

**Women and Superannuation —
The Impact of the Family Law
Superannuation Regime**

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ABSTRACT

This doctrinal analysis considers the impact of the 2002 superannuation reforms upon the treatment of superannuation in family law property settlement proceedings. Pre-reform the courts had limited ability to evaluate and split superannuation in property settlement proceedings. The parameters of inconsistency, uncertainty, lack of clarity and unfairness to women were identified to be key characteristics of the pre-reform law. Superannuation was becoming more widespread and valuable and notwithstanding changes in the public sphere women's superannuation entitlements remained significantly less than men's thus reinforcing the need for change. The 2002 reforms introduced a technical regime of superannuation payment splitting and flagging underpinned by obligations to provide information and undertake valuations but did not mandate the splitting of superannuation payments. Nor did the legislation provide guidance about how the discretion to alter the interests of parties in superannuation should be exercised.

This doctrinal thesis presents a study of the relevant background policy issues, a review of the notable literature and a critical analysis of the significant case law to evaluate the evolving legal principles post reform. The parameters of inconsistency, uncertainty, lack of clarity and unfairness to women are employed to evaluate the treatment of superannuation in property settlement proceedings. The success of the post-reform law is also measured against the standard of a substantive equality approach. This framework focusses the findings of the doctrinal analysis throughout the thesis. The findings of the empirical analysis of the reforms reported in the *2008 Evaluation* are assessed and compared with those of the doctrinal analysis. As well the results of the doctrinal analysis are assessed against the elements of the policy objectives identified by the Revised Explanatory Memorandum as being necessary to the success of the reforms.

The reforms have led to improvements in the treatment of superannuation on separation and divorce. Separating couples can obtain information about each other's entitlements that will allow most types of superannuation to be valued in accordance with prescribed valuation methods. Superannuation payments can be split and flagged, and the consideration of superannuation is no longer restricted to its treatment as a financial resource.

Nevertheless there are shortcomings. The expected benefits of clear law to guide separating couples, lawyers and courts have been impeded by the judicial response to legislative ambiguity that has led to the preferred approach of treating superannuation as a separate species of asset. Consequentially there is no consistent treatment of different types of superannuation as property together with all forms of family wealth. There is uncertainty and inconsistency about the valuation of different types of superannuation. There is no consistency about the assessment of different types of contributions to superannuation compared to other assets. There is no certainty about the approach to the assessment of the relative economic positions of separated couples in relation to superannuation compared to other assets. Unfairness continues both because of the lack of retrospectivity of the reforms and as a result of layered disadvantage resulting from the evolving legal principles.

Areas of future review and reform are identified and recommendations proposed. The retention of the discretionary approach is preferred to a rule based approach to property settlement generally or to superannuation specifically. However amendment of pt VIII B is recommended to remove the *Coghlan* legislative ambiguity and to clearly state the policy

intention of pt VIII B by way of guidance. Also amendment of the transitional provisions is recommended to achieve fairness of access to the reforms for women. A range of other ancillary options are considered and the limitations discussed. Finally an empirical analysis of identified issues is recommended that builds on the present findings and addresses the limitations of the doctrinal approach.

DECLARATION OF ORIGINALITY

I, Jennifer Anne Paxton, certify that this work contains no material which has been accepted for the award to me of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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Date

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CHAPTER 1 INTRODUCTION

I RATIONALE & BACKGROUND

The purpose of this thesis is to consider the effect of the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) (*FLLA(S)A*), which commenced operation on 28 December 2002, on women engaged formally in the family law system.¹ This legislation and a suite of complementary delegated and associated legislation enable retirement savings in the form of superannuation to be evaluated and divided after separation. The evaluation takes the form of a doctrinal analysis of the way in which superannuation is valued, assessed and redistributed after the reforms and builds on earlier empirical and scholarly research evaluating the legislation. The approach taken in this evaluation is to consider the developing jurisprudence about the implementation of the reforms by the courts in the exercise of the discretion to alter property interests of separating couples. The doctrinal analysis sheds light on the direct regulation of disputes and is significant because the earlier empirical research, with its emphasis on informal settlements, was unable to address this lacuna.

A *The Significance of a Doctrinal Approach*

Empirical research conducted by the Australian Institute of Family Studies ('AIFS') in the 1990s and post-reform focused upon the treatment of superannuation in family law. The first of these was a *1999 Working Paper*² which predated the reforms and the second was an Evaluation which post-dated the reforms and was published in 2008.³ These studies are examined together with other studies which touch upon superannuation and family law.⁴

Both the *1999 Working Paper* and the *2008 Evaluation* proceeded by way of empirical research based on national telephone surveys of the way in which separated and divorced men and women divided their assets, including superannuation, upon separation and divorce. Both included superannuation in the pool of property available for redistribution.⁵ This empirical research confirmed the growing importance of superannuation as a form of family wealth and demonstrated the benefits to women that could result from all forms of superannuation being included in a single pool of property to be divided.⁶

¹ John Dewar, 'Regulating Families' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press 2004) 82, 82 describes family law as the statutory rules and associated procedures 'governing marriage, divorce, parenthood, cohabitation and their consequences.' The family law system now broadly encompasses the legal and family relationships sectors and includes men and women who settle privately with little or no legal advice or court involvement as well as those with a greater level of involvement in the legal sector. The focus of the thesis is on women engaged in formal family law proceedings that result in a court order.

² John Dewar, Grania Sheehan and Jody Hughes, 'Superannuation and Divorce in Australia' (Working Paper No 18, Australian Institute of Family Studies, 1999) (*1999 Working Paper*).

³ Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post Reform Practice and Settlement Outcomes' (2008) 22 *International Journal of Law Policy and the Family* 206 (*2008 Evaluation*).

⁴ See, eg, Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986) (*Settling Up*); Sophy Bordow and Margaret Harrison, 'Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases' [1994] *Australian Journal of Family Law* 264.

⁵ *1999 Working Paper*, above n 2, 16–17, 25; *2008 Evaluation*, above n 3, 215, 223–5.

⁶ *1999 Working Paper*, above n 2, 25; *2008 Evaluation*, above n 3, 223–5.

