders so they had not provided the trustee of the husband's superannuation fund with procedural fairness. Austin J ordered that each party retain their own superannuation interests. This meant that the wife received the bulk of the non-superannuation. Austin J said:

The consequence of the husband retaining his superannuation interest is that the bulk of his entitlement must rest in that superannuation interest, which will not be available to him for use, other than in the case of manifest hardship, until his retirement. He will have little or no equity in alienable assets.

*The husband wishes to retain the former matrimonial home, but he realised the parties' financial position may not permit such an outcome. The husband may have access to funds of family members and friends that will enable him to pay out the mother's interest and thereby keep the former matrimonial home. If he does not, and cannot extend the mortgage for that purpose, then it will be necessary for the former matrimonial home to be sold for the wife to be paid her proper entitlement.*⁵⁴

Panagakos & Panagakos [2013] FamCA 463

The husband was 52 years of age and a public servant. The wife was 47 years of age and ran a personal services business. The parties married in 1991 and separated in December 2007 under the one roof. They divorced in May 2009 and physically separated in April 2011, after a relationship of about 16 years.

Of the net assets of \$2.25 million, about \$800,000 was in the form of superannuation and \$1.4 million was in the form of non-superannuation assets.

A single expert prepared a report regarding the husband's B Superannuation Scheme interest. In summary, the expert's evidence was:

- The value of the husband's interest as at 30 June 2012 was \$800,033.
- His interest had two components: a funded component made up of his contributions, the productivity contributions by his employer and interest, and an unfunded component, which was his entitlement to an indexed pension for life, provided he met qualifying conditions. Any indexed pension was paid out of Consolidated Revenue. The dollar value placed on that component was in effect an actuarial calculation of the value of that entitlement.

⁵³ [2013] FamCA 254 at paras 111-4

⁵⁴ [2013] FamCA 378 at paras 177-8

- If a splitting order was made, the wife in effect became a member of the fund in her own right. The trustee established the wife's fund, called an "associated deferred pension entitlement" and made a consequential reduction to the husband's entitlement in the fund.
- When the wife met a condition of release she became entitled to the benefit of the two components of her fund. However, unlike the husband who could elect to take the funded component as a non-indexed pension, the wife could only take that component as a lump sum. Like the husband, she had to take the unfunded component as an indexed pension for life.
- The wife could not roll her funded component out of the super fund until she met a condition of release (which might be 60 years of age).
- By contrast, the husband was able to retire before his statutory qualifying date (at 55 years and 11 months) and "receive a different but beneficial treatment of his termination benefits."

Both parties agreed that there should be two pools. Loughnan J adopted this approach.

Loughnan J found that the husband could access his superannuation in a little under 4 years whereas the wife had to wait 13 years. The husband was more likely to achieve a self-funded retirement, as contributions would continue to be made to the funded part of his entitlement and the unfunded part would continue to grow due to years of service and increases in his salary. By contrast, the wife could not contribute to the funded part of her interest and there would be no significant increases in her unfunded entitlement.

The wife did not seek a superannuation splitting order. She wanted to retain the home. This was easier to do if she did not receive a superannuation split.

Loughnan J addressed the various types of contributions in turn:

- Section 79(4)(a):

The husband's superannuation interest stood at \$47,538 as at the date of the marriage. As is explained by the expert... a component of the husband's retirement benefit, the indexed pension, is not a function of contributions. In fact no contributions are made to that component. It is a benefit, if the husband qualifies by meeting the terms of the fund, funded from consolidated revenue and quantified by reference to the husband's years of membership of the fund and his final salary. Thus the interest is more than is usually the case, an incident of the husband's employment.⁵⁵

- Section 79(4)(c) contributions:

This provision deals with contributions to the family and not to a specific asset. The findings above apply equally to superannuation. The wife's role no doubt made it easier for the husband to retain full-time employment throughout the marriage. The wife took time off after the birth of each child and had part-time employment throughout the marriage. With some assistance from the husband's parents, the wife allowed the husband to focus on his work.⁵⁶

⁵⁵ [2013] FamCA 463 at para 163

⁵⁶ [2013] FamCA 463 at para 165

Despite referring to the importance of the wife's direct contributions to the husband's superannuation, Loughnan J did not give much weight to them. The husband contended that he made a 65% contribution to superannuation and 55% to the other assets. The wife's case was that her contributions overall were 55% compared to 45% by the husband. Loughnan J considered that the husband was close to the mark. He said that he had not made mathematical calculations but the parties were together for about 17 of the 28 years of his contributory service. There were no non-financial contributions to superannuation. The husband's interest was largely related to his employment. The husband made about twice the contributions of the wife. The wife had her own modest fund.

