Super-Size Me: Superannuation Splitting and Family Law

Jacky Campbell
Forte Family Lawyers

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Carving up the Assets in Family Law Property Settlements
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Introduction

Most property settlements under the *Family Law Act 1975 (Cth)* (FLA) involve a consideration of superannuation. Even the smallest property pools will usually include some superannuation. On 1 July 2022 the Superannuation Guarantee (SG) contributions increased to 10.5 % of earnings. This is now the minimum percentage that an employer must contribute to each employee's superannuation fund. This percentage will continue to increase by .5% each year until it reaches 12% in 2025. Another change from 1 July 2022 was that even the lowest paid employees must have superannuation contributions paid by their employers. Previously the SG scheme did not apply to employees earning less than $450 per month. Superannuation will therefore continue to be an important aspect of property settlement and will often be a significant part of the property pool. It cannot be ignored.

This paper covers:

1. *Accessing superannuation details – recent reforms*
2. *Practical and financial consequences of splitting super – is there a better way?*
3. *Checking the fund rules – what to look for?*
4. *Joining the trustee to family law court proceedings*
5. *Managing super splitting involving multiple member funds*
6. *Specific issues concerning SMSFs, defined benefit schemes, and military pensions*
7. *Recent cases*

1. Accessing superannuation details – recent reforms

Before the value of superannuation can be determined under s 90XT(2)(b) FLA, the superannuation must be identified. Superannuation will usually be in a retail fund, an industry fund or a self-managed superannuation fund (SMSF). Although a party to a property settlement or maintenance proceeding must disclose their superannuation interests (r 6.06(3)(b), (e) and r 6.06(8)(c) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (the Rules)) they may either refuse to disclose any or all of their superannuation.

To address the problems of non-disclosure and under-disclosure of superannuation and to reduce the time, cost and complexity of obtaining accurate information from the other party's superannuation fund, the FLA was amended to enable a party to request a registry of a court to request information about a party's superannuation entitlements from the Australian Taxation Office (ATO). The *Treasury Laws Amendment (2021 Measures No 6) Act 2021* (Cth) was passed on 2 September 2021 and the new process commenced on 1 April 2022.

The ATO process is in addition to the process whereby a request can be made to the trustee of a superannuation fund using a Superannuation Information Form.

Request for information made through the court registry

The request must be made in the approved Superannuation Information Request form online using the Commonwealth Courts Portal. A party to a current property settlement proceeding, or their legal representative, can make a request.

To assist the ATO to locate their current or former spouse/de facto's superannuation information, the request must include, at a minimum, the following information:

- full name including former names
- any known addresses
- date of birth in full.

Their telephone number and/or email address, if known, should also be included. The more identifying information provided, the greater the chance of a successful match by the ATO.

The court will verify there are ongoing permitted family law proceedings between the parties before the request is submitted to the ATO.

A response to the request should be available on the Commonwealth Courts Portal within 7 days. The response is visible to all parties and their legal representatives.

The response to the request will be a letter from the ATO to the court advising one of the following:

- individual located and superannuation found, or
- individual located and no superannuation found, or
- individual unable to be located.

Where superannuation information belongs to an individual of an APRA fund (which includes most funds including industry, retail, corporate and small APRA funds), self managed superannuation funds (SMSFs) and/or ATO-held monies, the ATO may provide the following information:

- Superannuation fund name
- Australian Business Number (ABN) of the superannuation fund
- Unique Superannuation Identifier (USI) (if applicable) of the superannuation fund
- Last reported balance

- Date of last reported balance
- Account phase.

Where the information is blank or listed as “not yet reported” this probably means the ATO does not have the information. It does not necessarily mean that there is no superannuation to locate.

A problem is that the superannuation information provided by the ATO may not reflect the up-to-date account balance and should not be solely relied on. A request to the fund trustee may also be required and the process for this is outlined below.

The superannuation information received should be used solely for the purposes of the property settlement proceedings and must not be disclosed to anyone not part of that proceeding (s 355-65(3) in Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA) and s 90XZJ(2) or 90YZY(2) FLA). Making a record of, or on-disclosing, the superannuation information may be an offence unless it is for the purpose of the relevant proceedings (see ss 355-155 and 355-175 in Sch 1 to the TAA).

Applying for information from a fund trustee

The other process is not court based. The Superannuation Information Process can only be used if the non-member knows the name of the trustee of the fund, so if this is not known and the member refuses to disclose it, the court-based ATO process needs to be used first. The benefits of the non-court-based process, which involves the information being requested directly from the trustee, are:

- The fund can provide more up-to-date information as to value
- The process can be used to obtain information from earlier dates such as the dates of separation and cohabitation
- The fund will provide more information about the nature of the entitlements
- The process can be used where there are no proceedings before the court, for example, by parties negotiating consent orders or by parties entering into a financial agreement in anticipation of, during or after a de facto relationship or marriage

A person applying for information from the trustee must make a declaration that the information is required for either or both of the following purposes:

- to assist the applicant to properly negotiate a superannuation agreement
- to assist the applicant in the operation of Pt VIIIB FLA.

The declaration must be in the prescribed form (Form 6 declaration and the Superannuation Information Form) and accompanied by the "reasonable fee" required by the trustee. Unless the "eligible person" directs in the Superannuation Information Form that the information be provided to their lawyer, the information will be provided to the eligible person.

The information that a trustee may be required to provide varies. There are separate lists of requirements for different types of superannuation interests. Under Regs 63 to 68 of the *Family Law Superannuation Regulations 2001* (FLS Regulations), the following categories of superannuation interest are identified:

- accumulation interests
- defined benefit fund (DBF) interests
- percentage-only interests
- SMSF interests, and
- small superannuation accounts interests – these are not an accumulation account with a low value which is a common error made in completing the Application for Consent Orders. They are a special type of fund under the *Small Superannuation Accounts Act 1995* (Cth).

Within these categories, the information to be provided differs depending on whether the superannuation interest is in the growth or payment phase.

The trustee must not provide the non-member spouse with the address of the member (s 90XZB(5) FLA). The trustee also must not inform the member that the non-member spouse has requested information about the superannuation interest (s 90XZB(6) FLA). Breach of either of these prohibitions carries a criminal penalty of 50 penalty units for an individual and 250 penalty units for a corporation.

Failure to provide information when required to do so makes the trustee liable for a penalty of 50 penalty units for an individual or 250 penalty units for a corporation.

The information must be provided within a "reasonable time" (reg 68B(1)(b) FLS Regulations).

2. Practical and financial consequences of splitting super – is there a better way?

Is superannuation splitting the best option? The answer to this question will vary from case to case and will depend upon the client, their objectives and the property and

superannuation of the parties. Matters to consider include:

1. The type of superannuation being split, particularly if one or both parties have an interest in a DBF or a SMSF.
2. Whether either or both parties have met a condition of release eg:
    - Has reached their preservation age and retired
    - Has reached their preservation age and begun a transition to retirement income stream
    - Ceased an employment arrangement on or after the age of 60
    - Is 65 years old, even if they haven't retired
    - Has retired

    In certain circumstances at least part of a member's superannuation benefits can be released before the member has reached preservation age. Examples include permanent and temporary incapacity, severe financial hardship and compassionate grounds. There have also been temporary schemes such as the COVID-19 early release of super scheme in 2019-20 and 2020-21 financial years and the first home super saver scheme.
3. If the client is still working:
    - For how long?
    - How much superannuation do they have?
    - Are contributions being made to their superannuation? Possibly not if self-employed or unemployed.
    - Are they close to or over the transfer balance cap?
    - How stable is their housing?
4. The client's objectives e.g. housing, retirement income.
5. If the superannuation entitlements are in a SMSF:
    - Is the fund compliant?
    - Are the assets lumpy?
    - What type of investment is it eg:
        - freehold for business which will be retained by one of the parties
        - investment in an undiversified share portfolio
        - an investment which one party cannot or is not prepared to manage
        - the liquidation costs
    - Does the client want to operate a SMSF?
6. Can the non-member's entitlements be rolled out immediately?
7. Is a flagging order under s 90XU more appropriate? These are not used as frequently as the drafters of the legislation envisaged. In part this is because most funds varied

their scheme documents to enable splits to occur before the member meets a condition of release but it is also because flagging is often overlooked as an option.

Whilst the above list may seem overly technical it is useful to remember that superannuation is treated as property for the purposes of the paragraph (ca) definition of matrimonial cause and the paragraph (ca) definition of de facto financial cause (s 90XC(1) and (2)). Therefore, it is imperative, even though often scant attention is given to the assessment of contributions, s 75(2)/s 90SF(3) factors and whether a superannuation split is just and equitable. Some of the more recent cases discussed below (eg. *Minh & Dieu* [2021] FedCFamC2F 649) looked at the matters which the court is required to consider under s 79 or s 90SM and reached different conclusions in relation to the percentage division of superannuation vs non-superannuation.

A different approach can be shaped by looking at the nature, form, characteristics and value of the superannuation, relating this to the needs of the client. Rather than simply seeking that all superannuation be totalled and split 50/50 or all superannuation accrued during the relationship be split 50/50, a more nuanced approach may be in the best interests of the client.