The *2008 Evaluation* sampled both informal settlements and settlements reached with differing degrees of involvement with the legal system between 2002 and 2006⁷ by formerly married couples who had separated after June 2001 and concluded that informal agreements reached without an order of the court made up the majority of the settlements.⁸ Therefore the *2008 Evaluation* provides insight into outcomes when people settle privately with limited or no formal engagement with the family law system. Although one of the core findings of the *2008 Evaluation* was that the reforms led to more men and women considering superannuation when resolving a property settlement⁹ the findings were equivocal with respect to how the superannuation was being taken into account and the benefits to women that resulted from the legislation.¹⁰ The *2008 Evaluation* noted that the extent of any benefit to women resulting from increased consideration of superannuation as a form of family wealth depends upon the way in which the courts exercise the discretion and, allied to this, upon negotiating behaviour.¹¹ The objective of the doctrinal analysis is to address this gap in the research literature about women and superannuation. The focus is not on whether superannuation is taken into account, which was central to the empirical studies, but rather on the question of *how* superannuation was taken into account by the courts post reform.

The doctrinal analysis can be further distinguished from the *2008 Evaluation* by its examination of the distribution of superannuation in contested proceedings from the startup time in 2002 until 2011. The present analysis addresses a temporal and developmental limitation of the *2008 Evaluation* which sampled settlements between 2002 and 2006. The survey responses of those who sought legal advice in relation to superannuation are likely to have been influenced by the premature state of the development of the case law at the time the survey was undertaken. As discussed in Chapter 5 initially the case law was slow to develop and the most influential Full Court decision, which later shaped the implementation of the reforms, was not handed down until 2005.¹² Consequently a doctrinal analysis that includes an analysis of the current state of the law is timely because judicial officers, lawyers, trustees and other stakeholders have had the opportunity to become familiar with and apply the reforms. The courts have handed down significant decisions which have been interpreted and applied and stable patterns and clear themes are developing about the impact of the reforms upon litigated family law proceedings and the consequences of those developments for women. The *2008 Evaluation* focused on settlement behaviour during the earlier years of the introduction of the legislation. The thesis is intended to cover the operation of the law now bedded down in practice.

The principles emerging from the case law pre and post-reform are a valuable adjunct to and point of comparison with the findings of the *1999 Working Paper* and the *2008 Evaluation*. An examination of these principles is crucial to assessing the operation of the law prior to the reforms, and the success of the legislation post reform not only in relation to family law proceedings but also in relation to the wider dispute resolution system.

Research by the AIFS has noted that legislation in family law may have a range of regulatory roles to play and three in particular.¹³ The first is the broad function of shaping social behaviour and values. The second is the intermediate function of indirectly influencing

⁷ *2008 Evaluation*, above n 3, 212–13.

⁸ *Ibid* 219.

⁹ *Ibid* 217, 219–21.

¹⁰ *Ibid* 222–5.

¹¹ *Ibid* 223.

¹² *Coghlan & Coghlan* (2005) FLC ¶93-220 ('*Coghlan*').

¹³ See, eg, Rae Kaspiew et al, 'Legislative Aspirations and Social Realities: Empirical Reflections on Australia's 2006 Family Law Reforms' (2011) 33(4) *Journal of Social Welfare and Family Law* 397, 400.

negotiating behaviour and the third is the direct regulatory function. All three functions are important to understanding the effectiveness of legislation. The *2008 Evaluation* informed the first and second function of family law reform by virtue of its sampling approach. The present research largely informs the third function. The methodological approach taken in the AIFS superannuation research provides important information in relation to how family wealth is divided, and superannuation dealt with across the entire range of settlement forms, but was unable to shed light on the development and application of legal principles.

There are different points of view about the effectiveness of legislation and legal principles to assist and promote dispute resolution in family law.¹⁴ Dispute resolution in family law is expanding rapidly in importance.¹⁵ Wider dispute resolution is not always driven by legal principles and there are many considerations and influential factors that come into play.¹⁶ However there is a view ‘that well-drafted laws, capable of being understood and self-applied by individuals in a range of settings, can assist parties to arrive at their own agreements by setting out clear expectations, obligations, entitlements, principles etc.’¹⁷ The findings of the *2008 Evaluation* confirm the wider impact of the amendments on settlement behaviour.

The findings of the *2008 Evaluation* suggest a broad based and significant influence of the amendments on settlement behaviour. Eighty per cent of survey respondents’ reported that the former couple’s superannuation was taken into account (that is, considered when dividing the property or divided).¹⁸ This compares to less than half of all pre-reform surveyed cases where the parties had superannuation at separation.¹⁹ When evaluated against this simple parameter of success, the reforms appear to have improved the position of women by ensuring that their husband’s superannuation is, at the very least, disclosed and discussed as part of the negotiations about property. How superannuation is then taken into account by the courts post reform generates far more complex messages for those who settle in the law’s shadow, the effects of which are less predictable with regards to the benefits afforded women.

B The Relevance of Gender

The doctrinal research presented in this thesis has as its focus the impact of the legislation on women formally engaged in the family law system, that is, in ‘the “private” realm of “matrimonial property and superannuation” ’.²⁰ However the impact of the amendments on settlement outcomes for women cannot be considered in isolation of the wider socio economic context and ‘the “public” realm of “women and superannuation” ’.²¹ Chapter 2 examines the reasons for “why women have low membership in superannuation schemes and receive lower benefits when they are members”.²² This background establishes the rationale

¹⁴ See, eg, Robert H Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1978–79) 88 *Yale Law Journal* 950; John Wade, ‘Forever Bargaining in the Shadow of the Law — Who Sells Solid Shadows? (Who Advises What, How and When?)’ (1998) 12 *Australian Journal of Family Law* 256; Dewar, ‘Regulating Families’, above n 1, 96; Kaspiew et al, above n 13.

¹⁵ See, eg, Donna Cooper, ‘The Family Law Dispute Resolution Spectrum’ (2007) 18 *Australian Dispute Resolution Journal* 234.

¹⁶ Mnookin and Kornhauser, above n 14, 966–84; Wade, above n 14, 256–65; Kaspiew et al, above n 13, 407, 410.

