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FAMILY LAWYERS

SUPERANNUATION

Superannuation Splitting Agreements and orders

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Introduction

The *Family Law Legislation Amendment (Superannuation) Act 2001* ("the FL Superannuation Act") and associated regulations started on 28 December 2002. This paper looks at the practicalities of drafting orders and superannuation agreements, not valuation of superannuation interests and what percentage split should be made to the non-member.

Part VIIIB *Family Law Act 1975* (Cth) (FLA) applies both to property settlements under Pt VIII FLA between married couples and to Pt VIIIAB between de facto couples, except in Western Australia (although there are proposals for this to change). From 23 November 2018 Pt VIIIB FLA was renumbered. This paper uses the new numbers for the sections except where the numbers appear in a quote, in which case the new number is inserted in square brackets.

Valuing superannuation

This paper does not deal with the complexities of valuing superannuation, but refers to it briefly as it is the first step in the process of dealing with a superannuation interest by way of a court order or a financial agreement.

In most cases, parties only need to obtain a recent member's statement to value their superannuation (reg 31(2) *Family Law (Superannuation) Regulations 2001*) (FLS Regulations). This is fairly accurate for most interests in accumulation funds.

Further steps are only required if:

- orders are sought (by consent or otherwise) which deal with a superannuation interest;
- a court order is made requiring further steps;
- the interest is not in an accumulation fund e.g. it is in a defined benefit fund or self-managed superannuation fund;
- depending on income, the member's statement is more than say, 6 months old.

There are various methods of valuing an interest. These are:

- for an accumulation interest in the growth phase - a member's statement is sufficient (reg 31(2);
- for a defined benefit interest in the growth phase, a valuation by an expert is usually required after completion of the Superannuation Information Form ("SIF"). Some funds which have approved scheme specific factors do the calculations and include the valuation in the SIF. For funds without approved factors, the valuation is under reg 29;
- an interest in a SMSF is valued by such method as the Court considers appropriate (s 90XT(2)(b) FLA). For example, an industrial property is valued by a real estate valuer, noting that the fund's accounts may include values of assets at their purchase price (rather than market value) or as at 30 June in the previous year;
- if superannuation is not being split, the court need not accept the valuation under the Regulations (s 90XT(2)(b) FLA). It can value the superannuation in other ways such as using a variation of the formula.

Nature, form and characteristics of superannuation

Generally, where the superannuation interests of both parties to family law proceedings are accumulation interests, few difficulties are encountered by the Family Law Courts in dealing with them. However, an accumulation interest in the growth or payment phase and a defined benefit interest in the growth or payment phase differ in several important respects. As a result, examining the nature, form and characteristics of a superannuation interest is particularly important when a defined benefit interest is involved.

Those differences include the method by which the ultimate benefit is calculated; the risk to the member inherent in each and, very importantly, the effect of a s 90XT(1)(a) FLA order (an order which allocates a base amount to the non-member spouse). As the Full Court said in *Bulow & Bulow* (2019) FLC 93-885 (at [18]):

> "Each and all of those differences can, and very often do, have a dramatic impact upon the justice and equity of a proposed splitting order and, in turn, its place within just and equitable orders for settlement of property."

Superannuation splitting regulations

The FLA provides for superannuation splitting orders to be made which take effect when splittable payments become payable — that is, when the member spouse satisfies a condition of release. The FLA does not provide for the underlying superannuation interests themselves to be split. That work is usually done by Pt 7A of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations). The SIS Regulations allow the creation of a new superannuation interest in the name of the non-member spouse such that their interest is separated from the interest of the member spouse within the fund.

The Full Court of the Family Court pointed this out in *Bulow* (at [20]):

> "Crucially, however, defined benefit funds are not regulated by Part 7A of the SIS Regulations. It is therefore fundamental to a consideration of any proposed splitting order that the Court consider the governing rules of such funds contained within their specific trust deeds. It is those rules which will determine the effect of any splitting order on the underlying interest within that particular fund. As an example, within a defined benefit fund the fund's rules can dictate that a splitting order has significant effects on the formula by which a member's ultimate entitlement is calculated."

Defined benefit interests vs accumulation interests

The Full Court discussed in *Bulow* the distinction between defined benefit interests and accumulation interests (at [22]-[23], [25]):

> "By reason of the matters just discussed, it is an error both to fail to consider the specific requirements and ramifications of the PSS Deed's provisions and to assume that the effect of a s 90XT(1)(a) order upon the husband's defined benefit interest is the same as it would be if the husband held an accumulation interest. It is also an error to assume that the effect

> of a splitting order for the non-member spouse is the same as it would be in respect of an accumulation interest.
>
> The terms of the scheme-specific PSS Deed will dictate the variables by which the husband's present and future benefit will be calculated subsequent to any mooted splitting order. So, too, the PSS Deed will dictate the nature, form and characteristics of the interest which the wife will acquire subsequent to any such order. The justice and equity of any proposed splitting order cannot be considered without reference to both. Axiomatically, those matters are crucially relevant considerations in the exercise of a trial judge's discretion in the making of a splitting order …
>
> The nature, form and characteristics of the interests held by each of the parties consequent upon the proposed splitting order; the future benefits for each party upon vesting; when the respective interests might vest and the form in which any benefits might (or must) be taken at that time, are all likely to be relevant in assessing the s 75(2) factors. As an example, in this case the husband asserts before this Court that the splitting order made by his Honour restricts the amount he can contribute from salary and, thereafter, his ultimate potential benefit."

The husband had unsuccessfully sought to obtain expert evidence on the effect of a splitting order on his defined benefit interest. Although the parties each had expert evidence as to the value of the husband's interest, the Full Court in *Bulow* said (at [28]):

> "Neither expert provided an opinion on the nature, form and characteristics of the husband's superannuation interest nor how any splitting order sought by the wife (or any other splitting order) might impact upon that interest."

The Full Court concluded that the court needed to have evidence directly relevant to a determination of one of the central issues.

In summary, the differences in the nature, form and characteristics of an accumulation interest in the growth phase or payment phase and a defined benefit interest in the growth or payment phase include:

- an accumulation interest is like a bank account – its value is transparent. By contrast, the value of a defined benefit interest is calculated by reference to a formula;
- the risk to the member of, and the effect of, an order which allocates a base amount to the non-member spouse varies;
- the governing rules of the funds determine the effect of any superannuation splitting order on the underlying interest within that particular fund. A defined benefit fund's rules can dictate that a superannuation splitting order has significant effects on the formula by which a member's ultimate entitlement is calculated.

The justice and equity of any proposed superannuation splitting order can't be considered without reference to the nature, form and characteristics of the interest.