3. Checking the fund rules – what to look for?

The first thing to look for when checking the rules is to make sure you are looking at the correct document. Depending on the type of fund this could be:

- A trust deed
- Legislation setting up the fund eg. *Emergency Services Superannuation Act 1986 (Vic)*
- Legislation which impacts the fund eg. *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regs)
- Legislation or regulations which impact the fund eg. *Family Law (Superannuation) (Methods & Factors for valuing particular superannuation interests) Approval 2003*
- *Family Law (Superannuation) Regulations (2001)*

It is more important to check the fund rules, or preferably have an expert do it on behalf of your client, when the superannuation interest is a SMSF or a defined benefit interest.

A SMSF trust deed must contain certain details such as:

- Names of the members and individual trustees (or the names of the fund's directors if the fund has been set up with a corporate trustee structure)

- Objective of the SMSF. All superannuation funds (including SMSFs) must be set up for the sole purpose of providing retirement benefits to fund members (or to their dependants when they die). (s 62 SIS Act).
- Trustees or directors must document and implement the fund's investment strategy. The trust deed should outline the specific types of investments that the trustees/directors can make and the assets of the SMSF must reflect the investment powers in the deed. eg. can the fund borrow?
- Rules that outline how the fund will be administered, how a person can join the fund, how and when member benefits will be paid (as a lump sum or pension) and the circumstances in which the fund will be wound up.

Section 104A of the SIS Act requires that trustees and directors of trustees (if appointed after 30 June 2007), sign a declaration in the approved form that they understand their duties as trustee of a SMSF and ensure that other trustees do so also. This form must be retained so long as it is relevant, and in any case for at least 10 years. A breach of this section is a strict liability offence with a penalty of $2,200. Similarly, member reports must be kept for so long as they are relevant and for at least 10 years (s 105 SIS Act).

In the case of SMSF trust deeds it is also important to check that the deed:

- was prepared by someone competent to prepare it;
- was signed and dated by all the trustees;
- was properly executed according to the state or territory law in which the SMSF was established;
- has been regularly reviewed and updated as necessary.

The last point is the trickiest. As family lawyers we don't keep up-to-date with the frequent and highly technical changes in superannuation law and especially the laws relating to SMSFs. If there is a concern, it is advisable to refer the review of the deed to a superannuation expert.

Some of the more complex problems which may arise in a SMSF trust deed include:

1. Where the deed has not been updated to provide for:
    1.1. Superannuation splitting
    1.2. The number of members to be up to 6 (if there are 6 members). The change from a maximum of 4 to a maximum of 6 occurred on 1 July 2021
    1.3. The introduction of the transfer balance cap in July 2017. SMSF trust deeds may need to be updated to give trustees the power to "rollback" excess pension funds

into their members' accumulation accounts. The cap is $1.7 million (approx) from 1 July 2021.

2. The version of the deed produced is not the latest version.

3. An imbalance of the powers of the trustees. This may be an issue if there is a lengthy delay in negotiating or litigating a settlement or the parties agree that after court orders are made, they will both remain members of the fund for some time. By way of example, the following was a clause in a deed (eventually) disclosed by the other party:

> *(a) To arrive at decisions, all individual trustees may:*
> *(i) meet in person; or*
> *(ii) hold a meeting using a telephone link so that all individuals can hear each other at all times; or*
> *(iii) sign a Circulating Resolution;*
> *provided each individual trustee has been given the opportunity to participate in the decision-making process.*
> *(b) Decisions shall be made by a simple majority voting in favour of the resolution, and where there is an equality of votes, the vote cast by each individual trustee shall then be multiplied by the combined balance of all accounts held by each individual trustee in his/her capacity as a Member of the Fund, except where the Relevant Law requires otherwise.*
> *(c) All decisions must be committed in writing.*

4. A provision that a member ceases to be a member in the event that the trustee determines on reasonable grounds that the member should cease to be a member.

The minimum record keeping requirements are summarised on the ATO website

The following records need to be kept for a minimum of 5 years:

- accurate and accessible accounting records that explain the transactions and financial position of the SMSF
- documentation showing decisions made about what benefit payment type was paid (pension, lump sum or a combination of both) and the account the payment was paid from
- an annual operating statement and an annual statement of the SMSF's financial position
- copies of all SMSF annual returns lodged
- copies of transfer balance account reports lodged
- copies of any other statements required to be lodge with the ATO or provided to other super funds.

The following records need to be kept for a minimum of 10 years:

- minutes of trustee meetings and decisions (if matters affecting the fund were discussed, for example review of the fund's investment strategy, or the commencement or commutation - in part or in full - of an income stream)

- records of all changes of trustees
- trustee declarations recognising the obligations and responsibilities for any trustee, or director of a corporate trustee, appointed after 30 June 2007
- members' written consent to be appointed as trustees
- copies of all reports given to members
- documented decisions about storage of collectables and personal use assets.

What if the trust deed is lost?

SMSF trustees/directors must retain the original hard copy of their fund's trust deed (and any subsequent updates or deeds of variation) while their fund is in operation and for a period of 5 years after the fund's final annual tax return is submitted to the ATO. A SMSF which cannot produce the original trust deed is non-compliant. Despite this, however, SMSF trust deeds are lost relatively frequently.

Sometimes a copy of the deed is found because it was given to a bank, a lawyer, accountant or financial adviser. If so, the copy can help with the preparation of a new original.

There is no clear approach to be taken if a copy cannot be found. Options include:

1. Approach the Supreme Court for an order regarding how the SMSF should be administered. This may be disproportionately costly;
2. If the fund balance isn't significant, and the investment strategy is relatively simple, trustees may take the risk and continue to operate without the trust deed;
3. Wind up the SMSF;
4. Prepare a deed of variation which changes the terms under which the SMSF operates without actually creating a new trust deed.

The problem with creating a new trust deed rather than varying the original is that a new SMSF is created, which may later lead to CGT issues or other complications later.

4. Joining the trustee to family law court proceedings

It will rarely be necessary for a trustee to be joined to proceedings. The superannuation splitting scheme in Pt VIIIB FLA was designed to avoid this. In fact, the joinder of trustees was probably more common before the introduction of Pt VIIIB to the FLA as injunctive relief may have been the best or only option to protect the rights of the non-member.

If an order is sought by consent in a court exercising jurisdiction under the FLA which is intended to bind the trustee of an eligible superannuation plan, then 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:

(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 28 days

(d) that if the trustee objects to the order sought, the trustee must give the parties written notice of the objection within 28 days (r 10.06(2), Federal Circuit and Family Court of Australia (Family Law) Rules 2001 (the Rules)).

If the matter is proceeding to trial, the 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 trial, notify the trustee of the fund 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 (r 1.12(6) of the Rules).

If an application for final orders or a response or reply to such an application seeks a flagging or splitting order in relation to a superannuation interest or applies for such an order to be set aside, a sealed copy of the document must be served upon the trustee of the fund immediately after filing (r 1.12(5)(a) of the Rules).

If a splitting order or flagging order is made, the party in whose favour the order is, must serve the trustee with the order (r 1.12(5)(b) of the Rules).

The FLA and the Rules are silent about according procedural fairness to trustees in superannuation agreements. However, if the parties do not give the trustee reasonable notice of the terms of the agreement which it is proposed will affect them before executing the agreement, the trustee may say it is unable to put the provisions dealing with superannuation into effect. The problems of dealing with superannuation in a financial agreement entered into many years before separation were discussed in *Barre* & *Barre* [2021] FamCA 101 and *Barre & Barre (Superannuation)* [2021] FamCA 463.

An order made without the giving of procedural fairness is made without power. If that occurs, the Full Court in *Naisby* & *Naisby* (2021) FLC 94-025 [2021] FamCAFC 92 indicated that the usual course would be, after dispensing with the relevant court rule, to either:

(a) redraft the paragraphs in the property settlement order relating to superannuation splitting so that it had no effect until the expiration of 28 days after the order has been served upon the trustee, or

(b) delay actually remaking the order until the court was satisfied that the requisite notice has been given to the trustee without the trustee seeking leave to intervene.

It might be necessary to join the trustee if:

- SMSF trustee is not just one or both of the parties, but includes a 3rd party and/or
- Trustee objects to a proposed order

If a party seeks to join the trustee, the procedural requirements are set out in r 3.03 of the Rules.

5. Managing super splitting involving multiple member funds

A party whose superannuation is to be split may have multiple funds. The negotiations between the parties may include a consideration of:

- whether the interest in one fund is large enough to accommodate the split;
- a member may want to retain a particular fund which, for example, is a DBF interest, is paying a pension or has high investment returns;
- a SMSF may have lumpy investments (discussed below) which increases the impracticability and/or cost of a split;
- a SMSF may own an asset one or both parties don't want to retain;
- the other members of a SMSF may be family members of one of the parties;
- the non-member may not want to have to deal with multiple parties to effect the split;
- a fund may have linked life insurance at a favourable cost which will be lost if 100% of that fund is split;
- is it better to rollover all the superannuation into one fund and then do one split?
- the parties may perceive it as just and equitable for each fund to be split in the same proportions.

6. Specific issues concerning SMSFs, defined benefit schemes, military pensions and other less common situations

Self-managed superannuation funds

The main distinction between SMSFs and industry or retail funds is that the members of an SMSF are also usually the trustees of the fund. SMSFs are regulated under the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act), and the ATO (rather than APRA) regulates SMSFs and verifies their compliance. Some of the compliance requirements are set out earlier in this paper but there are many more. SMSFs are probably more likely to be non-compliant in proceedings under the FLA given the emotional and financial stresses of separation and litigation.