¹⁷ Dewar, ‘Regulating Families’, above n 1, 93; John Dewar, ‘Is Law Good for Families?’ (Paper presented at the Family Centre Annual Conference, Brisbane, February 2002).

¹⁸ *2008 Evaluation*, above n 3, 220.

¹⁹ *Ibid* 219–20.

²⁰ Jenni Millbank, ‘Hey Girls, Have We Got a Deal for You: Reform of Superannuation and Matrimonial Property’ (1993) 7 *Australian Journal of Family Law* 104, 105.

²¹ *Ibid*.

²² *Ibid*.

for the centrality of gender in evaluating the effectiveness of the reforms because if it were not for the fact that women continue to be in a disadvantageous position in relation to superannuation generally then change in the private sphere would have been unnecessary.²³

Superannuation is becoming an increasingly valuable and widespread form of wealth in Australia and is therefore assuming greater significance in family law over time.²⁴ Historically women are at a disadvantage when compared with men — in their capacity to access and accumulate superannuation. This uneven distribution of superannuation is for a number of reasons. Superannuation is linked to earnings from employment. Although women are engaged in employment more than ever before the patterns of employment of men and women differ.²⁵ Men are more likely to attain the long continuous higher paid employment necessary to accumulate adequate provision for retirement than women while by contrast women are more likely to engage in forms of employment having no superannuation entitlement.²⁶ They are more likely to be out of paid employment — or take breaks for family reasons.²⁷ Also women earn less than men on average by virtue of the occupations in which women are predominantly employed.²⁸ Furthermore women are paid less than men within their chosen occupation.²⁹ Moreover a finding has been made that a factor in the persistent gender pay gap in Australia is ‘simply being female.’³⁰

The *2009 NATSEM Gender Wage Gap Report* concluded that there is a persistent gender pay gap in Australia which had increased to about 17 per cent in February 2009 up from about 15.1 per cent in February 2005.³¹ The Australian Human Rights Commission noted that the gender pay gap was about 17.2 per cent in 2011.³² While the gender pay gap may have

²³ See Kristie Dunn, ‘Splitting the Difference: Superannuation, Equality and Family Law’ (1998) 12 *Australian Journal of Family Law* 1, 3 citing Millbank above n 20, 105. See generally Margaret Thornton, ‘The Cartography of Public and Private’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 2; Marcia Neave, ‘Private Ordering in Family Law — Will Women Benefit?’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 144 for a discussion about the multiple meanings of the public/private distinction; Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 5, 157–8.

²⁴ Cf for average values of superannuation for separated and divorced men and women see *Settling Up*, above n 4 176; *1999 Working Paper*, above n 2, 1, 14, 16–19; Bordow and Harrison, above n 4, 265, 269–70; for men and women not retired and under 65 years see Simon Kelly, ‘Household Savings and Retirement: Where Has All My Super Gone?’ (Research Report, CPA Australia, 2012) 22–3 (‘*KELLY Research Report*’); for men and women aged 15 years and over see Ross Clare, ‘Developments in the Level and Distribution of Retirement Savings’ (Research Paper, ASFA Research and Resource Centre, September 2011) 3, 6–9.

²⁵ See generally, Rebecca Cassells et al, ‘The Impact of a Sustained Gender Wage Gap on the Economy’ (Report, Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs, September 2009) (‘*2009 NATSEM Gender Wage Gap Report*’); House of Representatives Standing Committee on Employment and Workplace Relations, Parliament of Australia, *Making it Fair: Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce* (2009) 8–9 (‘*2009 House of Representatives Fair Pay Equity Report*’).

²⁶ *2009 House of Representatives Fair Pay Equity Report*, above n 25, 249, 252–3.

²⁷ *Ibid* 8.

²⁸ *Ibid* 8–9.

²⁹ *Ibid* 9.

³⁰ *2009 NATSEM Gender Wage Gap Report*, above n 25, v, 27.

³¹ *Ibid* v, 1–4, 27 (citing Australian Bureau of Statistics, *6302.0 — Average Weekly Earnings — Data Cube*, February 2009) calculated for full time, ordinary time adult employees. See generally *2009 Fair Pay Equity Report*, above n 25, xi, 18, 379.

³² Australian Human Rights Commission, *The Gender Gap in Retirement Savings*, http://humanrights.gov.au/sex_discrimination/programs/gender_gap.html (citing Australian Bureau of Statistics, *6302.0 — Average Weekly Earnings — Trend Data*, February 2011).

declined since 1985 it remains significant and there is continuing concern about the appropriate steps to take to reduce it.³³

As a result of earning less women accumulate less superannuation although the position is improving.³⁴ Also despite the fact that average superannuation balances are continuing to grow most men and women have relatively modest entitlements.³⁵ This is also expected to improve over time.³⁶ Notwithstanding the impact of the global financial crisis average superannuation balances for 2009–10 for men were \$71 645 and women \$40 475 a significant improvement on the 2003–04 position when the average balance for men was \$56 400 and \$29 300 for women.³⁷ Average retirement payouts for 2009–10 were about \$198 000 for men and \$112 600 for women and were projected to be \$250 000 for men and \$145 000 for women in June 2011.³⁸ Accordingly the gender disparity in the accumulation of superannuation continues.³⁹ Although many men and women will have inadequate superannuation for a comfortable retirement,⁴⁰ it nevertheless constitutes a significant and growing form of family wealth in the family law context.

This disparity is less conspicuous while couples are living together and are able to rely on the financial resources of each other and share the costs of living. However prior to the amendments it was particularly problematical when men and women separated. Many women left superannuation wholly in the hands of the owner without any adjustment being made in relation to the distribution of the other assets.⁴¹ This deprived women of obtaining the benefit of assets to which family income had been diverted and to which they had contributed during the relationship by virtue of their labour in caring for the children of the relationship and by supporting men in their employment. Consequently upon separation women potentially faced a comparatively poorly resourced retirement, with the greatest disadvantage experienced by mothers leaving long-term marriages.⁴²

³³ 2009 House of Representatives Fair Pay Equity Report, above n 25, xiv; 18, 379–83.

³⁴ Clare, 'Developments in the Level and Distribution of Retirement Savings', above n 24, 4.