Relevant date of superannuation split

When valuing a superannuation interest, the relevant date is the date at which the value of the interest is determined under the FLS Regulations. It is usually either the date the request for a valuation (the SIF) is signed by the eligible person or it is the date it is received by the fund. In some cases, another date is nominated such as the date of cohabitation or the date of separation. More than one date can be nominated.

What is a superannuation split?

A superannuation split under the FLA is a split of a payment. A superannuation splitting order does not affect the member's interest in the fund, the superannuation split only occurs when the payment is made to the member. The FLA only operates in relation to "payments".

Splitting the superannuation interest itself cannot be ordered under the FLA. Splitting the interest itself occurs under the superannuation legislation and regulations, and under the Deed if the Deed permits it.

If a new interest is created for a non-member spouse, this occurs under Div 2.2 SIS Regulations. The trustee of a superannuation fund can "split" an interest to create a new interest for the non-member or transfer assets to allow the non-member spouse to have an interest in another fund. For a superannuation interest to be split, it must be both:

- in a regulated superannuation fund; and
- an accumulation interest in the growth phase or an allocated pension.

If splitting the interest is possible, the trustee must issue a payment split notice. The notice gives three options to the non-member:

1. A new interest can be created in the member's superannuation fund
2. The interest can be rolled over to a fund nominated by the non-member
3. A lump sum can be paid if the non-member spouse satisfies a condition of release, such as retirement or permanent incapacity.

The trustee can create a separate interest for the non-member as at the operative time while waiting for the return of the payment split notice (reg 7A.03B(1)) SIS Regulations.

The trustee must be served with:

- the superannuation splitting order
- a notice under reg 72 giving details about the non-member.

Types of superannuation splitting orders

There are four types of superannuation splitting orders but the most common are called type (a) and type (b) orders. In type (a) orders a lump sum is set aside within the member's fund for the non-

member. The lump sum is calculated on the basis of a dollar figure known as the “base amount”. The base amount is adjusted over time and the non-member's interest grows independently of the member’s interest. The member can make contributions without affecting the base amount.

In type (b) orders the non-member is paid a certain percentage of each splittable payment. They are appropriate when superannuation is in the payment phase. The "payment phase" means that the member is receiving a superannuation pension or has met the conditions of release and is entitled to receive a pension or lump sum.

Procedural fairness

Before a superannuation splitting or flagging order is made there must have been procedural fairness to the trustee (s 90XZD FLA). This means that the trustee had prior notice of the specific order sought and had the opportunity to be heard about the order before it was made. Notice of an intended order usually occurs by serving a copy of the proposed order on the trustee. If the terms of the proposed order change, further notice to the trustee is usually required. Procedural fairness must also be given in relation to superannuation provisions in financial agreements.

The FLA does not define "procedural fairness". It appears that a trustee is required to be given reasonable notice of any intended orders relating to the superannuation fund and be given an opportunity to be heard in respect of them. If procedural fairness is not accorded there is an error of law justifying an appeal.

Generally, the phrase "procedural fairness" has a similar meaning to "natural justice" and "due process". In a case dealing with administrative law not family law, the High Court held that there is a common law duty to act fairly in making decisions which affect rights, interests and legitimate expectations (*Kioa v West* (1985) 125 CLR 550, 584 per Mason J).

Orders made without notice to the trustee are voidable, so they are valid until they are set aside (*Fatt & Fatt* [2004] FMCA fam 254).

Although it was not an issue raised by the parties, the Full Court of the Family Court in *Pandelis & Pandelis* (2019) FLC 93-885 raised the problem that the trustee had not been given procedural fairness and required that the parties rectify this before fresh orders were made.

Court requirements - Superannuation splitting rules

Rule 10.16 *Family Law Rules 2004* provides:

"Notice to superannuation trustee

(1) This rule applies in a property case if a party intends to apply for a consent order which is expressed to bind the trustee of an eligible superannuation plan.

(2) The party must, not less than 28 days before lodging the draft consent order or filing the Application for Consent Orders, notify the trustee of the eligible superannuation plan in writing of the following:

(a) the terms of the order that will be sought to bind the trustee;

(b) the next court event (if any);

(c) that the parties intend to apply for the order sought if no objection to the order is received from the trustee within the time mentioned in subrule (3);

(d) that if the trustee objects to the order sought, the trustee must give the parties written notice of the objection within the time mentioned in subrule (3).

(3) If the trustee does not object to the order sought within 28 days after receiving notice under subrule (2), the party may file the application or lodge the draft consent order.

(4) Despite subrule (3), if, after service of notice under subrule (2) on the trustee, the trustee consents, in writing, to the order being made, the parties may file the Application for Consent Orders or lodge the draft consent order.

Note: Eligible superannuation plan is defined in section 90MD [now s 90XD] of the Act."

Rule 14.06 *Family Law Rules* provides:

Notice to superannuation trustee

(1) This rule applies in a property case if:

(a) a party seeks an order to bind the trustee of an eligible superannuation plan; and

(b) the case has been listed for the first day before the Judge.

(2) The party must, not less than 28 days before the first day before the Judge, notify the trustee of the eligible superannuation plan in writing of the terms of the order that will be sought at the trial to bind the trustee, and the date of the trial.

(3) If the court makes an order binding the trustee of an eligible superannuation plan, the party that sought the order must serve a copy of the order on the trustee of the eligible superannuation plan in which the interest is held.

Note 1: Subrule 7.13(2) sets out how to prove service of a copy of an order.

Note 2: Eligible superannuation plan is defined in section 90XD of the Act.

Rule 24.07 *Federal Circuit Court Rules 2001* provides:

"Service of application or order for superannuation interest

(1) This rule applies if, in an application, response or reply, a person:

(a) seeks a flagging order or splitting order in relation to a superannuation interest under Part VIIIB of the Family Law Act; or

(b) applies under section 79A or 90SN of that Act for an order to set aside an earlier order made in relation to a superannuation interest.

(2) The person must, immediately after filing the application, response or reply, serve a sealed copy of that document on the trustee of the eligible superannuation plan in which the interest is held.

(3) If the court makes a flagging order or splitting order or any other order in relation to the superannuation interest, the applicant must serve a copy of it on the trustee of the eligible superannuation plan in which the interest is held."

Completing the financial statement

Part J Superannuation

You must attach a completed Superannuation Information Form for each superannuation interest if you are seeking an order for property settlement.