A non-compliant fund risks losing the tax concessions associated with superannuation funds meaning that tax penalties and interest may be payable which may be quite high. Its assessable income is taxed at the highest marginal rate. There are other restrictions, such as the inability of a non-compliant SMSF to open a bank account, rollover entitlements into the SMSF or have superannuation guarantee contributions paid into it by an employer. The trustees may be issued with an education direction and ultimately may be suspended, removed and/or disqualified (s 133 SIS Act).

To check the status of a SMSF use the ATO's Super Fund Look Up. The options are:

- Regulated — not yet assessed as complying

• Complying — has been issued with a Notice of Compliance

• Non-complying

• Regulation details withheld — may be temporary but needs investigation

• Regulation details removed — annual returns not lodged

Importantly, members of an SMSF must usually be trustees (or directors of a corporate trustee) and trustees must also be members (SIS Act s 17A(1)). This means that both parties to the marriage or de facto relationship need to be trustees of the fund or directors of the corporate trustee. The only exception to this is if the SMSF has only one member. If the SMSF has only one member and there is a corporate trustee, there does not need to be a second director who is a member. If there is no corporate trustee, the second director must be a relative of the member (SIS Act s 17A(2)).

Each trustee or director is jointly and severally liable for breaches of the obligations imposed on trustees (SIS Act s169). See *Re Shail* [2011] AATA 940.

Common problems with SMSFs in family law matters include:

• financial statements and taxation returns not completed in a timely fashion;

• failing the residency test. There are various requirements but a common breach is that a member with more than 50% of the SMSF is no longer an Australian resident;

• acquiring an asset from a related party not at market value

• lending funds to a member

• not investing properly. Often funds are simply left in a bank account. This is not, in itself, necessarily a breach although the fund is required to have an investment strategy and this may be an indication that there is no investment strategy or it is not being followed. In these cases, especially in a low interest rate environment, parties may be financially better off using an accumulation fund;

• use of fund assets for personal use (eg bank account, holiday house and even a family home), which is a breach of the sole purpose test (SIS Act s 62);

• Incorrectly categorising the taxation status of funds held by the SMSF;

• Investments which are not approved for superannuation funds.

Another problem is that the underlying assets may be illiquid or “lumpy”, and a strategy may be required to ensure that the interest of one party is properly transferred to another fund. A sale of the lumpy asset will usually be ordered so that the split can be effected even if this results in a substantial reduction in the value of the fund.

If the fund is non-compliant:

- Independent expert advice may be desirable as to the works and costs required to make the fund compliant. Professional advice should be sought as to how to deal with any potential tax penalties;

- There are ongoing risks for a party resigning as a trustee. Liability for a penalty is joint and several (s 169 SIS Act). An order that the remaining trustee indemnify the resigning trustee for any penalties may be difficult and expensive to enforce;

- The courts will usually make orders that the non-compliance be rectified as recommended by an accountant or other expert.

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 or easily updated: publicly listed shares may be, but real estate, shares in unlisted companies and units in unit trusts are not. 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.

There may be liabilities to take into account in determining the values of a SMSF and each of the member accounts. Capital gains tax (CGT) may affect the valuation of the fund if the requirements of *Rosati & Rosati* (1998) FLC 92-804 are met. It is important to ascertain whether the CGT will definitely be incurred. If it will not be incurred immediately or in the near future, it should not be taken into account in valuing the SMSF. The CGT may not eventually be payable or the amount may vary due to changes in the member's circumstances, tax laws, etc.

CGT concessions may apply when transferring assets in specie between superannuation funds. Certain conditions must be satisfied in order to attract CGT roll-over relief because of marriage or relationship breakdown between funds in circumstances where each party is keeping their own entitlement. These conditions 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 126-140(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;

8. 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, or the SIS Regulations are met.

Usually, the parties will agree that the expenses incurred in relation to the split of a SMSF (eg. sale costs, any CGT, accounting fees) be borne by the parties in proportion to their entitlements or equally, but reg 5.02 SIS Regs does not require this. Other options are possible. Reg 5.02 SIS Regs requires that the costs of implementing a payment split be distributed in “a fair and reasonable manner.”

Since 1 October 2021, SMSF trustees have been required to use SuperStream and are covered by the SuperStream rollover standards. There was a concern that certain funds were taking too long to roll over members’ benefits when requested to do so.

SuperStream is the way businesses pay employee superannuation contributions to superannuation funds. SuperStream is operated by the ATO. It transmits money and information between employers, superannuation funds and the ATO.

If trustees don’t process a rollover within the strict time limits they may breach operating standards for SMSFs and could face financial penalties for each contravention of up to $4,400 for each trustee.

The requirement to process rollovers quickly may be particularly difficult for SMSFs which don’t have financial statements updating in real time and those with investments that cannot be liquidated quickly. By contrast, industry and retail funds usually update their records on a daily basis and can produce a daily unit price as well as maintaining sufficient cash to enable them to pay out rollovers in a timely fashion. If a rollover is requested, a SMSF will usually need to prepare interim financial statements to enable the rollover amount to be calculated. This work may be difficult to complete in the requisite short time-frame of 3 business days from the request being made.

What can the trustees of SMSFs do to avoid SuperStream problems?

1. Start planning after the parties separate to ensure that:
   1.1. There is sufficient cash to pay out a rollover if one party will want to rollover into an industry or relevant fund rather than into another SMSF;
   1.2. Taxation consequences are considered;
   1.3. Accounts are kept as up-to-date as possible and are easily and quickly updated.
2. Negotiate a reasonable time-frame for the rollover so that the accountant for the SMSF has sufficient time to prepare the accounts before the rollover request is made;
3. Request that orders be drafted which allow sufficient time to ensure there is no breach.

***Powell & Christensen* [2020] FamCA 944**

The court ordered that the parties make the SMSF compliant before they made submissions as to how the superannuation and non-superannuation property be adjusted between the parties. The court found that it was unable to value the parties' interests until the parties had paid the funds required to make the SMSF compliant.

The father did not cooperate with the process and the mother had to obtain enforcement orders dispensing with the necessity for his co-operation. The father's main objection was that he wanted one of the parties to do the work to make the fund compliant and did not want to pay accountants. The court ordered that the parties engage the accountant to do the work.

An appeal was dismissed in *Christensen & Powell* [2020] FamCAFC 148.

***Aldam & Cesari (No 2)* [2020] FamCA 732**

The husband's proposal for the wife to be paid a lesser amount of non-superannuation rather than 50% of his superannuation was rejected. The husband argued that a discount should apply to the wife's entitlement because on his approach the wife would enjoy the benefit of immediate access to funds, and the wife would not be burdened by hardship as she would be free to invest that money in another fund, property, shares or other appreciating assets. The husband would retain the benefit of his interest in the SMSF. He said that given the ages of the parties, he would not have access to those funds for a considerable time, that the 30% discount rate proffered was reasonable under s 75(2) FLA

and in the event that an order for a sale of the real property was made the husband would first want an opportunity to buy out the wife's share in the property owned by the fund.

The husband argued that a sale of the real estate was an unnecessary erosion of the value of the fund. The court rejected this proposition and said as the erosion was more apparent than real as on his proposal the husband would be left with the real property at full value whereas the wife would receive a discount of 30% on her 50% share of the property thereby reducing her entitlements to the fund from $102,718 to $71,524. By contrast the husband would be left with very valuable real estate in his sole name.

The court held that the husband's proposal was likely to have the effect of occasioning undue hardship on the wife.

***Odens & Odens* [2021] FCCA 575**

After over 22 years of marriage there was insignificant property available for distribution between the parties except for superannuation.

The wife had superannuation of $79,000 in an industry fund. The husband's superannuation was in a retail fund until he unilaterally moved it into a SMSF which he valued at $284,000. The SMSF owned a residential property which the husband valued at $410,000 and was subject to a mortgage of $203,000. The SMSF had other liabilities including a loan to the husband of $79,000.

The wife was alarmed at the prospect that if she had entitlements in the SMSF, the husband could detrimentally affect her entitlements by borrowing further amounts from the SMSF. The husband was concerned that the sale of the residential property might attract capital gains tax. He considered a sale to be financially improvident and wanted the wife to retain an ongoing interest in the SMSF.

The wife sought a 50/50 split of the husband's interest in the SMSF and that her 50% be rolled out into a fund of her preference. She sought a 65%/35% division in her favour of her own superannuation because it was primarily acquired after separation. Rather than a split of her superannuation which would be $27,549, she sought that the husband's share be notionally allocated to her as costs as the husband had unduly protracted the proceedings.

The trial judge pointed to the advantages of the superannuation being managed by a professional trustee, advantages which had been denied to the wife by the husband's

unilateral actions in setting up a SMSF. A superannuation split of 50% in favour of the wife was ordered with the husband to bear all the costs of implementing the split.

The trial judge, after considering s 117 FLA, agreed that the wife was entitled to indemnity costs and this should be paid by not making the super splitting order in favour of the husband of the wife's fund and he could do this as a s 75(2)(o) factor.