³⁵ Ibid 10. See also Marcia Keegan, Anne Harding and Simon Kelly, 'A Growing Divide? Retirement Incomes by Gender in Australia' (Paper presented at the 32nd General Conference of The International Association for Research in Income and Wealth, Boston, 5–11, 2012) 12–14, 21 concluding that the low superannuation balances of older divorced and never married man should also be a matter for concern.

³⁶ Clare, 'Developments in the Level and Distribution of Retirement Savings', above n 24, 5; *KELLY Research Report*, above n 24, 23.

³⁷ Clare, 'Developments in the Level and Distribution of Retirement Savings' above n 24, 3–6 also opining that the global financial crisis had concluded by late 2008 or early 2009 which may be the subject of debate by economists. But see Ross Clare, 'Equity and Superannuation – The Real Issues' (Research Paper, ASFA Research & Resource Centre, September 2012) 17–18 that having regard to HILDA data the extent of disparities in the distribution of superannuation for the recently divorced between 2006 and 2010 had decreased for a number of reasons that might include the use of splitting arrangements.

³⁸ Clare, 'Developments in the Level and Distribution of Retirement Savings', above n 24, 3, 10.

³⁹ The analysis of ABS, *Survey of Income and Housing* data on superannuation presented in Clare, 'Developments in the Level and Distribution of Retirement Savings', above n 24, and the analysis of HILDA household wealth data (2002–10) represented in the *KELLY Research Report*, above n 24, present the most current Australian data on superannuation for women and men available that are based on national representative sampling. No comparable data are available to assess the degree of this disparity beyond 2010. Wave 11 of HILDA collected in 2012 contains no wealth data (citing email from Roger Wilkins, Principal Research Fellow and HILDA Survey Deputy Director (Research), Melbourne Institute of Applied Economics and Social Research to Grania Sheehan on the 31 October 2013) and the ABS *Survey of Income and Housing* 2011–12 data was released for analysis in August 2013.

⁴⁰ *KELLY Research Report*, above n 24, 5.

⁴¹ *Settling Up*, above n 4, 199–200; *1999 Working Paper*, above n 2, 20–3.

⁴² See generally Ruth Weston, 'Changes in Household Income Circumstances' in *Settling Up*, above n 4, 100, 119; *Settling Down include ref; 1999 Working Paper*, above n 2, 15–16 that the more children in the household the higher the value of the men's superannuation and the lower the value of women's with the

The superannuation amendments have little or no role to play in addressing the structural issues resulting in the gender disparity in superannuation. Rather family law is concerned with the redistribution of family wealth after relationships break down. Therefore it is acknowledged that even the successful implementation of the reforms will not alter the fact that many women may nevertheless be disadvantaged in retirement. However the reforms have a significant role to play in ensuring that this increasingly valuable form of family wealth is not undervalued in property settlement proceeding as it was prior to the reforms, nor overlooked when women's contributions to the family wealth and their future financial needs post separation are taken into account.

As noted the studies have shown that superannuation is becoming an increasingly valuable form of wealth in absolute terms and is comparable to the family home in many cases.⁴³ The inclusion of superannuation in the pool of family wealth to be redistributed should increase the overall share of that wealth received by women. In turn this should enable a greater share to be received in the form of superannuation or by way of other assets or a mixture of both to suit the circumstances of the parties depending on the chain of legal reasoning. Younger women with children to house may be afforded a greater opportunity acquire housing by offsetting their share of the superannuation, while for older women in financially comfortable circumstances a share of superannuation may be a priority.

It might be argued that the gains may be comparatively small in cases where there is a modest asset pool. However at present there has been no Australian empirical research that has assessed the role of small to moderate transfers of household wealth to women in alleviating financial hardship on retirement.⁴⁴ Nevertheless although the benefits of small financial gains either by way of superannuation splitting or adjustment in relation to other assets might be questioned such adjustments can lead to gains of considerable importance to women of limited financial means such as providing assistance with rehousing, education and retraining for employment and general alleviation of the costs of separation as well as provision for retirement however small. The significance of modest improvements for women in poor financial circumstances is not to be underestimated. The reforms are especially important if superannuation is the principal asset.

The amendments facilitate an opportunity for the courts to accurately value superannuation, recognise women's contribution to their former partner's superannuation, address financial need and achieve greater fairness in the distribution of family wealth. Whether the implementation of the amendments achieves fairness is considered 'in the light of long

greatest disparity in high asset marriage with three or more children; Bruce Smyth and Ruth Weston, 'Financial Living Standards After Divorce: A Recent Snapshot' (Research Paper No 23, Australian Institute of Family Studies, December 2000) 8–10 that older women were most financially disadvantaged after divorce; De Vaus, David et al, 'The Consequences of Divorce for Financial Living Standards in Later Life' (Research Paper No 38, Australian Institute of Family Studies, February 2007) 21 confirmed that a higher proportion of men than women aged 55 to 74 years had superannuation.

⁴³ 1999 Working Paper, above n 2, 13–19; 2008 Evaluation, above n 3, 217–18; Milica Kecmanovic and Roger Wilkins, 'The Composition of Household Wealth' in Roger Wilkins (ed), *Families, Incomes and Jobs: A Statistical Report on Waves 1 to 10 of the Household, Income and Labour Dynamics in Australia Survey* (Statistical Report Volume 8, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 2013) 82–3.

⁴⁴ Email from Francisco Azpitarte, Research Fellow in Economics at the Brotherhood of St Laurence Research and Policy Centre to Grania Sheehan, 22 October 2013 noting the absence of Australian research analysing the impact of assets on household welfare. The Brotherhood of St Laurence Research and Policy Centre is conducting a pilot study to address this question using HILDA data, with preliminary findings available in 2014.

standing feminist debates about the meaning of equality in relation to matrimonial property.⁴⁵ This scholarship is considered in Chapter 2.⁴⁶ In particular the *1994 Justice for Women Report* outlined three contemporary approaches to the assessment of ‘equality and inequality in laws, policies and programs’⁴⁷ each of which are discussed in Chapter 2 in reference to the superannuation reforms. The thesis draws upon the substantive equality model to assess the benefits afforded to women by the reforms.