GROSS VALUE

4 Interest in superannuation

NAME OF SUPERANNUATION PLAN 1

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TYPE OF INTEREST

- ☐ Accumulation interest
- ☐ Partially vested accumulation interest
- ☐ Defined benefit interest
- ☐ Self managed fund
- ☐ Eligible annuity
- ☐ Retirement saving account
- ☐ Small superannuation account
- ☐ Percentage only interest
- ☐ Approved deposit fund

NAME OF SUPERANNUATION PLAN 2

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TYPE OF INTEREST

- ☐ Accumulation interest
- ☐ Partially vested accumulation interest
- ☐ Defined benefit interest
- ☐ Self managed fund
- ☐ Eligible annuity
- ☐ Retirement saving account
- ☐ Small superannuation account
- ☐ Percentage only interest
- ☐ Approved deposit fund

NAME OF SUPERANNUATION PLAN 3

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TYPE OF INTEREST

- ☐ Accumulation interest
- ☐ Partially vested accumulation interest
- ☐ Defined benefit interest
- ☐ Self managed fund
- ☐ Eligible annuity
- ☐ Retirement saving account
- ☐ Small superannuation account
- ☐ Percentage only interest
- ☐ Approved deposit fund

TOTAL GROSS VALUE OF YOUR SUPERANNUATION
WRITE THIS ITEM 45 TOTAL AT ITEM 2D ON PAGE 2 OF THIS FORM

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Operative time or date for superannuation split

The operative time or date determines when a trustee must start to recognise the interest of the non-member. The operative time is different from the relevant date. The operative time has a different meaning in different circumstances. It is defined in s 90XD FLA as:

(a) in relation to a payment split under a superannuation agreement or flag lifting agreement - the beginning of the fourth business day after the day on which a copy of the agreement is served on the trustee, accompanied by the other documents required under s 90XI.
(b) in relation to a payment flag under a superannuation agreement - usually either:
    (i) the service time, if the eligible superannuation plan is a self-managed superannuation fund; or
    (ii) otherwise, the beginning of the fourth business day after the day on which the service time occurs (both (i) & (ii) are under s 90XK(1)); or
    (iii) if s 90XLA applies, the time that the payment to the trustee of the new ESP is made (s 90XLA(2)(c)).
(c) in relation to a payment split under a court order, the time specified in the order.

In relation to a superannuation agreement, the operative time is the beginning of the fourth day after the service of the agreement and any other relevant documents on the trustee (s 90XDA(a) FLA).

The Full Court in *Wilkinson & Wilkinson* (2005) FLC 93-222 said that a superannuation splitting order should have an operative time. The parties agreed that this should be the date of the order. The court considered that it should generally be the date of valuation of the interest. This was because the member's interest may continue to grow from the date of valuation to the date the orders are made. The majority's approach is very inconvenient and perhaps less practical for the trustee, but fairer between the parties. In practice, the trustee will object if the operative time is before the date on which the order is served.

Base amount for superannuation split

This term is not defined in the FLA but is used when splitting most interests. A set dollar figure is allocated to the non-member. This represents the non-member's interest in the total value of the superannuation. Adjustments may be made to the base amount before the splittable payment occurs. A payment can also be split by allocating a percentage of the splittable payment to the non-member. The base amount should not be higher than the family law value.

Is the payment or interest splittable, unsplittable or not splittable?

The completed SIF will specify whether a payment is splittable. Section 90XE(1) FLA defines a ''splittable payment'' as any of:

(a) a payment to the spouse;
(b) a payment to another person for the benefit of the spouse. This covers the situation where the member ''rolls over'' the superannuation interest into a new eligible superannuation plan;
(c) a payment to the legal personal representative of the spouse, after the death of the spouse;

(d) a payment to a reversionary beneficiary, after the death of the spouse;
(e) a payment to the legal personal representative of a reversionary beneficiary covered in (d), after the death of the reversionary beneficiary.

A "splittable payment" no longer exists once the superannuation split has occurred (reg 14).

The terms "unflaggable interest", "unsplittable interest" and certain payments which are "not splittable payments" are defined in the FLS Regulations (s 90XE(2) FLA).

An "unflaggable interest" is a superannuation interest in the "payment phase" (reg 10A). In practice, this will almost always be a pension.

An "unsplittable interest" is a superannuation interest with a withdrawal benefit of less than $5,000 (reg 11).

Certain payments to the member are "not splittable payments" (reg 12 to 14Q FLS Regulations). They are usually payments made to the member on the "compassionate grounds" under reg 6.19A(1) SIS Regulations which include:

- if the member is in severe financial hardship as defined by reg 6.01(5) SIS Regulations;
- the ill health of a member or dependant;
- the special needs of a member or a dependant arising from a severe disability.

The SIS Regulations were changed to counter the problem of orders being over-ridden by binding death benefit nominations. Injunctions can still be useful, though.

Growth phase

A superannuation interest is in the growth phase if:

- a condition of release has not been satisfied; or
- a condition of release has been met but no benefit paid; or
- only part of the benefit has been paid, provided that benefit is not a pension.

Superannuation not in the growth phase is described as being in the payment phase.

How a superannuation split works

According to Energy Super (www.energysuper.com.au) a superannuation split occurs as follows:

> "Where a defined benefit has a family law split, the amount payable to the receiving partner is withdrawn from the member's accumulation account first. Any remaining split is offset against the member's defined benefit and accumulates with interest at the three year average crediting rate as a family law offset. On rare occasions where market returns are negative, the offset amount may decrease.

The balance of this offset is then deducted from the member's benefit at the time the benefit is paid. However, if the defined benefit member has funds in an accumulation account, makes additional contributions, or rolls in other super benefits, they can request in writing to have some or all of the offset cleared at any time. With agreement from your employer, you can close your defined benefit account and transfer the remaining amount to an accumulation account. This effectively removes the exposure to the three year average crediting rate. However, you need to think about things like your age, salary, personal circumstances, insurance differences and the expected growth rate of your accumulation account. You will also need to consider the appropriate investment strategy for your accumulation account. You will not be able to transfer back to a defined benefit account at any time in the future, and your entire benefit will be subject to the net earning rates of the investment option your accumulation account is invested in.

Unrestricted non-preserved, restricted non-preserved and preserved benefits are shared between the parties in the same proportion to their share of the overall benefits.

The tax-free and taxable components of the superannuation benefit are calculated immediately before the family law split, and divided between the member and the receiving partner in the same proportion.

No tax is payable when a superannuation benefit is split, unless the receiving partner satisfies a condition of release and elects to receive the entitlement in cash."

Creation of new superannuation interest under the superannuation regulations

When the payment split is made, an interest will be created for the non-member spouse in a regulated superannuation fund or an Approved Deposit Fund ("ADF"). It can be done either at the non-member spouse’s request or at the trustee’s initiative. Part 7A of the SIS Regulations gives three options:

1. the creation of a new interest;
2. the transfer or roll over of the interest;
3. the payment of a lump sum where the non-member spouse has satisfied a condition of release (e.g. reaching retirement age).