Defined benefits funds

A defined benefit fund (DBF) provides benefits to members according to a formula specified in the first deed rather than based on the earnings of the funds. The formula usually takes into account the member's length of service with an employer or years of membership of the fund and the final average salary or level of salary nearing retirement. A DBF is defined in reg 5(1) *Family Law (Superannuation) Regulations 2001* (FLS Regs).

The Military Superannuation & Benefits Scheme (MSBS or Military Super) is a DBF. It is a particularly difficult fund for family law purposes, and illustrates some of the thornier issues which can arise with DBFs. In many cases the member may be receiving a pension which is not commutable to a lump sum, and if there is a splitting order of the ongoing pension payments, upon the member's death the non-member has no further entitlements. Early retirement for invalidity is common in the MSBS and there are different levels of entitlements.

A member may be entitled to a lump sum, a lifetime indexed reversionary pension or both.

Like many other DBFs the dollar amount specified in the superannuation splitting order may not equal the amount allocated to the non-member spouse by the fund. The scheme value is calculated in accordance with the governing legislation (or deed) of the fund. However, it is the family law value which must be used if the superannuation is being split. Section 90XT(2) FLA states:

> "Before making an order referred to in subsection (1), the court must make a determination under paragraph (a) or (b) as follows:
>
> (a) if the regulations provide for the determination of an amount in relation to the interest, the court must determine the amount in accordance with the regulations;
>
> (b) otherwise, the court must determine the value of the interest by such method as the court considers appropriate."

For the MSBS the family law value is calculated in accordance with the special scheme or factors approved by the Attorney-General.

Usually the scheme value is higher than the family law value. Why is the family law value different from the scheme value?

- Different formulas
- Gender. Women have slightly longer life expectancies
- Age. The younger the member the more that the scheme value is discounted to achieve the family law value

In the MSBS the amount allocated to the non-member spouse is called the transfer amount. The transfer amount is determined by the trustee at the operative time.

The operative time or date determines when a trustee must start to recognise the interest of the non-member after a splitting order is made. The operative time is not the same as the relevant date (which is the date of determination of value), but it is easy to confuse the two terms.

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.

So, in relation to a superannuation agreement, the operative time is the beginning of the fourth day after the agreement and any other relevant documents are served upon the trustee (s 90XDA(a) FLA), but a court order can theoretically nominate any date.

If the member has an interest in the growth phase the transfer amount is called an associate preserved benefit. The associate preserved benefits includes:

- Associate A benefit. This is the funded component. It is invested in the fund and grows at the same rate as the fund’s investment returns. It can be rolled over to another fund.

- Associate B benefit. This is unfunded. It is not invested in the fund, but is indexed with the 10 year Treasury bond rate. It can only be rolled over after age 55 and is paid as a lump sum on retirement after preservation age.

The non-member can only receive a lump sum and cannot convert the preserved associate benefit to a pension with the MSBS.

If the member's interest was in the payment phase the transfer amount is converted to an associate pension. The annual rate of the pension is determined using a pension conversion factor applicable to the non-member spouse's gender and age.

In the MSBS, the non-member can rollover their entitlement (subject to the Associate B limitation) without waiting for the member to meet a condition of release but in some other DBFs such as the Public Sector Scheme (Cth) (PSS) they cannot and the investment options are limited. With the PSS if the non-member starts to receive a pension there may be no residuary benefit payable to their estate or dependants when they die.

If the spitting order sets a percentage, the transfer amount is the percentage multiplied by the scheme value.

If a base amount is specified the transfer amount is calculated by:

$$\frac{\$\text{BASE AMOUNT}}{\$\text{FAMILY LAW VALUE}} \text{ X SCHEME VALUE}$$

Importantly, this means that if the family law value is higher than the scheme value, the amount specified in the order as the superannuation split is not what the non-member will receive, but a percentage of the family law value.

A MSBS interest in the growth phase can have a separate accumulation component called the Ancillary Benefit. It can be split separately to the rest of the interest if the orders provide for this.

It cannot be assumed that all DBFs treat superannuation splitting orders in the same way. For example, ComSuper says that it implements splits in accordance with their scheme rules. If the family law value is equal to or greater than the scheme value, the base amount specified in the orders will be split to the non-member spouse. If, however, the scheme value is greater than the family law value, a separation amount is calculated and this is the amount subsequently split to the non-member spouse, in place of the base amount specified in the court orders or agreement. ComSuper says this is done to ensure that the non-member

spouse receives the benefit of the higher of the 2 methods of valuation. If not on notice, the member may be surprised if they lose a higher dollar amount than nominated as the base amount in the order.

An additional problem is that if a ComSuper member's pension is split equally, the dollar value of the non-member's pension will usually be different to the member's pension. ComSuper does not equalise fortnightly payments but equalises the value of the pension interest which means that a younger non-member spouse will receive lower pension payments as the non-member will statistically have a longer life expectancy so the pension will be paid for a longer period.

There have been many cases which have considered DBFs, including the MSBS. The most recent are discussed below.

***Bulow* & *Bulow* (2019) FLC 93-885, *Bulow* & *Bulow (No 3)* [2021] FCCA 314 *and Bulow & Bulow* [2022] FedCFamC1A 19**

There is a long series of cases involving these parties, most of which involve superannuation.

In the 2019 case the parties' experts agreed that $66,100 was the portion of the family law value of the husband's PSS superannuation that was attributable to him making contributions at the rate of 10% of salary, rather than at 2% of salary after separation. The experts made it clear that the direct financial contributions made by the husband had a direct impact upon specific variables which in turn directly impacted upon an increased value of the fund.

The Full Court of the Family Court accepted that the trial judge had not properly considered the husband's direct post-separation contributions to his superannuation. The Full Court also pointed out the importance of examining the terms of the fund (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".

The Full Court discussed the distinction between the splitting of 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) FLA 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 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".

Furthermore, it said the trial judge had failed to refer to (at [50]):

> "… the particular nature of the husband's interest; the specific evidence about the increase in the value of that fund; the derivation of that increase; and any specific comparison between that contribution and specific contributions made by the wife …"

The Full Court concluded (at [109]):

> "In light of our conclusion that his Honour was not favoured with evidence as to the ramifications of the proposed, or any, splitting order, it is not possible for this Court to contemplate re-exercising the discretion; the evidence before us does not permit of that outcome. Unfortunately for the parties, the matter must be remitted for rehearing."

In the 2021 case Judge Heffernan explained the different consequences for growth of the parties' respective interests in the PSS following the splitting order which had been successfully appealed against (at [62]-[63]:

> "It is relevant to consider the comparative future growth of the associate preserved benefit and the future growth of the member entitlement. In the event that I make a splitting order, Ms Bulow's associate preserved benefit will be comprised of a funded component and an unfunded component. The funded component would be allocated interest earnings by the scheme which would reflect the performance of the scheme. The unfunded component would be allocated interest at the long term bond rate for Treasury bonds having a ten year term. Her total entitlement would be the combined

> value of the funded and unfunded components. As Mr Bourke has observed in his report, the superannuation interest of the husband would continue to increase after a splitting order with benefit multiple and salary. I take into account that any splitting order I make will have a corresponding effect on the husband's entitlements and to that extent he will suffer a detriment. Mr Bourke gave oral evidence on this matter:
>
> > The advantage of this scheme to the member is that while there is a reduction in his end benefit because of the allocation of the associate benefit, it still accrues at a very handsome rate ...
>
> Mr Bourke said that in practical terms that could be demonstrated by reference to the splitting order made by me at the time of the first trial. Had that order not been overturned on appeal, then during the period between the order and the 2020 valuation obtained for the purpose of this trial, the wife's associate preserved benefit would have increased by approximately $26,000 and the husband's member entitlement would have increased by $213,000."

An appeal against the equal splitting of superannuation made at the second trial was dismissed in *Bulow & Bulow* [2022] FedCFamC1A 19.

***Campbell* v *Superannuation Complaints Tribunal* [2016] FCA 808**

The correctness of many of the cases which involve the valuation of a pension in the payment phase was thrown into doubt by this Federal Court's decision. Justice Logan heard an appeal from the Superannuation Complaints Tribunal (Tribunal). He held that Mr Campbell's vested entitlement to an invalidity pension was, for the purposes of the FLS Regulations, an "accumulation interest". Mr Campbell was receiving invalidity benefits under the MSBS. He applied for information about his superannuation interest in the MSBS under s 90MZB (now s 90XZB) FLA using a superannuation information form. The Commonwealth Superannuation Corporation (CSC) provided 2 responses: one with respect to his preserved benefit which was in the growth phase and one with respect to the invalidity pension which was in the payment phase.

Mr Campbell objected to receiving information with respect to his invalidity pension and argued that it was not superannuation. The Federal Court accepted that it was superannuation. It was not disputed that MSBS was a superannuation fund within the meaning of the SIS Act and thus, within the definition of s 90MD (now s 90XD) of an "eligible superannuation plan". That definition is "an interest that a person has as a member of an eligible superannuation plan".

However, Logan J found that the invalidity pension was not a defined benefit interest as reg 5(2) removed it from the scope of reg 5(1) because the pension was "only payable on invalidity".

Regulation 5(2) states:

> "A superannuation interest, or a component of a superannuation interest, is not a ***defined benefit interest*** for these Regulations if the only benefits payable in respect of the interest, or the component, that are defined by reference to the amounts or factors mentioned in subregulation (1A) are benefits payable on death or invalidity".