C *The Legal Position Prior to the Reforms*

Chapter 3 considers the legislative and judicial treatment of superannuation in family law prior to the reforms. The treatment of superannuation in family law proceedings was problematical prior to the amendments because of inter alia the unique nature of superannuation and the statutory constraints of the *Family Law Act 1975* (Cth) (*FLA*). Section 79 of the *FLA* provides the court with a broad discretionary power to alter property interests having regard to a specified list of factors. In exercising the discretion the court follows a four step approach.⁴⁸ The first step is to identify and value the parties’ property.⁴⁹ The second step requires an assessment of the financial and non-financial contributions of the parties to the property and to the welfare of the family.⁵⁰ The third step requires the court to assess whether an adjustment is necessary having regard to a range of mainly prospective factors which are primarily focussed on future financial need.⁵¹ The fourth and final step in the exercise of the discretion, comparatively recently recognised as a distinct exercise, is generally to consider what order is just and equitable in the circumstances of the particular case.⁵²

In contested proceedings the court only had the power to deal with property to which the parties were entitled at the time of the hearing.⁵³ Superannuation was not generally considered to be property unless a condition of release had been met and the entitlement had been paid.⁵⁴ The court could not generally deal with a prospective entitlement to superannuation in the same way as other property of the parties. Orders dividing superannuation which were binding upon trustees could not generally be made. A uniform regime of valuing the various different types of superannuation interests was not available and non-members spouses could not obtain information about superannuation interests from trustees.

The courts developed a number of approaches in an attempt to circumvent these limitations and give due regard to this increasingly valuable form of wealth.⁵⁵ Two of these approaches predominated. The first was to offset superannuation against the non-superannuation assets. The increase in the non-member spouse’s share of the non-superannuation assets was justified on the basis that any superannuation entitlement of the member spouse was a resource.⁵⁶ Thus step three enabled any gender disparity in the accumulation of superannuation to be taken into

⁴⁵ Dunn, above n 23, 2.

⁴⁶ See below Chapter 2.

⁴⁷ Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69 (1994) pt II, [3.7] (*‘1994 Justice for Women Report’*).

⁴⁸ See below 118–19.

⁴⁹ See below 119, 155.

⁵⁰ See below 119, 169–75.

⁵¹ See below 119, 196–201.

⁵² See below 119, 216–18.

⁵³ *FLA* s 4(1) (definition of ‘property’).

⁵⁴ See below 43–5.

⁵⁵ See below 45–52.

⁵⁶ *FLA* s 75(2)(b).

account usually for the benefit of the wife. Step three had a prominent role to play prior to the reforms.

The second was to deal with the superannuation when it was actually paid either by way of a present order to take effect in the future when the payment was made or by adjourning the proceedings about superannuation until that time for orders to be made. Thus superannuation could be dealt with when it became property. This approach failed to determine the financial relationship between the parties potentially for a significant period of time. Also the non-member spouse was at significant risk because the cooperation of the member-spouse was required.

The issue of the treatment of superannuation after separation received increasing attention over a long period of time as superannuation became a more significant form of wealth. Various studies, reports and reviews as well as academic literature identified the disadvantage to women resulting from the treatment of superannuation in family law and proposed a variety of responses to the problems.⁵⁷ Notably empirical research indicated that prior to the reforms superannuation was not generally taken into account in the division of property after separation in the majority of cases.⁵⁸

As Dewar, Sheehan and Hughes commented in 1999 '[t]here are therefore both needs-based and justice-based arguments for redressing the gendered inequality in the distribution of superannuation benefits following divorce.'⁵⁹ Women have a greater need for superannuation to support them in their retirement because they generally accumulate less superannuation for the reasons discussed and also because women tend to live longer than men.⁶⁰ The introduction of a superannuation splitting regime enables the needs-based arguments to be addressed to the extent possible in the family law system. It is, however, beyond the scope of this thesis to investigate the prevalence of splitting orders, or critique the quantum of those orders with respect to meeting women's financial needs on retirement. The reforms have also potentially addressed the justice-based arguments by recognising that superannuation is a form of family wealth to which women have contributed during a relationship and which should be included as property available for redistribution.

D The Statutory Framework after the Reforms

In response to the above practical issues and concerns about injustice in the way family wealth was being redistributed on separation and divorce the family law superannuation regime commenced operation on 28 December 2002 18 months after the *FLLA(S)A* received Royal Assent. The reforms enabled superannuation to be treated as property for the purposes of s 79 of the *FLA*.⁶¹ The legislation enabled payment splitting orders to be made that bind superannuation trustees to divide superannuation when it is paid thus providing greater security on retirement to the non-member spouse. Flagging orders can also be made that prevent trustees making certain superannuation payments to the detriment of the non-contributing partner where a splittable payment is pending. The *Family Law (Superannuation) Regulations 2001* (Cth) ('*FL(S)R*') provide a valuation regime for most types of superannuation and trustees are required to provide to non-member spouses the information necessary to undertake valuations. Furthermore interest splitting is facilitated in many cases

⁵⁷ Below 52–60.

⁵⁸ *Settling Up*, above n 4, 199; *1999 Working Paper*, above n 2, 20–1.

⁵⁹ *1999 Working Paper*, above n 2, 2. See also *2008 Evaluation*, above n 3, 207.

⁶⁰ Keegan, Harding and Kelly, above n 35, 9.

⁶¹ See also *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) s 90SM ('*FLA(DFFMOM)A*') in relation to de facto relationships.

by various consequential amendments which enable the entitlement of the member spouse to be divided prior to payment of the entitlement.⁶²

The delay in the commencement of the legislation was necessitated by the technical complexity of the reforms and allowed time for delegated legislation and wide-ranging complementary legislation to be passed.⁶³ It was also designed to enable the superannuation industry time to undertake required changes to administration and information systems.⁶⁴ An extensive educational campaign was undertaken directed at the community, the superannuation industry and family law professionals. The delay provided the opportunity for judges, lawyers and other family law professionals to educate themselves about the changes and to make plans to enable the changes to be implemented. But the amendments were not retrospective and generally did not apply where previous orders or agreements were in force at the start up time.⁶⁵ Many orders or agreements about superannuation were concluded prior to the startup time and also during the transition period which were affected by this lack of retrospectivity. The present examination of the impact of the reforms on women takes into account this transitional period and explores whether any injustice for women arises from orders made prior to the startup time.⁶⁶

The statutory framework which is the centrepiece of this doctrinal analysis is complex and requires detailed consideration. This analysis is set out in Chapter 4. Analysis of the *FL(S)R* and the valuation methods are included to facilitate an understanding of the case law and to provide sufficient context in order to explore the research aims. The range of complicated actuarial provisions, techniques and formulae for determining the value of different types of superannuation contained within the *FL(S)R* are, however, outside the scope of this thesis. The analysis highlights the complexity of these provisions and provides the context and understanding necessary for the research.