Part 7A of the SIS Act contains additional operating standards for regulated superannuation funds and ADFs (SISR reg 7A.02). Failure to observe these standards constitutes an offence (SIS Act s 34) and puts the complying status of the fund at risk.

The amount payable to the non-member spouse is calculated in accordance with reg 45A, 45B, and 45D(3) and (4) of the FLS Regulations. The FLS Regulations require that at the time of payment, the amount to be paid to the spouse is the base amount stipulated in the court order or superannuation

agreement adjusted with interest from the operative time up to the payment date. The interest rate applied to the base amount is determined by the Australian Government Actuary and is published in the Commonwealth Gazette. The rate is 2.5% above the percentage change in the original estimate of full-time adult ordinary time earnings for all persons in Australia, as published by the Australian Bureau of Statistics during the year ending with the November quarter immediately before the beginning of the adjustment period.

The rates for the current and the previous two financial years are:

- 2020/2021 – 5.7%
- 20218/2020 – 4.8%
- 2018/2019 - 4.9%

The actual scheme earning rate has no relevance in determining the interest rate to be applied. It is irrelevant if the scheme has negative earnings between the operative date and the payment date; interest is still paid on the base amount at the rate set by the Australian Government Actuary.

What is a superannuation flag?

A flag is a type of injunction on the trustee of a superannuation fund. The trustee cannot make any payments or transfers in relation to that interest if a flag is in place. A flag only applies if the interest is in the growth, not the payment phase. A flag can be imposed by agreement (s 90XL FLA) or by order (s 90XU FLA).

If a payment flag is in place, the trustee must notify the non-member and the member within 14 days of a splittable payment becoming payable (i.e. on satisfaction of a condition of release). The trustee cannot make a splittable payment unless the flag is lifted either by a court order or a "flag lifting agreement". Splittable payments include most payments to a member. Payments for temporary incapacity or hardship and payments to children are not splittable payments.

A flag does not prevent the member making decisions about investment options and life insurance. The interest can, therefore, still be eroded by high insurance premiums or risky investment decisions.

A payment flag survives the death of either spouse.

When to flag superannuation

A payment flag is mainly used when a condition of release is imminent and the value of the superannuation will not be clear until the superannuation is paid out. It is usually imposed on a defined benefit scheme, but can also be used with a partially vested accumulation interest (e.g. a scheme which provides incentives such as bonuses for employees). It can also be imposed on an

interest in an accumulation fund if the member has or will soon meet a condition of release, to prevent either dissipation of the fund or the member electing to receive a pension rather than a lump sum.

The effects of a flagging order are set out in s 90XU(1) FLA. A flagging order:

- directs the trustee not to make any splittable payment without the leave of the court
- requires the trustee to notify the court, within a period specified in the order, of the next occasion when a splittable payment becomes payable in respect of the interest.

The court may take into account, in deciding whether to make a flagging order:

- such matters as it considers relevant
- in particular, the likelihood that a splittable payment will soon become payable in respect of the superannuation interest (s 90XU(2) FLA).

A flag may be appropriate if:

(a) the member is close to or over a condition of release
(b) there is a chance that the non-member will not achieve a just and equitable settlement, e.g. the member elects to receive a pension rather than a lump sum
(c) the member may terminate employment and put the superannuation into a less accessible form e.g. deferred annuity.

Matters relevant to whether a flagging order should be made include:

1. The length of time before a splittable payment will be made. The closer this event is, the more likely a flag order might be made. The longer the period of time, the less likely a flag order would be made. The longer a flag is in place, the greater the likelihood of the parties losing contact with each other and the court. Section 90XU(2) FLA refers to whether a splittable payment will be made "soon".

2. The circumstances of the parties. Section 81 FLA requires the court to make an order which achieves finality but only if it is "practicable". Section 81 FLA must be balanced against s 90XU FLA.

3. The type of interest. A flag order is more suited to defined benefit interests or partially vested accumulation interests than fully vested accumulation interests. A fully vested accumulation interest has a readily ascertainable value. There is little to be achieved by a flagging order unless the member is about to meet a condition of release.

4. The circumstances of the member. If payments are made in certain circumstances, they may not be protected by a flag order. The non-member may, however, be prepared to take a chance that they may receive more rather than accept a certain but lesser sum under a superannuation splitting order. An imminent event which may impact on the value of the superannuation will increase the likelihood of a flag order. The most common situations are:

    - Proposed resignation;
    - Possible redundancy;
    - Possible invalidity; or
    - Terminal illness.

But beware of not splittable payments and unsplittable payments, which are defined in regs 12 to 14Q and reg 11 respectively of the FLS Regulations.

***O'Shea & O'Shea* (1988) FLC 91-964**

This case pre-dated the 2002 amendments, so a flagging order was not possible. Instead, the proceedings were adjourned under s 79(5) for 20 years. The wife had the 6 youngest of 7 children living with her. There was only $12,000 of non-superannuation. The husband was 39 years old and had superannuation entitlements of $90,000 after estimated tax. At age 53 he was entitled to $227,000 and considerably more at age 60.

***BAR & JMR* (2005) FLC 93-231**

A flag was imposed pending a pension becoming payable at which time the pension payments would be split between the parties. The flag was expected to operate for 7 years but it may operate longer. Justice Young did not look at the effect of s 90MU(2) FLA (now s 90XU(2) FLA).

***Zoller & Zoller* [2012] FamCA 47**

The wife lived in Australia. The husband lived in Germany, but was in the Caribbean at the time of the hearing. A substantial proportion of the parties' property was in Australia, but the court was satisfied that there existed the possibility for a substantial part of the parties' property to be withdrawn from Australia unilaterally by the husband. The husband was aware in general terms that the wife was bringing an application for property settlement proceedings. He was due to arrive in Australia in about two weeks. The trustee of the fund had received procedural fairness and did not seek to be heard. It agreed to abide by any court order.

The court was satisfied that there was no undue prejudice to the husband within r 5.12 *Family Law Rules* (which sets out the requirements of an application without notice), but relisted the matter to give the husband the opportunity to be heard. In the meantime a flagging order was made on an ex parte basis.

Silver & Woden **[2016] FamCA 120**

The husband was able to retire approximately one month after the hearing of the wife's application for a flagging order. There had not yet been a valuation of a real property owned by the husband or of the husband's interest in a company, but the wife argued that it was possible that the husband's superannuation interest of $122,400 might be the only property available to meet her claim for a property settlement.

As the husband did not consent to any flagging or restraining order and would not give an undertaking not to dispose of his superannuation, the court found it appropriate to make a flagging order to preserve the property until the proceedings were finally determined.