The effect of the determination of Mr Campbell's invalidity pension as an accumulation interest rather than a defined benefit interest on its value was not set out in the judgment. Logan J remitted the matter to the Tribunal.

There is an even greater need for specialist superannuation advice regarding invalidity pensions in the payment phase now than there was before *Campbell*.

The reasons for the decision in *Campbell* were explored by Stephen Bourke in "Invalidity Pensions after *Campbell v SCT" Australian Family Lawyer*, 26/2, August 2017. He also explained the effect of the decision, specifically with respect to the MSBS (taking into account amendments to the Scheme as a result of the decision in *Campbell*) and more generally with respect to hurt on duty pensions in the payment phase. Mr Bourke pointed out that the "method approved for the calculation of the amount to be taken as the value under r 43 of the FLS Regulations only applies to pensions payable for life and the approval instrument (see *Family Law Superannuation (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003*) does not apply to pensions other than pensions payable for life".

He emphasised the importance of ascertaining whether the pension is a lifetime pension or a fixed term pension payable only until the next medical review when payments may either cease or continue. He also outlined the need for reform in this area taking into account the complexities of defined benefit superannuation and the individual schemes.

The Full Court of the Family Court has not expressed a view on the correctness or otherwise of the decision in *Campbell*. However, in *Welch & Abney* [2016] FamCAFC 271, the Full Court of the Family Court in allowing an appeal, considered that the parties should have an opportunity to make submissions with respect to that decision. This was a factor in favour of the matter being remitted for rehearing rather than the Full Court re-exercising the discretion.

***Suris & Suris* [2021] FedCFamC1F 1**

Justice Carew distinguished the facts from *Campbell* as the member had received lump sum rather than pension payments from the MSBS which were superannuation.

***Blackwell & Blackwell* [2022] FedCFamC2F 66**

The husband sought a discrete ruling that his permanent disability pension was not superannuation (and was therefore not property) but a financial resource or alternatively should be dealt with in a discrete pool. He argued, consistently with *Campbell*, although the court did not say which superannuation fund it was dealing with, that his permanent disability pension was not superannuation because it was paid by virtue of a medical condition.

The information provided by the fund confirmed that the husband's interest was a "superannuation interest in the payment phase", it was a splittable interest and that the lump sum valuation of the disability pension, calculated using the standard method as prescribed in the FLS Regulations *was* $976,925.38 at 20 February 2021 and $979,524.79 at 27 May 2021. Furthermore, the husband had an option of taking a lump sum payment in lieu of his pension at ages 60 or 65.

Judge Middleton concluded (at [16]-[18]):

> "It is quite clear that the Respondent is a member of C Super Fund and furthermore, it is clear that C Super Fund is a superannuation fund within the meaning of the SIS Act and is therefore by virtue of section 90XD an eligible superannuation plan.
>
> I am satisfied that the Respondent has a superannuation interest as defined in section 90XD because his interest comes about by virtue of his membership. Furthermore, the correspondence of 17 June 2021 specifically states that the Respondent's interest is a "superannuation interest in the payment phase".
>
> Accordingly, I am not satisfied that the Respondent's interest in C Super Fund is a financial resource."

***Carron* & *Laniga* (2019) FLC ¶93-909; [2019] FamCAFC 115**

The Full Court of the Family Court agreed with the trial judge's approach that the wife's MSBS superannuation interest in the growth phase should be taken into account as property but that the MSBS pension, which was a continuing but modest income stream that could not be commuted or alienated, should be taken into account as a financial resource. As the husband sought no splitting order in relation to it, the pension did not need to be given a capitalised value under the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (Cth).

Summary with respect to DBFs

The above illustrates the necessity in relation to DBFs of:

- Carefully examining the scheme entitlements, whether acting for the member or the non-member, which will usually require the obtaining of expert advice
- Examining whether an asset by asset or global approach should be taken
- Applying s 79/s 90SM

- Considering the scheme value and the family law value
- Is it a lump sum or pension?
- Looking at whether the pension is commutable to a lump sum
- Can the non-member's entitlements be rolled out immediately?
- Considering whether a flagging order may be appropriate

7. Recent cases

***Scriven* & *Scriven* (2020) FLC 93-988; [2020] FamCAFC 236**

The Full Court of the Family Court upheld an appeal in circumstances where the trial judge decided to take an asset-by-asset approach but failed to consider the respective

contributions of the parties to each asset, and in particular to the husband's superannuation interest.

***Salters* & *Salters* [2020] FamCA 138**

The court had made earlier interim property orders pursuant to which the wife rolled out 50% of the total value of a SMSF. Each party had $3,773,447 in superannuation at that time.

By the time of the trial, 7 months later, the wife had invested her superannuation and it had fallen in value to $2,673,583. By contrast, the husband's superannuation had increased in value to $4,087,762.

The husband argued that the values at the time of the wife's 50% interest being rolled out should be used in working out the property to be divided between the parties at trial. The court refused to do this and used the values at the time of the trial. There can only be one exercise of power under s 79 FLA although the power can be exercised in a series of stages and by the making of orders on different dates. Ultimately though, the orders must be just and equitable between the parties which meant that the values at the time of the trial had to be used.

***Barre* & *Barre* [2021] FamCA 101 and *Barre & Barre (Superannuation)* [2021] FamCA 463**

This case involved a s 90B financial agreement. Besides there being difficulties as to whether or not the financial agreement adequately dealt with the superannuation, so that the superannuation could be "shared" between the parties, the SMSF was also non-compliant. There was a dispute as to who was the trustee of the SMSF. The husband was also bankrupt and a bankrupt cannot be a trustee of an SMSF (ss 120(1) and 126K SIS Act).

The husband was occupying the residence which was the main asset of the SMSF. A

company of which he was the sole director and shareholder was the tenant.

The court adjourned so that the parties could make further submissions, and perhaps present further evidence at the next hearing. The adjournment also enabled the parties to consider the impact of orders for the sale of two real properties upon the bankruptcy of the husband.

On the adjourned date orders were made to enable the properties to be sold so that the SMSF could be made compliant, and for the husband to rollover his interest into another fund.

***Finlay & Finlay (No 3)* [2021] FCCA 592**

The wife proposed to split her entire interest in the SMSF to the husband in the first instance and then receive a 45% split in her favour at a later time when he received a splittable payment. In the meantime the parties would jointly manage the SMSF through the trustee company, which Judge Betts viewed as problematic. It left the parties financially entangled to an extent incompatible with the "clean break" principle set out in s 81 FLA (or s 90ST).

The court preferred the husband's form of order which involved an immediate split to the wife of a base figure (of $46,067), and that she promptly roll out her interest in the fund. This was much more consistent with s 81 FLA and fairer to both parties.

***Palumbo & Mandel* (2019) FLC 93-929; [2019] FamCAFC 228**

The trial judge decided to deal with the superannuation as a discrete class of property but then failed to assess the parties' contributions to the superannuation (as opposed to the non-superannuation property) before splitting the superannuation 70%/30% in favour of the husband.

The Full Court of the Family Court re-exercised the discretion and assessed contributions to both superannuation and non-superannuation as 53%/47% in favour of the husband and then made a further adjustment of 3% in favour of the husband.

The request by the husband to receive more of his entitlements in non-superannuation was refused (at [121]) as:

> "The nature and characteristic of these classes of property are fundamentally different and the wife is just as entitled as he is to have her proper share of the available non-superannuation property."

The Full Court confirmed (at [46]) “the majority did not purport to lay down a hard and fast rule that superannuation must be dealt with as a discrete class of property”.

***Kuzmin & Russo* [2020] FCCA 3291**

After a de facto relationship of about 6 years and 2 children, the father sought “equalisation of superannuation” but in evidence he sought an equalisation of the increase in his superannuation during the course of cohabitation, and not the total of his superannuation entitlements.

The trial judge rejected the argument by both parties that only additional contributions or increases to superannuation during the relationship or marriage are divided between the parties, and they are divided equally. He referred to this approach (based on the *West & Green* (1993) FLC 92-395 formula) as being useful for solicitors in negotiating an outcome particularly where there is a small amount of superannuation among young parties far from retirement. However, this approach was not the law about the way to deal with superannuation in the era of superannuation splitting orders.

If superannuation is to be divided other than by agreement it is necessary to identify the value of the parties’ superannuation, contribution factors and future needs. Taking into account the ages of the parties and the father’s greater contribution to the superannuation by bringing in more superannuation at the start of the relationship, Judge O’Shannessy said there should be no superannuation split unless the mother was unable to retain the home and it had to be sold.

***Varnham* & *Moses* (2021) FLC 94-007; [2021] FamCAFC 31**

Both parties sought a superannuation splitting order but the trial judge did not make one and did not explain her reasons for not doing so. The trial judge divided the property pool 60%/40% in favour of the wife on the basis of contributions.

The husband had superannuation of about $540,000 and the wife had $31,000. The trial judge gave the wife a further 10% for s 75(2) FLA factors in part because of the discrepancy in the parties’ superannuation entitlements. This meant that the wife’s overall entitlements were 70% of the property pool and she received almost all of this in non-superannuation property, whereas the husband received most of his property entitlements in superannuation.