II RESEARCH AIM AND EVALUATION FRAMEWORK

The aim of this thesis is to evaluate the implementation of the legislation by the courts and to consider whether each of the outcomes of consistency, certainty and fairness in the redistribution of family wealth including superannuation has been achieved. Crucially the thesis examines how superannuation is now taken into account and how its value is distributed between the parties, whether by offsetting, splitting or flagging, in property settlement proceedings. This requires consideration of how superannuation is evaluated at each of the four steps in the discretionary process. Expectations in relation to the treatment of superannuation at each of these four steps are discussed in detail below. This step wise analysis lays the foundation for a broader critique of whether the reforms have achieved the policy objectives, and if not, how the law could be better structured to do so.

A *Parameters*

There has been a long history of proposals for reform of superannuation in family law, which commenced with the early modest proposals after the commencement of the *FLLA* and

⁶² See below 111–12.

⁶³ See below 61–2.

⁶⁴ Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2001 (Cth) 13 ('REM').

⁶⁵ *FLLA(S)A* s 5.

⁶⁶ See below 65–70.

culminated with the final comprehensive reforms proposed in the *A-G's 1998 Position Paper*.⁶⁷ Associated with this history are various reports and reviews acknowledging the shortcomings of the previous treatment of superannuation by the courts and the consequential disadvantage to women. Chapter 3 describes these reform proposals in depth and identifies the mischief that was to be addressed by the reforms. As noted in the *1994 Justice for Women Report* the treatment of superannuation had been a source of considerable difficulty for the courts.⁶⁸ There was inconsistency in how superannuation was being dealt with and injustice for women, particularly in circumstances of long marriages where women had spent a considerable period of time out of paid work to have and care for children.⁶⁹ Inconsistency,⁷⁰ uncertainty,⁷¹ lack of clarity,⁷² and unfairness to women⁷³ were identified to be the fundamental consequences of the courts' pre-reform treatment of superannuation. These parameters for measuring the success, or otherwise, of the direct regulation of property disputes involving superannuation pre-reform are employed throughout the thesis to guide analysis, synthesis and critique of the post-reform law. There is no comprehensive or established definition of these terms in the reform advocacy literature. The terms are explained below in reference to how they have been applied in the pre-reform context, and will be applied throughout the thesis.

The critique of 'inconsistency' applied to the way superannuation was treated when compared to other assets. Different types of superannuation were treated differently and superannuation did not generally form part of the pool of family wealth to be considered for redistribution which was inconsistent with the general approach to a wide range of other family assets. Consequent upon this there followed a lack of consistency about how it should be taken into account compared to other family assets. The new legislation could achieve such consistency by including superannuation in all its forms in the pool of family wealth for redistribution. This meant that there could be uniformity in how it was taken into account when compared with other forms of family wealth.

The pre-reform treatment of superannuation was uncertain because there was little express guidance provided by the *FLA* about the treatment of superannuation in the exercise of the discretion to alter property interests. The reform advocacy literature indicated that separating couples were influenced by this uncertainty when negotiating a settlement and confused as to whether it was relevant at all.⁷⁴ A variety of approaches were developed by the courts to the treatment of superannuation because of the statutory shortcomings and there was further uncertainty about the application of these different approaches.⁷⁵ Also separating women had limited knowledge about their own and even less knowledge about their former spouses' superannuation.⁷⁶ Consequently separating couples were uncertain about the value of superannuation when dividing their assets. When separating couples and their legal representatives — are uncertain about legal entitlements, because the law itself is uncertain,

⁶⁷ Commonwealth, 'Superannuation and Family Law' (Position Paper, Attorney-General's Department, 1998) (*'A-G's 1998 Position Paper'*).

⁶⁸ *1994 Justice for Women Report*, above n 47, [2.32].

⁶⁹ Law Reform Commission, *Matrimonial Property*, Report No 39 (1987) xxvii (*'1987 Hambly Report'*); *1994 Justice for Women Report*, above n 47, [2.32]

⁷⁰ *1987 Hambly Report*, above n 69, xxvii; *1994 Justice for Women Report*, above n 47, [2.32]; *1998 A-G's Position Paper*, above n 67, 1; REM, above n 64, 4.

⁷¹ *1998 A-G's Position Paper*, above n 67, 1; REM, above n 64, 5.

⁷² *1987 Hambly Report*, above n 69, xxvii; REM, above n 64, 4.

⁷³ *1987 Hambly Report*, above n 69; 46; *1994 Justice for Women Report*, above n 47, [2.32]; *1998 A-G's Position Paper*, above n 67, 1, 9; REM, above n 64, 4.

⁷⁴ See, eg, *A-G's 1998 Position Paper*, above n 67, 9 citing *Settling Up*, above n 4.

⁷⁵ *Ibid* 10.