Self managed superannuation funds (SMSFs)

Members of self managed superannuation funds (SMSFs) must also be trustees of the fund or directors of the trustee company of the fund. If both parties to the marriage are members of an SMSF, an added layer of complexity arises as both parties must continue to be involved in the trusteeship of that fund until the parties are no longer members of the same fund. This may affect decision making during the period between separation and settlement.

The underlying assets may be illiquid or "lumpy", and a strategy may be required to ensure that the interest of one party is able to be transferred to another fund. Assets of the fund may need to be sold if cash for one member's interest to be rolled over into an accumulation fund is required as that member doesn't want to be in another SMSF.

If the SMSF's financial statements show current values of the assets in the fund, these can be used to value the fund. However, the valuations in the financial statements are usually not current; publicly-listed shares may be at their purchase price or as at the previous 30 June, and real estate is usually at its purchase price. In addition, sales and purchases may have taken place, interest or dividends may have been earned and taxation or other expenses incurred since the financial statements were prepared. Valuations may be more costly with SMSFs as accountants and real estate valuers are often required. Expert actuarial advice may be required to consider issues associated with reserves, forgone benefits or unallocated contributions. Legal and accounting advice may be required to assist with the interpretation or construction of the trust deed, and to finalise the relevant resolutions of the trustee.

Care must be taken when dealing with SMSFs as some are non-compliant. If the SMSF is compliant, it is important to ensure that the fund maintains its complying status at all times. If the fund is non-compliant, independent advice may be desirable as to the work and costs required to make the fund compliant. One member may, in practice, have less knowledge of the SMSF and may not have practical control to ensure the SMSF is compliant.

Nevertheless, that member is jointly and severally liable for any tax and other penalties which may be imposed. If that member is leaving the fund, they will probably want an indemnity from the ongoing member. But an indemnity will not be enough if the ATO can't recover from the ongoing member. The outgoing member will still be jointly and severally liable to the ATO for any tax and penalties which relate to the period when they were a trustee.

Professional advice should be sought as to how to deal with any potential tax penalties. See, for example, *Linder* & *Linder* [2013] FamCA 988, *Gabbard* & *Gabbard* [2010] FMCAfam 486 and *Thurston* & *Loomis* [2016] FamCA 318.

CGT concessions may apply to the transfer of assets in specie between superannuation funds. These are useful if a member rolling out their interest into another SMSF. The conditions which must be satisfied to attract CGT roll-over relief because of marriage or relationship breakdown between funds in circumstances where each party is keeping their own entitlement are as follows:

1. The parties are members of an SMSF.
2. An interest in the SMSF is subject to a payment split under the FLA.
3. The trustee of the SMSF transfers a CGT asset to the trustee of another complying fund for the benefit of the leaving party.
4. The transfer is in accordance with an award, order or agreement under s 26-140(2B) of the *Income Tax Assessment Act 1997* (ITAA97) or under s 90XZA FLA.
5. The transfer is in accordance with the terms of a superannuation agreement or order and the transfer is because of marriage or relationship breakdown.
6. As a result of the transfer, the leaving party will have no entitlement in the SMSF.
7. It may be necessary to have cross-splits to ensure that the party who remains a member of the SMSF does not incur a CGT liability as a result of the restructure.

CGT roll-over relief may also be available to payment splits where the parties are not retaining their own interests if the requirements of the FLA, especially s 90XZA FLA, or the SIS Regulations, are met.

***Gabbard* & *Gabbard* [2010] FMCAfam 1486**

The husband dissipated nearly all of the assets of the SMSF without the wife's knowledge or consent. In August 2007, there was $164,936.45 in the SMSF. By 12 January 2009, the balance was only $1,767.23. Federal Magistrate Henderson found that it was a priority that the fund be repaid the sum necessary to make it compliant. There had been two adjournments to enable the husband to do certain things including to reimburse the SMSF, but he did not do so.

The wife relied on the report of an expert setting out the actions required to make the SMSF compliant. These actions were:

- the moneys must be fully refunded
- tax returns had to be prepared for the six non-complying years
- the ATO had to be advised of the husband's conduct and actions, and
- the parties would then await the ATO's decision.

Federal Magistrate Henderson referred to the SMSF's trust deed and found that the wife could be appointed as the delegate of the trustee of the SMSF to do all acts necessary to make the fund compliant. She also appointed the wife as trustee to sell the real estate so that the wife could pay the amount necessary to the fund to make it compliant.

***Callis* & *Callis* [2014] FamCA135**

The parties finalised property matters in December 2002. These orders were set aside in February 2013 under FLA s 79A(1)(b) and (c). The transitional provisions when the superannuation splitting legislation commenced, prohibited the parties from re-opening previous settlements by consent on the grounds of the introduction of the superannuation splitting regime. These parties were able to rely on other grounds to set them aside and a consent order for a superannuation split.

The base amount was determined by the parties to be the amount equal to the value of a real property in Suburb D, Queensland. That sum was to be met by a transfer of the Suburb D property to the wife's superannuation fund.

All costs associated with the transfer were to be paid by the wife. Justice Cronin was surprised at this as the order left only one trustee liable for the costs, being the wife, rather than both trustees.

***Thurston* & *Loomis* [2016] FamCA 318**

Justice Forrest was dealing with an SMSF with which there were substantial issues of non-compliance with legislative and regulatory requirements by the parties who were directors of the corporate trustee of the SMSF.

The parties had withdrawn most of the funds from the SMSF to pay for the development of real property registered in the name of one party and the rest to pay for personal purposes not related to the proper conduct of the fund. A jointly instructed independent accountant gave evidence which was summarised by Forrest J (at [4]) recommending that:

> "… the withdrawals should be treated as loans to members of the fund as a prelude to taking remedial steps so as to reduce the impact of the regulatory consequences of the non-compliance, as far as is possible. Whilst … treating the withdrawals as loans to members does not in itself remedy the non-compliance because they are related party loans and breach the 'in house asset' rules of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation Industry (Supervision) Regulations 1994* (Cth) … if the loans are repaid with interest calculated at the appropriate rate, having regard to guidance set by the Australian Tax Office ('the ATO'), that the issues of non-compliance may be dealt with in a less punitive fashion by the ATO than they might if the non-compliance is otherwise not addressed."

Justice Forrest ordered that funds held in two bank accounts which derived from the sales of real property acquired by the parties during the relationship should be used to repay the SMSF. He also ordered that the independent accountant report the matters to the ATO. He adjourned the delivery of

his judgment until after the interim matters were dealt with and the parties and the judge had been advised of the remaining funds in the two accounts.

***Tippett & Tippett* [2017] FamCA 198**

This is a useful case to refer to when preparing orders to effect a 50%/50% split of a self-managed superannuation fund.