The contributions to superannuation were held to be in the proportions of 65% by the husband and 35% by the wife. This approach harks back to the pre-superannuation-splitting days when the non-member often received little or no benefit on account of the member's superannuation as the non-member had made no direct financial contribution to it.

In relation to s 75(2) factors, Loughnan J made an adjustment of 5% in favour of the wife. This meant that the non-superannuation (save for the moneys held on trust) should be divided equally and the superannuation split 60% to the husband and 40% to the wife. However, superannuation did not benefit the wife as much as it did the husband. Loughnan J found that it was appropriate for there to be a superannuation splitting order in favour of the wife in relation to the husband's superannuation interests, but not fully in superannuation. He gave one half of the wife's entitlement to a superannuation split as superannuation and made a discounted adjustment for the balance out of non-superannuation assets.

The wife was entitled to about \$320,000 in superannuation. She already had \$2,000 and therefore the adjustment required was about \$318,000. A splitting order based on a percentage aimed at achieving half that adjustment was \$159,000. A percentage approach was preferable as there was no up to date valuation of the superannuation. This was rounded up to 20%, so that 20% was the percentage of the husband's superannuation which was split for the purposes of s 90MT(1)(b)(i).

Loughnan J took into account that the wife was receiving an adjustment for superannuation almost immediately when she would, in the normal course, have had to wait 13 years for it. Even then, most of it would be in the form of a small increment to a modest pension. Over 13 years, \$100,000 at 4 per cent would realise over \$155,000. He found that a proper discount for cash was achieved if the adjusting amount in non-superannuation assets was marginally more than that, \$110,000. The wife received \$110,000 of tangible assets instead of \$159,000 of additional superannuation.

This approach was arguably more favourable to the husband than to the wife. The discount was because the wife would receive the cash now rather than wait 13 years for it, but the husband only had to wait for a little under 4 years. The adjustment did not appear to take into account his earlier eligibility.

The splitting order for the balance of the wife's entitlement was for a percentage rather than a dollar amount because the valuation was 11 years out-of-date. A percentage order was made so that the trustee had to make the necessary calculations of the wife's entitlement based on the current superannuation.

Roberts & Pedrana [2012] FamCA 224

The husband had \$31,000 of superannuation and the wife had \$39,000. Neither party sought a splitting order. After referring to *Hickey and Coghlan*, Cronin J said:

*The fact that it is a different species can be recognised by its very nature. It is not an entitlement in the sense of cash and in many cases, such as the one here, it has little apparent value to the parties for many years to come. Further, the unusual feature of this case is that the bankruptcy legislation treats it as a different species of property by excluding it from the bankrupt's estate. In my view, the respective superannuation interests should be treated differently and should not be added to the other assets.*⁵⁷

He assessed the direct and indirect contributions to the superannuation as being the same as contributions to the non-superannuation but "consciously avoided" taking it into account when considering s 75(2).

Forster & Forster (No. 7) [2013] FamCA 522

The husband was 61 years of age and retired. He lived on a U.S. government pension which appeared secure. The wife was 45 years of age, and a healthcare worker on a very modest income. The parties married in 1989 and separated in 2007.

Cronin J found that there was no evidence that entitled him to conclude that the husband's pension was a superannuation interest under Australian law. However, the pension could not be ignored as the wife followed the husband through his government career for many years and endured various hardships.

The trustee of the U.S. government pension could not be subject to Family Court orders because the trustee was not a party to proceedings nor bound by Australian law. An order affecting the husband's superannuation entitlement, if that was what it was, could not be made.

In relation to the value of the husband's pension and how it should be taken into account, Cronin J said:

A number of approaches arose before 2002 many of which were where the Court took into account the fact that a party had a superannuation interest and offset it in some way against the non-superannuation assets. That step required some sort of valuation of the interest and I am not comfortable to use the wife's actuary. Apart from anything else, the rules have not been followed in relation to expert evidence, there is no evidence about the American legal position nor whether the actuary has the expertise to do what he was doing.