⁷⁶ *2008 Evaluation*, above n 3, 218.

then this effectively leads to unrestrained decisions at the discretion of the courts.⁷⁷ It also impedes the ability of separating couples to negotiate fair informal settlements on their own and amplifies inequalities in bargaining power.⁷⁸

This lack of both consistency and certainty contributed to a general lack of clarity about the pre-reform treatment of superannuation that covered a wide variety of increasingly valuable superannuation entitlements.⁷⁹ The absence of clarity was reiterated by the REM, which reaffirmed the lack of clarity in the way superannuation was taken into account⁸⁰ reported earlier in the *1987 Hambly Report*.⁸¹ Clarity requires that the law should be comprehensible to lawyers and clients⁸² in order to ‘maximise compliance and correct interpretation’ and assist parties negotiate agreements.⁸³

The reform advocacy literature and the empirical research confirmed that because superannuation was not considered to be property and could not be divided the resulting distribution of assets could produce unfair outcomes. This was particularly the case for women who exited lengthy marriages leaving superannuation wholly in the hands of their husband. As a consequence women failed to benefit from family wealth to which they had contributed during cohabitation. In the absence of clear legislative guidelines, there was a failure to recognise and properly value the non-financial contributions of women to superannuation. Consequently the financial contributions of men to superannuation were valued too highly.

Superannuation as a form of family wealth was devalued when courts took superannuation into account, but not at full value, using one of the pre-reform approaches to valuation. This situation generally benefited men at an increasing cost to women as the absolute value of superannuation increased over time. If superannuation was the main asset then the pre-reform approaches, particularly the reliance on offsetting to compensate women, — were largely ineffective and the only option of adjournment was risky and generally restricted to cases where the entitlement was due to be paid soon. The focus of the assessment of future financial needs was effectively a method of last resort for taking superannuation into account and achieving fairness for women when the family wealth was comprised of valuable superannuation entitlements.

The *A-G’s 1998 Position Paper* acknowledged the uncertainty, inconsistency and unfairness of the prior law about the distribution of superannuation and that ‘the impact of these difficulties has generally fallen on the non-superannuated spouse, most particularly women out of the workforce because of homemaker and child-rearing responsibilities.’⁸⁴ These are the key parameters against which the present evaluation assesses the success or otherwise of the reforms in ameliorating the disadvantage to women that resulted from the pre-reform treatment of superannuation in family law. Additional underlying concerns about the pre-reform position were stated to be the lack of access to information about superannuation; valuation difficulties; legislative constraints and limited court powers; the impracticality of

⁷⁷ Anthony D’Amato, ‘Legal Uncertainty’ (1983) 71 *California Law Review* 1, 3.

⁷⁸ See generally Dewar, ‘Is Law Good for Families?’ above n 17, 3 and noting that his claim that ‘having a clear framework for settling differences in a way that protects the weak from the strong, while drawing on the capacities and expertise of a group of expert professionals, is a good thing’ is not an empirical claim.

⁷⁹ *1987 Hambly Report*, above n 69, xxvii; *A-G’s 1998 Position Paper*, above n 67, 9.

⁸⁰ Above n 64, 3.

⁸¹ Above n 69, xxvii.

⁸² Dewar, ‘Regulating Families’, above n 1, 94.

⁸³ *Ibid.*

⁸⁴ Above n 67, 9.

adjourning proceedings until payment and the difficulty of attributing appropriate weight to superannuation. Ultimately, as the REM stated, the overarching objective of the reforms is ‘to provide a coherent framework for addressing the shortcomings of the current arrangements ...’⁸⁵

B *Expected Impact of the Reforms on Litigated Disputes*

A number of outcomes were expected from the reforms in the light of the preceding history, reform advocacy literature and having regard to the statutory framework. The overarching expectation of the thesis was that the reforms would substantially redress the disadvantage to women identified above.

1 *Retrospectivity and Responsive Transitional Arrangements*

The reforms were not retrospective in operation and the policy intention was that they would not apply if a property settlement had been finalised prior to the startup time either by court order or court approved agreement whether or not superannuation had been taken into account. This was potentially an issue where proceedings about superannuation had been deferred pending either payment of the entitlement or the commencement of the reforms. It was also an issue where the parties sought to replace pre-startup time orders about superannuation with splitting orders. Since the reforms had recognised the previous shortcomings it was expected that the transitional provisions would facilitate access to the superannuation regime in certain circumstances, for example, if the parties were in agreement. Otherwise the lack of retrospectivity had the potential to maintain unfairness to women involved in proceedings about superannuation prior to the startup time by denying them access to the benefits of the reforms.

The transitional provisions and the case law interpreting them will be considered in Chapter 4. It was expected that the interpretation of the transitional provisions should be facilitative to maximise the reach of the amendments.

2 *Treatment of Superannuation as Property at Step One*

There were good reasons for optimism about the effect of the amendments on settlement outcomes for women. The major proposal of the *A-G’s 1998 Position Paper* was for a presumptive equal division of superannuation as a starting point.⁸⁶ The final form of the reforms rejected an approach of an equal division of marital superannuation in every case which would have had the effect of quarantining superannuation from other forms of family wealth and treating it differently. It was expected that the reforms should result in superannuation consistently being treated as property at step one along with the other forms of family wealth.

Furthermore the changes should result in the consistent treatment of superannuation of different types and varying values as property at step one. The *2008 Evaluation*, guided by the legislation as drafted, treated all superannuation in the same way and assumed uniform treatment of different types of superannuation as property when assessing the share that women received of the total pool of family wealth.⁸⁷ Construed in this way the reforms had the potential to greatly expand the family wealth available for distribution to include the husband’s superannuation to which women had made a contribution. The position proffered

⁸⁵ Above n 64, 4–5.

⁸⁶ See below 57–59.

⁸⁷ *2008 Evaluation*, above n 3, 223–5.

in this thesis is that this was a foreseeable and appropriate outcome of the reforms. Nevertheless whether the results of this empirical approach can be extrapolated depends upon the approach taken in the decided cases in the exercise of the s 79 discretion. Both the amendments and different types of superannuation are complex. Therefore this may not have been an appropriate assumption to make.

The thesis considered that these expected outcomes would expand the family wealth available for distribution to include superannuation to which women had made a contribution. The evaluation of step one is crucial to the chain of legal reasoning that follows and the key to greater fairness in the treatment of superannuation. A significant shift in the redistribution of family wealth was expected as a result. The *2008 Evaluation* considered the absolute and relative significance of superannuation as a form of family wealth after the reforms and confirmed its increasing significance and therefore the importance of its treatment at step one.⁸⁸

3 Valuation of Different Types of Superannuation at Step One

The amendments enable the parties to obtain comprehensive information about their respective superannuation entitlements and introduced a regime for the valuation of most types of superannuation. It was expected that because of the introduction of a statutory scheme of valuation that a certain value would be attributed to most types of superannuation at step one in contested proceedings whether or not a splitting order was sought. There are many different types of superannuation and the reforms establish valuation methods for valuing most types of superannuation. The valuation methods are more complex for some types of superannuation than for others.⁸⁹ Better recognition of the value of superannuation especially the complex types of superannuation was a substantial change. Consistency in the treatment of superannuation across its various forms was an anticipated and laudable outcome.