The intention and effect of the orders was explained at paragraph 11 of the Orders:

> "11. That in order to give effect to the superannuation splitting orders contained in Orders 8-10, the intent of which is agreed and acknowledged to divide all assets of the D Super Fund as to 50 per cent to the husband and 50 per cent to the wife in specie, to distribute any tax free components as to 50 per cent to the husband and 50 per cent to the wife and to achieve the appropriate percentage division of assets by reference to their cost base for capital gains tax purposes, upon the Trustee Company giving effect to the splitting order, the husband and wife in their capacities as Directors of the Trustee Company shall forthwith divide within the D Super Fund the assets of the D Super Fund and do all acts and things to attend to the following:
> 11.1. Transfer 50 per cent of all cash held by the fund to an account nominated by the wife; and
> 11.2. Transfer 50 per cent of each individual parcel of shares or equities as historically acquired by the D Super Fund (and presently held) to be transferred to a share trading account nominated by the wife, and the balance to the husband, and for avoidance of doubt such division and transfer to be carried out conformably with the following example:
> Example: Assume that the D Super Fund holds 600 shares in X Limited; 200 purchased for $1.00 per share in 2000 (“the 2000 shares”); 200 purchased for $5.00 per share in 2002 (“the 2002 shares”) and 200 purchased for $10.00 per share in 2005 (“the 2005 shares”). The obligation imposed on the trustee shall not simply be to transfer 50 per cent of the shares in X Limited to the wife’s nominated fund, but to transfer 50 per cent of the shares comprising the 2000 shares, the 2002 shares and the 2005 shares."

Defined benefit funds

Most superannuation interests are accumulation funds. There are rarely valuation difficulties with accumulation funds. Defined benefit funds are decreasing in number. The value of interests in defined benefit funds does not bear a direct relationship to the contributions made by the employer, employee or both, and to any earnings on investments.

The whole or part of the interest in a defined benefit fund is defined by reference to one or more of:

- the member's salary at the date of termination of the member's employment, the date of the member's retirement or another date
- the member spouse's salary averaged over a period
- the amount of salary, or allowance in the nature of salary payable to another person (e.g. a judicial officer)
- a specified amount
- specified conversion factors (reg 5(1) and (1A) FLS Regulations).

An interest in a defined benefit fund cannot always be split. The member's spouse may have to meet a condition of release and seek access to the superannuation before the non-member's interest can be released to the member. The non-member's interest can only be withdrawn at that stage if the non-member meets a condition of release at the time the member accesses the superannuation. A member may be able to delay accessing their superannuation until age 75 or even later. This will delay the non-member receiving their share.

Many defined benefit funds have either amended their deeds or governing legislation to enable an immediate split or are looking at doing so. This reduces the cost and complexity for the fund of having the member and non-member each having separate "interests" in the one interest. It also removes the risk for the fund of allowing the member to deal with the interest in contravention of the superannuation splitting order, or of miscalculating the non-member's interest many years later when the member meets a condition of release.

Overseas superannuation funds

Overseas superannuation funds are not covered by the FLA superannuation splitting scheme. This is very clear from s 90XD FLA as they are not within the definition of "eligible superannuation plan". This has not, however, stopped parties from trying to value overseas funds using the methods allowed by Australian law.

An example of an overseas fund arose in *Forster & Forster* [2015] FamCA 57. The husband was retired and received a pension of US$3,733 per month from a United States government agency. The wife's adversarial expert valued the pension by giving it a capital value using the valuation factors approved under the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation interests) Amendment Approval 2003*.

Justice Benjamin rejected the valuation by the expert as he was not an expert in the law of the relevant United States government agency pension. Justice Benjamin treated the pension income as a valuable financial resource of the husband accumulated over about 28 years. The husband was married to the wife for about 10 years, being about 36% of the period of his employment.

The husband gave evidence that the wife had rights under United States law to seek a portion of the pension income. The wife's evidence was that she did not intend to claim any part of any entitlement that may exist. Justice Benjamin accepted the evidence and said that if the wife acted contrary to that evidence, she was likely to impeach the orders he made.

Justice Benjamin divided the property (which did not include the United States pension) equally, which meant each party received about $260,000.

Another example of overseas superannuation funds arose in *Preiss & Preiss* [2017] FamCA 12. Neither party sought an alteration of the Australian or Israeli superannuation interests. The parties

agreed that their contributions to the superannuation funds were equal. The trial judge said that there were grounds for an adjustment under s 75(2) FLA, but taking into account that the parties were a long way from retirement and the absence of evidence about the substance and form of the various superannuation interests, the judge was satisfied that no adjustment of superannuation interests should be made.

In relation to United States funds, the non-member spouse may be able to apply for the equivalent of a split of the member's interest independently of any Australian orders and without the necessity of obtaining an order in the United States. It is an administrative process.

Separation declarations

There are two types of separation declaration under the FLA:

1. Separation declarations are required to enable certain provisions of a financial agreement to be effective. A financial agreement dealing with property or financial resources will be of no force or effect unless and until a separation declaration is made under s 90DA FLA or for de facto relationships, s 90UF FLA.

2. Separation declarations are also required specifically to enable a superannuation split in a financial agreement to be effective. They are required to help ensure that financial agreements (which are essentially private arrangements) are not used to enable parties in intact marriages to take advantage of the superannuation-splitting provisions which are only for separated couples.

   There are two sub-types of separation declarations that apply to superannuation splits in financial agreements, depending on the value of the superannuation interest:

   2.1. Section 90XP FLA - Where the member has superannuation interests with a withdrawal value that is less than the low rate cap amount ($225,000 for 2021/2022 and $215,000 in 2020/2021), the separation declaration needs to state that the spouses were married or in a de facto relationship but are separated at the declaration time. If either or both of the spouses have died, the declaration must state that the spouses were married or in a de facto relationship, but separated, at the most recent time when the spouses were alive. In this latter case, the declaration may be signed by the spouse's legal personal representative. The withdrawal value of the member's interests is determined by adding together the withdrawal benefits for each superannuation interest the member has in any eligible superannuation plan (reg 20 FLS Regulations).

   2.2. Section 90XQ FLA - Where the member has superannuation interests with a withdrawal value that is more than the low rate cap amount, a more formal declaration

is required. This is because of the considerable tax advantages that are on offer. In such a case, the declaration must state that:

- the spouses were married or lived in a de facto relationship
- the spouses have separated and thereafter lived separately and apart (even if under the one roof) for a continuous period of at least 12 months immediately before the declaration time
- in the opinion of the spouse signing the declaration (or both if both are signing), there is no reasonable likelihood of cohabitation being resumed.

Where either or both of the spouses have died, the declaration may be signed by the spouse's legal personal representative and must state that at the most recent time when both spouses were alive:

- the spouses were married or in a de facto relationship, but
- the spouses were separated and had lived separately and apart for a continuous period of at least 12 months immediately before that time.