The Full Court of the Family Court held that the trial judge erred in giving the wife a 10% s 75(2) FLA adjustment in lieu of a superannuation split when the parties had asked for a

splitting order to be made. The trial judge also erred in not explaining how it was just and equitable to both parties for there not to be a superannuation split.

***Pates* & *Pates* [2018] FamCAFC 171**

The wife unsuccessfully appealed on the ground that the trial judge misconceived the real and effective disparity between the parties' earning capacities. The trial judge found that the husband earned about $277,000 per annum, which comprised income of $180,000 and a tax-free pension of $97,000 but he soon intended to retire, which would mean loss of his earned income but retention of his pension. The wife was made redundant some years before, there was little likelihood of her finding future employment, she had little current remuneration and therefore little or no future earning capacity. The significant disparity between their superannuation interests, which favoured an adjustment to the wife pursuant to s 75(2)(b) FLA, was noted. The husband's tax-free non-commutable pension was counted as property and was attributed a notional capital value of around $1,140,000. Aside from the pension, the husband had accumulated superannuation of nearly $500,000 whereas the wife had only $50,000.

The trial judge had found that the contribution-based entitlements of the parties during the period of cohabitation were 50%/50% but that in the 11 years between separation and the pronouncement of judgment the overall contribution-based entitlements of the parties were 55% to the husband and 45% to the wife because his post-separation contributions were substantially greater than hers.

The s 75(2) FLA adjustment in the wife's favour was fixed at 3.5%. This equated to about $360,000, but in real terms it changed the parties' respective entitlements by double that amount. The adjustment was levied on net property, non-superannuation property and the parties' superannuation interests, which in aggregation were valued at nearly $10,300,000.

Although in retirement the husband would continue to receive his tax-free pension of about $97,000 per annum, his other superannuation would then be available for use, which was $450,000 more than the wife's. The effect of the trial judge's decision was to ensure that the wife received a 48.5% share of the parties' combined superannuation interests, her share being about $820,600. Allowing for the retention of her own superannuation of just over $50,000, she therefore received a capital payment of about $770,000 in satisfaction of her share from the husband's superannuation interests. Given that his other accumulated superannuation was worth only about $500,000, the orders necessitated that he surrender non-superannuation property to meet the capital adjustment to the wife. She therefore took

most of her share of property in non-superannuation property to compensate for the husband's continuing income stream.

The Full Court of the Family Court rejected the wife's contention that the trial judge "misconceived the real and effective disparity in the present and future earning capacities of the parties". The trial judge knew the husband contemplated imminent retirement, that he would keep his tax-free pension, that the wife had little or no chance of earning income from gainful employment and her accumulated superannuation was far inferior to the husband's. He therefore made a substantial capital adjustment in her favour on account of those circumstances.

***Gainsford & Gainsford* [2020] FCCA 394**

The parties had been in a relationship for 35 years, both had retired and received disability support pensions. The wife's income was supplemented with a superannuation pension of $850 per week which could not be commuted to a lump sum, but was valued for family law purposes as around $643,000. The balance of the property pool including superannuation other than the wife's pension was valued at a little over $1.1 million. The wife's contribution-based entitlements to the property were assessed at 55%.

The Federal Circuit Court judge split the pension in the same proportions as the other property which meant that the parties had similar incomes in their retirements.

***Hyndman & Garside* [2022] FedCfamCIF 14**

The SMSF owned 50% of the land on which the parties' business operated and 50% of the business. Justice Hartnett ordered at trial that the property including superannuation be divided 50/50 between the parties.

In 2014, 3 years before the separation, the husband started to receive a pension income from the parties' SMSF. The payments were made into the wife's bank account but it was only the husband who was at an eligible age to receive the payments. From the commencement of those payments until separation, the husband received a total of $490,000 which was used by the parties in the acquisition of their assets and for the benefit of their family. The contributions of the parties were assessed as equal and the husband's pension had no impact on the outcome.

Prior to trial the court made an order enabling the husband to withdraw $50,000 from the SMSF's bank account as a withdrawal from the husband's member balance with such withdrawal to be characterised at trial. The wife was 23 years younger than the husband who

had a very low weekly income. The withdrawal was held not to be a part property payment as submitted by the wife at trial. At that stage, the husband needed funds to live on, and was entitled to withdraw such monies from his own superannuation fund as he had met a condition of release.

The court had also made an earlier order by consent that the husband be paid $34,495, being 2.5% of the husband's retirement phase pension, from the SMSF within seven days. The purpose of the order, as agreed between the parties, was to prevent the SMSF from committing a further contravention. A party in receipt of a pension must be paid a minimum amount each year.

The parties' SMSF was non-compliant and this was advised by the auditor of the fund to the parties and to the ATO. The ATO wrote to the trustee of the SMSF and informed the trustee that the SMSF was non-compliant and needed to be rectified. The contraventions of the fund related to the non-payment of rental by the business for the use of property owned by the SMSF.

The business owed the SMSF $218,657 in rent. At trial, it was the wife's evidence that the rental debt could likely be offset against the capital investment that the parties made in the O Property, or alternatively the debt could be written off. The husband, being the other trustee, did not agree with either of the wife's proposals. He sought that the rent be paid. It was clearly advantageous to the husband for the monies to be paid to the SMSF, as the SMSF was funding his retirement. The wife's evidence was "there's no income to pay the rent", but the court did not accept that evidence.

As part of his superannuation entitlements pursuant to the splitting order, the husband was entitled, at his election, to include the real property subject to its mortgage liability.

The husband was left with a superannuation asset. He had cash available to him and no exposure to debt outside of the SMSF. Those matters were just and equitable to him given his age and retirement status. He had accommodation with his partner. The wife and children had accommodation in the former matrimonial home.

The wording of part of the orders is reproduced below:

> "23. That there be an equal division of assets between the parties including the SMSF, calculated as if the SMSF has received the rental due to it from DPL of approximately $218,657.
>
> 24. That as part of the superannuation entitlements pursuant to a splitting order, the Husband be entitled to include the real property situate at 4 J Street, K Town in the State of Victoria ("N Property"), owned by the SMSF in specie in the rollout to him.

> 25. That the wife be at liberty to retain the SMSF for her own use as a self-managed superannuation fund, or in the alternative the SMSF be wound up after the implementation of the splitting order.
>
> 26. That in the event there are penalties levied against the SMSF as a result of compliance failure with respect to the non-payment of rent by DPL, the wife shall indemnify the husband for any such loss and the amount to be rolled out or retained by her in the SMSF shall be applied to pay any such penalty as and when it falls due."

***Vinci & Adamo* [2021] FedCFamC1A 53**

The parties married in 2002 and separated in 2012 but remained living under the one roof until October 2018. They had two children born in 2006 and 2009.

The wife purchased a house at Suburb E in 1996. At the time of the marriage it was worth approximately $900,000 with a mortgage of $40,000. At the time of the hearing it was worth $2.6 million and was the only substantial non-superannuation property available for division.

The husband had a superannuation interest which had been valued pursuant to the FLS Regulations at $116,037.25 and the wife had a superannuation interest similarly valued at $143,000.

In addition, the wife had a defined benefit interest in Super Fund 1 which was valued at $1,225,685.75 by the husband and $886,759 by the wife. The primary judge noted that the wife was not entitled to receive the pension until she turned 55 years of age in 2026, at which time she would be entitled to receive a pension at 45% of her then salary. Her Honour decided that the pension could not properly be included as property in a lump sum and accordingly decided to deal with the superannuation and pension interests separately from the other property. No challenge was made to that course being taken.

The non-superannuation assets had a value of $2,026,267. The primary judge determined that the parties' contributions to the non-superannuation property favoured the wife as to 70% and the husband 30%. After considering the matters raised by s 79(4) FLA an adjustment of 10% in favour of the wife was appropriate.

There was no appeal against the decision to award 80% of the non-superannuation property to the wife, although some collateral attacks were made to some of the findings that led to that conclusion.

The trial judge determined that each party should each retain their modest superannuation entitlements. As to the pension, she said (at [310]-[311]):

> The [appellant's] entitlement to the pension accrued by virtue of her [career] in 2003 and her remaining there until [early] 2011. In relation to her [career], I am satisfied that this was an enterprise to which the [respondent] contributed

> his expertise and efforts. I am also satisfied that, when the [appellant] was an elected official, she was assisted in carrying out her duties by the fact that the [respondent] was available to care for the children.
>
> The entirety of her entitlement to the pension accrued during the marriage and I consider that their contributions to it are equal. The orders will provide for the pension to be equally split.

The appellant wife challenged the primary judge's finding that the parties' contributions during the marriage were equal and therefore the contributions to the pension were equal. Her first submission was that the primary judge was obliged to follow the course set out in *Coghlan & Coghlan* (2005) FLC 93-220 but did not do so. There, the majority of the Full Court said that when "considering what order should be made with respect to the property of the parties (and/or any superannuation interests)" the court must take into account the matters raised by s 79(4) FLA. Such a proposition was held by the Full Court to be entirely unremarkable.

Due to s 75(2) considerations a further adjustment was made to the wife of 10%. The adjustment was in relation to the non-superannuation assets only and not to the superannuation interests or pension.