*Even if I could estimate its value I do not know what the nature, substance and form of the interest is. It is safer, in my view, to treat it as a secure income stream and one from which the wife has no similar entitlement or benefit.*⁵⁸

Cronin J ultimately had regard to the husband's pension as a s 75(2) factor. He did not specify the percentage amount of the loading.

Raine & Creed [2013] FamCA 362

The husband sought a splitting order but this was opposed by the wife. The Family Court decided not to make a splitting order as the husband had a present source of income, the wife also had some income and each party contributed to their own superannuation scheme.

⁵⁷ [2012] FamCA 224 at para 407

⁵⁸ [2013] FamCA 522 at paras 56-7

The court considered that it was preferable for the superannuation to be taken into account in adjusting the overall pool of assets. The wife said that she had \$10,000 in superannuation at the commencement of cohabitation, but the bulk of the parties' superannuation entitlements arose during the relationship and were acquired from income derived during the marriage. The court took into account the wife's initial contribution of \$10,000 as a contribution made from funds acquired prior to the relationship. It did not consider it necessary to make any further adjustment to the overall distribution of property in respect of superannuation issues, assessing contributions as equal. The wife was left with her \$66,500 of superannuation and the husband with his \$189,500.

***Werner & Werner* [2013] FamCA 341**

The Family Court concluded that the pool of net property, "add backs" and superannuation interests should notionally be divided as 66% to the wife and 34% to the husband. In relation to the superannuation interests, the husband wanted a cash payment from the wife, rather than a superannuation split, because he needed the money immediately and could not wait 10 years until he retired. The husband's own superannuation interest was only \$700 of the total \$486,886 of superannuation in the pool. He required a further \$164,841 of superannuation to have 34% of the total superannuation.

The court said that there was absolutely nothing unjust and inequitable about the husband receiving his percentage share of the superannuation interests by way of a splitting order. That way he was in no significantly different position with respect to the distribution of that pool than the wife. The court also took into account the fact that the husband was 56 years of age so that he had already reached his preservation age. Once the split occurred, the husband was able to access all of his superannuation, albeit with some taxation consequences, if he retired before he turned 60. Alternatively, he could access some of his superannuation by way of a transition to retirement pension. The court was satisfied that the husband did not have to wait 10 years to receive the benefits of the superannuation split.

***Bishop & Bishop* [2013] FamCAFC 138; (2013) FLC ¶93-553**

The Full Court of the Family Court allowed the husband's appeal regarding the parties' contributions to their superannuation entitlements. In remitting the matter for rehearing, the Full Court found that the Federal Magistrate failed to make findings regarding the parties' contributions to their superannuation entitlements. The Federal Magistrate adopted a "separate pool" approach as suggested by the Full Court decision in *Coghlan & Coghlan* (2005) FLC ¶93-220; [2005] FamCA 429 but did not follow *Coghlan* as he did not make any findings concerning the parties' contributions to their superannuation interests which had a relatively significant value in the overall context of the parties' assets.

***Benford & Benford* [2012] FMCAfam 8**

The Federal Magistrate decided not to make a superannuation splitting order. In deciding how to divide the assets between the parties, he took a "two-pool" approach. That is, he attributed to the wife an overall entitlement that was 50% of the value of the superannuation and 60% of the non-superannuation assets. The court said that did not mean that there had to be a superannuation splitting order of 50%, or at all, especially if it meant that the wife would not be able to retain the former matrimonial home. The court also noted that while one of the policy reasons behind the superannuation splitting law was to provide equity in relation to separated parties' future retirement security, the total value of the parties' superannuation was insufficient to provide any long-term security in retirement for either of them.

Conclusion

Recent cases dealing with separation both in the Full Court and by trial Judges indicate that despite the superannuation splitting regime having operated for over 12 years, there are still

many uncertainties about the application of s 79 to superannuation. These issues include how initial contributions to superannuation should be dealt with, the assessment of indirect contributions to superannuation and whether s 75(2) factors are applied to superannuation.

It is important not to forget indirect contributions to superannuation or to assess s 75(2) factors. If superannuation is dealt with as a separate pool these may be forgotten or the assumption may be made, probably incorrectly, that it is double-dipping to assess s 75(2) factors in relation to superannuation, in addition to assessing contributions.