A person who makes a separation declaration under s 90XP FLA or 90XQ FLA knowing that it is false or misleading in a material respect may be guilty of an offence if the declaration is served on the trustee of a fund for the purposes of splitting a superannuation interest. The penalty is imprisonment for a period of up to 12 months (s 90XZG FLA). However, a person is not guilty of the offence if a spouse to which the declaration relates died before the declaration was made.

When to use a superannuation agreement?

Reasons for using a superannuation agreement include:

1. The parties want to settle their affairs with a financial agreement. Under s 90XH(1) FLA, a superannuation agreement can be part of a financial agreement which also deals with non-superannuation property. Parties may prefer to have all their financial issues covered by one document in circumstances where they have already agreed to formalise the division of non-superannuation property in a financial agreement.

2. There does not need to be a formal valuation of the superannuation. This may suit parties faced with difficult valuation issues regarding a defined benefit fund, self managed superannuation fund or a pension in the payment phase. There may be a significant difference in the value of the fund using scheme specific factors rather than the member's statement and the parties agree to rely on the members statement. Another example is when parties agree to assume a retirement age of, say 55, rather than another age imposed by the Regulations or scheme specific factors. Valuation evidence of some sort is still required to reduce the risk of later negligence claims against the lawyers.

3. The parties may have agreed to take the superannuation into account in a manner which may not seem, on its face, to be proper, appropriate, and just and equitable as required by s 79. Using a superannuation agreement avoids the risk of a Registrar knocking back the consent orders in Chambers and referring the matter to a Judge in open Court. Of course, the benefits of this must be weighed up against the risks of a later application by one of the parties to set the agreement aside.

4. The parties can specify a method in the agreement for splitting the superannuation interest. This can be different to the options available in court orders. If the parties use their own method they must give an example to the trustee to show how the base amount is to be achieved (s 90XI(b) FLA). This does not need to be in the agreement itself but can be in a separate document.

5. The complexity of superannuation generally and of the proposed orders in a particular case may encourage lawyers to split superannuation by a superannuation agreement even if non-superannuation is dealt with in consent orders. A superannuation agreement can be particularly useful with the complex issues which may arise with self-managed funds.

Requirements for a superannuation agreement

Besides meeting the requirements for a financial agreement in Pt VIIIA FLA or Pt VIIIAB FLA, a superannuation agreement must meet three other conditions which do not apply to court orders dealing with superannuation. These are:

1. A trustee cannot act on a superannuation agreement unless it is satisfied that the parties are either separated or divorced. The operative time for a payment split is determined by the date of service of the agreement and certain other documents as set out in s 90XI FLA. One or both parties can sign a declaration stating that they are married (or were in a de facto relationship) but are separated at the time of the declaration (s 90XI(a)(ii) FLA and s 90XP FLA). If the parties are divorced the decree absolute must be served (s 90XI(a)(i) FLA). For a financial agreement made before divorce, a s 90DA FLA separation declaration may also be required.

2. If the member's interest exceeds the eligible termination payment tax-free threshold ($215,000 in 2020/2021 and $210,000 in 2019/2020), a separation declaration under s 90XP FLA is required. This is to reduce the potential for tax avoidance (s 90XQ FLA). The declaration must state that:
    - the parties are married or were in a de facto relationship;
    - the parties separated and lived separately and apart for a continuous period of at least 12 months immediately before the time the declaration was made;
    - in the opinion of the party or parties making the declaration, there is no reasonable likelihood of cohabitation being resumed.

3. An agreement which splits an interest does not bind the trustee until four working days after the date on which a copy of the agreement is served on the trustee (s 90XI FLA).

Can superannuation be dealt with in a pre-nuptial agreement?

Despite s 90XH(1) FLA providing that superannuation can be dealt with in a financial agreement, it may not be practical to deal with it in a s 90B, 90UB (pre-separation), 90C or 90UC FLA agreement.

Section 90XH(1) FLA says a superannuation interest does not have to exist when the agreement is made but s 90XJ(1)(a) FLA requires the interest to be identified in the agreement. How can an unknown future interest be identified?

Section 90XI(1)(b) FLA allows a superannuation split to occur if the agreement specifies a method for calculating the base amount. A formula can possibly be inserted in the agreement even if the future interests of the parties are unknown.

What about procedural fairness to the trustee? The *Family Law Rules* 2004 (Cth)(to be replaced from 1 September 2021) require this for orders but the FLA is silent in relation to financial agreements. Trustees still require it though, so the proposed agreement should ideally be sent to the trustee before the agreement is executed. Although an unsplittable payment is a ground for agreements to be set aside under s 90K(1)(g) FLA, trustee refusal to implement is not within the definition of an unsplittable interest in Reg 11 FLS Regulations. As a superannuation split cannot be as clearly set out in a pre-nuptial or pre-cohabitation agreement or an agreement during cohabitation or marriage as in a post-separation agreement or court order, a trustee may be quite justified in refusing to implement it or the trustee may be unreasonable. This may be grounds for impracticability within s 90K(1)(c) but do lawyers need to advise clients of this risk?

It is probably theoretically possible to navigate these sections of the FLA, but luck rather than legal skill may be required, and the pitfalls were confirmed in *Barre & Barre* [2021] FamCA 101.

Is it possible to make a superannuation-splitting order (to implement the provisions of a financial agreement) by way of enforcement under s 90G(2) FLA? Probably not, as the order is being created rather than enforced. Is a superannuation split in a financial agreement within s 90KA FLA? It is far easier to envisage the court making orders to transfer, say, shares of entities which were not in existence at separation (under a general provision requiring that a party transfer shares in all entities to the other) than creating a super-splitting order from scratch.

The implementation of superannuation split provisions in agreements entered into before separation has not been examined by the courts.

Common problems with superannuation splitting orders

1. The trustee is not correctly named.

2. The name of the fund is not correct – see www.superfundlookup.gov.au.

3. Any court order or superannuation agreement which specifies an operative date before the commencement of the relevant provisions of the order is likely to be objected to by the trustee.

4. The court order or superannuation agreement seeks to split an unsplittable superannuation interest.

5. An appropriate identifier for the member spouse (such as the member spouse's membership number or date of birth) isn't included in the court order or agreement.

6. The court order or agreement specifies a base amount which is greater than the value of the member spouse's superannuation interest in the fund.

7. The separation declaration is incomplete.

8. The court order or superannuation agreement does not comply with the requirements in the FLA regarding superannuation splitting. For example, it won't comply with the FLA if it:

   - specifies the payment of a lump sum payment to the non-member spouse when the superannuation interest is preserved; or

   - doesn't specify a percentage split to which the non-member spouse is entitled; or

   - specifies that the base amount will be paid to the non-member spouse rather than specifying that the non-member spouse will be entitled to be paid an amount calculated under Part 6 of the FLS Regulations using the base amount.