The Full Court said (at [18]):

> "In short, the primary judge has acted entirely in accordance with s 79(4). The submission that, had *Coghlan* been applied, there was no way that the primary judge could have concluded that the respondent was entitled to half of the pension is not a submission as to whether s 79(4) and hence s 75(2) of the Act was correctly applied, but rather a plea to us to substitute a different conclusion to that reached by the primary judge. Absent error, that is not a course open to us."

The Full Court recorded the findings of the primary judge (at [14]) that the parties both contributed in their own way to the wife's career "according to their abilities" (at [225]). The critical finding was, however, that the parties' contributions to the marriage, as opposed to their initial contributions or post-separation contributions, taken as a whole were equal. As the wife's rights to receive the pension in due course occurred entirely during that period, the primary judge regarded the contributions to that pension also as being equal.

It was submitted that the primary judge's reasons were inadequate because the wife's "capacity to attain the age of 55 and meet one of the criteria for eligibility for the deferred pension is not something to which [the respondent] has contributed at all" yet the primary judge found that the contributions were equal. The Full Court said this misrepresented the primary judge's findings which were that as the parties' contributions during the marriage were equal and as the wife's rights to the pension arose entirely during that period (her career took place at the time the marriage subsisted), the contributions to that pension

should be also regarded as equal. Further, the significance of the wife's ability to turn 55 was not raised in either before the primary judge. It was not an obvious point and, given the absence of submissions, it could not be said that the primary judge's was in error for not taking it into account. It was not at all clear to the Full Court how the capacity to attain the age of 55 bore on those findings or indeed, what weight could be placed upon it.

It was contended that husband was obliged to show that his contributions to the pension were equal, which he had not done. The Full Court confirmed that was not the basis on which the findings as to the contributions to the pension were made.

The Full Court said (at [38]):

> "Despite the strenuous attempts of counsel for the appellant to rake through the coals to find error in the conclusions as to the pension, we are quite unpersuaded of any. Further, it appears to us that there is a difficulty in appealing only one out of a suite of orders when it is plain that the primary judge was satisfied that the overall outcome was just and equitable. The appellant never attempted to grasp that nettle."

The Full Court recorded the findings of the primary judge in relation to the wife's pension (at [44]):

- There was no dispute that the wife will not be entitled to receive her pension as a lump sum;
- She had no entitlement to the pension until she reached the age of 55 years in 2026;
- Her entitlement to receive a pension was to the equivalent of 45 percent of the salary. The salary was currently $169,192 so the pension, based on the current figure, would be $76,136 or $1,464 per week.

Whilst splitting by a base amount obviously requires a valuation in accordance with the FLS Regulations the Full Court did not see why the above discussion was not a sufficient valuation for the purposes of a percentage order and s 90XT(2)(b) FLA. It took into account the likely sum to be received each week, as best it could be divined on the evidence, so that it was clear what each party would receive under the order.

Minh & Dieu **[2021] FedCFamC2F 649**

Both parties submitted that the superannuation assets should be dealt with separately to the non-superannuation assets.

The respondent did not concede that there should be any splittable payment made from her superannuation fund to the applicant's superannuation fund. It was, however, the respondent's alternative position that if the applicant was to be paid more than $66,754 any further amount

should be split from her superannuation. That way, the respondent argued, she would be able to retain her home.

The respondent argued that the applicant held $90,000 in superannuation at the commencement of the relationship, which was all lost to the failed business within the first year. She argued that the applicant's superannuation was lost due to his reckless and wanton behaviour in spending them but there was insufficient evidence for the trial judge to make that finding.

The trial judge determined that the applicant should receive a total of $125,336.25. Contributions and s 75(2) factors were assessed differently with respect to superannuation so that the applicant was held to be entitled to 32.5% of the non-superannuation property pool and 25% of the superannuation property pool.

The applicant couldn't prove that her borrowing capacity was as limited as she said it was and the court found that it wasn't just and equitable to order that the respondent receive extra superannuation rather than cash.

While the issue was not explored at trial, the primary judge considered it curious that the applicant was seemingly unable to increase his superannuation. This was particularly questionable given his current and past income. The applicant's current employers were legally obliged to contribute to his superannuation, yet he held only $6,271 in superannuation. He currently earned $55,000 and his entitlement to SGC contributions to his superannuation was set in accordance with the employment contract. The primary judge did not accept that the parties' agreed figure of $6,271 accurately represented the true value of the applicant's superannuation. He assumed the applicant's superannuation had a value of $10,450.

***Winnel & Winnel* [2022] FedCFamC1F 82**

The parties were able to access their superannuation and do so free of tax.

The court ordered that the wife retain all the superannuation so that the husband could retain the home.

Blandford & Esmore **[2022] FedCFamC1A 67**

The Full Court of the Federal Circuit and Family Court agreed with the trial judge that the wife's superannuation ought not in some way be quarantined. She argued that it should be as she had greater income during the relationship. The Full Court said at ([20]):

> "To adopt such an approach would leave homemakers, who have not accumulated significant superannuation, with no share of the superannuation of the party who engaged in employment throughout the relationship. It would also operate unfairly against those who are self-employed or in casual and contracting roles, and may not have accumulated superannuation but instead applied their income to day to day needs of their family."

Bonnett & Bonnett **[2021] FedCFamC1A 95**

The Full Court upheld an outcome of the wife receiving 70% of the parties' superannuation on the basis that there was equality of contributions but the s 75(2) factors favoured the wife. There was no non-superannuation property. The appeal was successful in relation to spousal maintenance and child support and the case was remitted for rehearing with respect to the husband's capacity to pay and the proper amounts payable.

Branic & Sandberg **[2021] FCCA 1652**

The proceedings were between the husband and the executor of the wife's estate. The pool was $3.46 million, of which $1.575 million was money received from insurance policies as a result of the wife's total and permanent disablement (TPD) and later death.

In 2009 the parties set up the SMSF and took out insurance policies on the advice of a financial planner. The SMSF paid the premiums.

The wife made a claim for a trauma benefit after a cancer diagnosis in 2012 and the sum of $100,000 was deposited into the wife's account, not into a joint account. The sum of $71,000 was used for treatment in an overseas country.

The parties separated in late 2015 or early 2016.

In March 2019 the wife claimed on the TPD component of the policy. By then there were property settlement proceedings on foot and it was clear that she wanted to use the money that was due to be received as a result of the TPD claim to make provision for the children in the way that she preferred, and that was not by giving it to the husband to help him look after them.

In January 2020 the wife executed a Binding Death Benefit Nomination which directed the trustee of the SMSF to pay 100% of her benefits under the fund to her legal personal representative. At or about the same time she made a will leaving her estate as to 10% to

her sister Ms Sanberg, 10% to her sister's children and the remaining 80% to the children of the marriage.

The court took into account that the insurance policy was taken out as the result of a joint decision of the parties:

- The premiums were paid by the SMSF for 10 years.
- The husband made contributions throughout the marriage in many and diverse ways.
- The wife's illness and death were the direct contributing factors to the money being in existence.

The court assessed contributions to the superannuation fund as 75% by the wife and 25% by the husband. This entitled the husband to $393,844.25 and the estate to $1,181,532.75 of the SMSF. The remaining pool was worth $889,189. The court was satisfied that contributions to the date of separation should be assessed as equal. For the husband's care of the children since December 2019, a 2% adjustment was made in his favour from this pool, which would entitle him to 52% of the pool and the estate to 48%.

As a cross-check, this meant that the husband was entitled to 35% of the total pool and the wife to 65%, an outcome which fits comfortably with the fact that the pool which existed when the parties separated had been significantly augmented as a result of the wife's illness and death.

The outcome would not have been different with a non-SMSF.

***Basara & Wasen* [2021] FedCFamC1A 83**

At trial, the parties each argued wastage by the other following separation. The wife withdrew $234,200 from the parties' home loan account, placing the money into a term deposit that had a value of $238,900 at the time of trial. The effect of the withdrawal was that interest accrued on the home loan debt and repayments were required by the bank, which the husband paid. The husband dealt with his superannuation in various ways which reduced his superannuation interests from $872,397 to $106,327 by the time of trial.

The trial judge assessed the parties' contributions to the property (including superannuation) of $2,157,853.91 as equal but gave the wife 5% for s 75(2) factors as a result of the husband's dealings with his superannuation after having regard to the wife's dealings with the home loan account.

The husband's appeal was dismissed.

***Amos & Louis* [2022] FedCFamC2F 1074**

The court found that the value of the parties' non-superannuation property was $1,681,514 and the value of their superannuation was $1,521,186. The total value of the non-superannuation property and superannuation property of the parties was $3,202,700.

The parties' contributions to the non-superannuation pool were assessed as 37.5% to the wife and 62.5% to the husband.

The husband accumulated 14 years of entitlements to his defined benefit fund arising from his employment prior to the parties' cohabitation in 2001. He accumulated further contributions by way of his employment during the 15 years of cohabitation. He was assessed as hurt on duty in 2013 and ceased work on medical grounds in 2014.

Judge Murdoch said it was well settled that the wife cannot claim any direct contribution arising from the husband being hurt on duty. However, the wife made indirect financial contributions and contributions as homemaker and parent (*Schmidt & Schmidt* [2009] FamCA 1386). The wife's contributions as a homemaker and parent to the parties' children continued for 6 years between the separation and the final hearing.

A significant portion of the husband's entitlements were found to have arisen prior to the parties' cohabitation. The wife sought almost the entirety of his current entitlements. This would leave the husband with almost no income. The wife's superannuation had increased during the course of the parties' relationship and the husband had also made indirect contributions to its accumulation.

Judge Murdoch assessed the parties' contributions as:

- To the superannuation property pool - 25% by the wife and 75% by the husband;
- To the non-superannuation property pool – 37.5% by the wife and 62.5% by the husband.

An adjustment to each of the non-superannuation and superannuation pools was made of 7.5% in favour of the wife. Therefore the wife received 45% of the non-superannuation property pool and 32.5% of the superannuation property.

Conclusion

Almost all property settlements involve superannuation. A decision must be made as to whether there should be any splitting of the superannuation interests of the parties. This will

normally require an examination of the nature, form, value and characteristics of the superannuation entitlements of the parties, the values of non-superannuation, the total value of the property pool and the personal circumstances of the parties. If a superannuation entitlement is to be split its value must be determined under s 90XT(2) FLA. If it is not being split the family law value need not be used. There will be questions of how much the split should be and in the case of SMSFs and DBFs the implementation of the split often raises other complex issues.

The diversity of superannuation interests, the personal needs of the parties and the proportion of superannuation vis-à-vis non-superannuation gives opportunities for many different outcomes when considering the impact of superannuation. Whilst with accumulation funds the process may be simple, the ages and needs of the parties may still impact a just and equitable outcome. Once SMSFs and DBFs are in the mix though, the options and opportunities are considerably greater.

Super-Size Me: Superannuation Splitting and Family Law

Supplement

Jacky Campbell
Forte Family Lawyers

11 October 2022

Carving up the Assets in Family Law Property Settlements
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1. What if the implementation of the split is delayed?

The effect of a delay in the implementation of a superannuation split will depend upon a number of factors including:

- Is it a percentage split? A percentage split can still be implemented, but the non-member may get a windfall gain by receiving the benefit of the member's post-operative date contributions. It may be possible to negotiate a variation of the order by consent to ensure this doesn't occur, but still allows the non-member to receive in dollar terms more than they would have received if the split had occurred in a timely fashion. The non-member would have presumably received some growth of the split had occurred and they had the entitlements in their own fund.

- Is it a base amount split? The usual procedures for calculating adjustments to the base amount are set out in the SIS Regulations – see below - operate from the operative time.

- What is the operative date? Is it say 4 days after service of the order, or is it a specific date? If it is a specific date then the split will take effect from that date and the usual procedures for calculating adjustments to the base amount are set out in the SIS Regulations. If it is say 4 days after service of the order then it is sensible to negotiate for an increased amount to be payable to the non-member as otherwise the member will benefit unfairly from the growth in the non-member's agreed entitlements.

- Did the obligation to serve the order fall on a particular party? If the obligation fell on the member, the orders may be able to be set aside under s 79A(1)(c) or s 90SN(1)(c) FLA. If the obligation fell on the non-member then the orders cannot be set aside on the basis of their own default.

- Was the order served on a SMSF, and the SMSF has refused to implement the split? If so, enforcement orders may need to be obtained which set out the interest payable and require the trustee to implement the split. The trustee of a retail or industry fund will have processes to ensure the proper adjustment is made to the base amount – see below.

- If the fund does not allow the split to occur immediately, and there is therefore a delay in rolling out the non-member's entitlement, the fund may create a separate account for the non-member which may not increase at the same rate as the member's benefit. For example, the DFRDB increases at the long-term Treasury bond rate between the operative time and the date when the benefit becomes payable to the non-member. The FLS Regs do not apply as the adjustment is under the approved scheme.

- Does either party have a claim against their lawyer for not ensuring that the split occurred in a timely manner?

All of this reinforces the necessity for the lawyers for both the member and the non-member to ensure the split occurs before ending the retainer and closing the file.

How is the amount payable to the non-member spouse calculated?

The amount payable to the non-member spouse, whether the split is delayed or occurs as expected, is normally calculated in accordance with the FLS Regulations.

- Regulation 45 defines " base amount allocated to the non-member spouse" . The base amount is rounded up or down to the nearest dollar.

- Regulation 45A sets out that the base amount of an interest in the growth phase is to be adjusted by the trustee in accordance with the rate of interest which applies in that adjustment period under reg 45D. It may be a positive, negative or nil amount.

- Regulation 45B sets out the method of determining applicable adjustment periods for superannuation interests not covered by reg 45C.
- Regulation 45C sets out the applicable adjustment periods for accumulation interests in regulated funds which are not SMSFs), approved deposit funds (ADFs) or RSAs.
- Regulation 45D sets out how the interest rate is calculated for different types of superannuation interests.
- Division 6.2 applies to interests in the growth phase and division 6.3 applies to interests in the payment phase.

The trustee is bound by the order to split payments (s 90XZD) and it has obligations under Pt 7A *Superannuation Industry (Supervision) Regulations 1994* (SIS Regs) to transfer the transferable benefits. When the trustee has observed its Pt 7A obligations, any payments made to the member that would otherwise be splittable are no longer splittable payments under the terms of the order (reg 14 of the FLS Regs)**.**

The term "transferable benefits" is defined in reg 1.03(a) SIS Regulations and operates together with the definition of "adjusted base amount" also referred to in reg 1.03 SIS Regulations:

> **"transferable benefits**, in relation to a superannuation interest that is subject to a payment split and in relation to the non-member spouse in relation to that interest, means benefits that are equal to:
>
> > (a) if the payment split is a base amount payment split and an adjusted base amount applies to the non-member spouse when the benefits are transferred – the adjusted base amount less the amount of any fees payable by the non-member spouse in respect of the payment split; or
> > ...
>
> **adjusted base amount**, in relation to a non-member spouse at a particular date, means the adjusted base amount applicable to the non-member spouse at that date worked out under Division 6.1A of the Family Law (Superannuation) Regulations 2001."

Pursuant to reg 45D FLS Regs, the interest rate for the adjustment is:

> "the interest rate for the adjustment period is the rate determined by the Australian Government Actuary, and published in the Gazette, being a rate that is 2.5 percentage points 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 February."

As published by the Australian Government Actuary the most recent interest rates are:

- For the financial year ending on 30 June 2023, the rate is 4.7%; and
- For the financial year ending on 30 June 2022, the rate was 5.7%.

There are statutory obligations to be observed with time limits under Pt 7A SIS regs.

- The request by the non-member of the transfer of the transferable benefits must usually be made before the end of 28 days after the trustee gives a payment split notice to the person (r.7A.08 SIS Regs); and
- The transfer of the transferable benefits must usually be made within 30 days of receiving the request under reg 7A.06 (r.7A.12(4)(a)(i) SIS Regs.

Therefore, the base amount will be adjusted between the operative time and the date when the payment split is made, and that adjustment will be the addition of interest as set out in the FLS Regs, currently 4.7%.

Another point to look at is if the order can be set aside under s 79A or 90SN FLA (for a splitting order) or s 90K or 90UM for a split sin a superannuation agreement. In relation to orders, possible grounds to argue are miscarriage of justice or default in carrying out the orders.

The following two cases illustrate the issues.

***Tennant & Tennant* [2018] FamCA 111**

The respondent, who was the recipient of a superannuation split in a court order claimed interest on the delayed payment of the superannuation split. The respondent was entitled to a superannuation split from a SMSF of a base amount of $347,400, calculated in accordance with Pt 6 FLS Regulations.

The applicant paid only $342,293.27. Interest on that sum at the rate of 7.5% was sought by the respondent.

The respondent also sought enforcement of the outstanding base amount of $5,106.73 and interest on that sum. Part 6 FLS Regulations provides for adjustments to be made to a base amount for applicable adjustment periods. The applicable adjustment period in this case was from the operative time pursuant to the Order, i.e. four business days from the date of the 2017 Order and the day before the payment became payable.

There was no evidence before Carew J of the calculation of the base amount pursuant to Pt 6 FLS Regulations. Accordingly, it was not possible to calculate what (if any) interest should be paid. Pursuant to the orders each party was obligated to contribute equally to the costs and fees involved in giving effect to the payment split. The applicant had deducted from the payment made to the respondent certain accountant's costs, which she contended had been incurred in giving effect to the payment split, but provided no evidence to support those amounts.

It seemed to Carew J (at [37]) that the most efficacious way of resolving the dispute "… is for the parties to retain an accountant to undertake the calculation of the base amount in accordance with Pt 6 FLS Regulations and obtain an invoice specifically for the costs and fees involved in giving effect to the payment split", which the parties should pay equally.

***Ainscrow* & *Gilborne* [2021] FCCA 1182**

There was a delay in the husband implementing a superannuation split of the self-managed superannuation fund in favour of the wife. He was required to pay interest to the wife of $16,935 calculated under reg 45D FLS Regulations and costs of $7539.

Q 2 Are the new superannuation-splitting arrangements for Western Australian de facto relationships the same as already in Pt VIIIB?

The new provisions operate from 28 September 2022.

They are in a new Pt VIIIC of the FLA. Most of the provisions are identical, or near identical with just minor language or jurisdictional differences. The most important thing to watch is that the section and Part references may be different. For example, the definition section is s 90YD not s 90XD and a splitting order is under s 90YY not s 90XT.