9. Confusing superannuation splitting with rollovers.

10. Superannuation splitting orders are inconsistent with the assets owned by an SMSF.

11. Inconsistency with trust deed/rules.

12. No procedural fairness given to the trustees under s 90XZD FLA

Common problems with superannuation splitting agreements [1]

1. The operative time, if included, is incorrect. The operative time is specified in s 90XI FLA. A payment split can only commence on the fourth business day after the day on which a copy of the agreement is served on the trustee, along with other necessary documents;

2. A Separation Declaration or divorce certificate is not provided;

3. The Separation Declaration is incomplete. The specific requirements of a Separation Declaration vary, depending on the value of the superannuation entitlement, pursuant to s 90XP FLA and s 90XQ FLA;

4. No Statement of Independent Legal Advice;

5. The Agreement is not signed by the parties;

6. The Agreement fails to specify the method of superannuation splitting by:
    - base amount pursuant to s 90XJ(1)(c)(i) FLA; or
    - percentage pursuant to s 90XJ(1)(c)(iii) FLA; or
    - method pursuant to s 90XJ(1)(c)(ii) FLA.

7. Not submitting the agreement to the fund before it is executed. There is no legal requirement that this be done, but if the fund says it is unable to implement the agreement, it will need to be terminated by consent or one party will need to apply for it to be set aside and they may not be successful.

8. The payment of death benefits is complex. The fund can only pay out a death benefit in accordance with the governing rules of the fund. Points to note are:

    - The eligible beneficiaries for death benefits are prescribed in the relevant legislation and cannot be varied - death benefit nominations by the member will only have effect in some funds and in limited circumstances;
    - Pension payments are contingent upon the life of the beneficiary and therefore will cease on the death of the beneficiary (reversionary pensions may be payable in some circumstances to eligible beneficiaries);
    - The value of a benefit paid on death may differ from the value calculated for family law purposes, this is because these calculations take into account particular assumptions, for example, that the member will work until retirement age.

[1] Adopted from "A Guide for Family Law Superannuation Splitting Agreements", ESS Super, May 2015

Sample wording

ESS Super Agreements

Sample 1: where a base amount is to be specified

"That pursuant to section 90XJ(1)(c)(i) of the Family Law Act 1975, whenever a splittable payment becomes payable in respect of the superannuation interest of [name of member] in the Emergency Services Superannuation Scheme - [name of scheme]:

(a) [name of non-member spouse] shall be entitled to be paid an amount calculated in accordance with Part 6 of the Family Law ((Superannuation) Regulations 2001 using the base amount of $XXX;*

(b) there be a corresponding reduction in the superannuation interest of [name of member] to whom the splittable payment would have been made but for this Agreement."

* base amount may not exceed the value of the member's interest.

Sample 2: where a percentage split is to be specified

"That pursuant to section 90XJ(1)(c)(iii) of the Family Law Act 1975, whenever a splittable payment becomes payable in respect of the superannuation interest of [name of member] in the Emergency Services Superannuation Scheme - [name of scheme], the trustee shall pay to [name of non-member spouse] [insert percentage required]% of each splittable payment and there be a corresponding reduction in the entitlement [name of member] would have had but for this Agreement."

Sample 3: operative time to be specified

"That the operative time for this Agreement is four business days after service of the Agreement on ESSSuper, accompanied by a [decree absolute/separation declaration]."

Sample 4: inclusion of clause for member to provide forms if a splittable payment becomes payable

"If as a result of termination of his/her employment [name of member] becomes entitled to a benefit prior to ESSSuper making a payment under section [insert clean break section of relevant Act], s/he shall provide to ESSSuper all such forms as shall be necessary to enable the trustee to determine the nature and quantum of the superannuation entitlement and any other related information it may reasonably require, within 7 days of that entitlement arising."

Unisuper Orders

Sample 1: where a base amount is to be specified

"That pursuant to section 90XT(1)(a) of the Family Law Act 1975 (Cth), whenever a splittable payment becomes payable in respect of the superannuation interest of [name of member] in UniSuper:

(a) [non-member spouse] shall be entitled to be paid an amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001 (Cth) using the base amount of $..... (provided that such base amount shall not exceed the value of the interest determined under section 90XT(2)); and

(b) there be a corresponding reduction in the superannuation interest of [member] to whom the splittable payment would have been made but for the Order."

Sample 2: where a percentage split is to be specified

"That pursuant to section 90XT(1)(b) of the Family Law Act 1975, whenever a splittable payment becomes payable from the superannuation interest held by [member] in UniSuper, the trustee shall pay to [non-member spouse] [insert percentage required]% of each splittable payment and there be a corresponding reduction in the entitlement [member] would have had but for the Order."

Sample 3: inclusion of liberty to apply

"That each party and the trustee has liberty to apply on not less than three (3) business days' notice."

UniSuper Agreements

Sample 1: where a base amount is to be specified

"That pursuant to section 90XJ(1)(c)(i) of the Family Law Act 1975 (Cth), whenever a splittable payment becomes payable in respect of the superannuation interest of [member] in UniSuper:

(a) [non-member spouse] shall be entitled to be paid an amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001 (Cth) using the base amount of $..... (provided that such base amount shall not exceed the value of the member's interest); and

(b) there be a corresponding reduction in the entitlement of [member] to whom the splittable payment would have been made but for this Agreement."

Sample 2: where a percentage split is to be specified

"That pursuant to section 90XJ(1)(c)(iii) of the Family Law Act 1975 (Cth), whenever a splittable payment becomes payable in respect of the superannuation interest of [member] in UniSuper, the trustee shall pay to [non-member spouse] [insert percentage required]% of each splittable payment and there be a corresponding reduction in the entitlement [member] would have had but for this Agreement."

Sample 3: operative time

"That the operative time for this Agreement is four business days after service of the Agreement on UniSuper, accompanied by a [certificate of divorce/separation declaration]."

Sample 4: statement regarding independent legal advice

"The parties acknowledge that before signing the Agreement, they have each had individual and independent legal advice from separate legal practitioners in relation to:

- *the effect of the agreement on the rights of that party; and*
- *about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement.*

In the knowledge of that advice, the parties freely and willingly enter into this Agreement, and acknowledge that they have each received a copy of this statement."

Conclusion

This overview of the making of superannuation splitting and flagging orders, and drafting superannuation provisions in financial agreements sets out some of the problems and issues which need to be considered when drafting these provisions. When dealing with funds which are not self-

managed superannuation funds, the first step should always be to look at the website of the relevant fund and follow as closely as possible any preferred wording of the fund.