However because the valuation regime is complicated for certain types of superannuation there was a risk that certainty of valuation and consistency of treatment of superannuation might be difficult to attain in the context of a discretionary process. Nevertheless the reforms provide considerable clarity when valuing the less complex entitlements that would be unobjectionable to the majority of separating couples. Consequently, it was expected that superannuation in this form would no longer be undervalued.

A significant change introduced by the amendments is the imposition of a duty upon trustees of superannuation funds to provide prescribed information to non-member spouses about the entitlements of member spouses.⁹⁰ The prescribed information is designed to enable superannuation to be properly valued. The regime of valuation recognises that some types of superannuation are more valuable than others and the starting point for proper recognition of this is greater knowledge and understanding of entitlements. This change provides a more certain basis from which the four step approach can progress because whether or not a splitting order is sought the parties have an obligation to make full disclosure about superannuation and a means by which to do so. The thesis expected that this change would result in greater fairness by ensuring that the true worth of superannuation is taken into account in contested proceedings and that this would expand the asset wealth of separating couples available for distribution in most cases. Such a significant result would be especially important for women in less wealthy couples where superannuation might constitute a

⁸⁸ Ibid 216–18.

⁸⁹ See below 109–111.

⁹⁰ *FLA* s 90MZB.

considerable proportion of the family wealth.⁹¹ Chapter 6 evaluates step one in relation to superannuation.

4 *Assessment of Contributions to Superannuation at Step Two*

The extent of any gain for women expected to result from properly valued superannuation being considered at step one along with the other forms of family wealth then depends upon the ‘other links in the chain of legal reasoning’⁹² at steps two, three and four. The thesis considered that the non-financial contributions of women to superannuation should no longer be devalued and the the financial contributions of men to superannuation should no longer be overvalued which had been the effect of the previous treatment of superannuation. The general principles about the assessment of contributions⁹³ should apply to superannuation included in the pool of all assets to be divided as presumed by the *2008 Evaluation*. It was expected that the contributions of the homemaker to superannuation would be assessed similarly to and together with non-superannuation assets. Were this to be the case it would support fairer distribution to women on the basis of non-financial contributions to a form of family wealth, which had in the past been excluded from the pool of property available for distribution. There would also be consistency with the way the law has operated in relation to other assets of the marriage and perhaps afford parties greater certainty in relation to the outcome of the courts’ discretion at step two. Chapter 7 examines step two after the reforms.

5 *Approach to Superannuation and Other Assets at Step Three*

In property settlement proceedings courts are required to consider whether any adjustment in quantum is necessitated on account of various factors that are mainly focused on future financial need at step three.⁹⁴ Although previously superannuation could not generally be treated as property and included in the list of assets to be divided, it could be treated as a resource requiring an adjustment to be made at step three. Thus step three had a pivotal role to play in taking superannuation into account in property settlement proceedings. It was envisaged that the inclusion of superannuation as an asset at step one could reduce the amount of any adjustment deemed to be appropriate at step three and thereby diminish or otherwise moderate any gains for women. However, the thesis considered that while superannuation should not be both included as an asset at step one and also taken into account as a factor requiring adjustment at step three, that income earning capacity and the allied ability to accumulate superannuation in future may nevertheless still warrant an adjustment in appropriate cases in addition to other relevant step three factors. It was expected that any step three adjustment would be applied to all forms of family wealth including superannuation and that greater fairness would be the outcome. Chapter 8 addresses step three after the reforms.

6 *Just and Equitable Orders at Step Four*

The extent to which the reforms alter current legal practice and deliver better settlement outcomes for women depends upon the implementation of the reforms by the courts in the exercise of the broad discretion to alter property interests constrained by existing doctrinal principles. In turn this will depend upon the arguments put to the courts. It was anticipated that new principles would develop about the role of step four after the reforms to provide guidance about the orders that should be made. The pre-reform literature offered little foresight about how the reforms would ultimately shape the courts’ discretion at this final

⁹¹ *1999 Working Paper*, above n 2, 19; *2008 Evaluation*, above n 3, 218, 223–5.

⁹² *2008 Evaluation*, above n 3, 212.

⁹³ *FLA* ss 79(4)(a)–(c).

⁹⁴ *FLA* ss 79(4)(e), 75(2).

stage. An expanded, more complex and flexible role for step four was predictable in view of the reforms overall and the addition of the power to make splitting orders in particular. Nevertheless if properly valued superannuation is included in the list of assets at step one, if step two is evaluated in the usual way and any adjustment applied to all assets including superannuation and adjustments for relevant step three factors, including future earning capacity and ability to accumulate superannuation, are also applied to all assets then the just and equitable outcome at step four ought to operate in a way not inconsistent with its pre-reform application by the courts, with the exception of the courts now being able to order that superannuation payments be split. It was expected that splitting orders would not be made in every case as a matter of course and that women would still be able to offset a share of superannuation against current assets to meet housing and other needs of children in appropriate cases. This series of steps should together deliver fairness to women.

Chapter 9 examines the principles that have developed about the role of step four.

C *Policy Objectives*

In this thesis, the position is taken that the policy objectives of the reforms were shaped by the failure of the pre-reform law to deliver consistency, certainty and fairness in the treatment of superannuation on separation and divorce.

The REM, which is further considered in Chapter 2, stated that, in addition to the main policy objective of providing a coherent framework for addressing the shortcomings of the pre-reform law,⁹⁵ the concurrent policy objectives were to encourage agreement between parties; minimise cost of compliance and be consistent with government retirement incomes policy in favour of adequate provision for women's retirement.⁹⁶ The accomplishment of these policy objectives was expected to flow from reforms that addressed the failings linked to each of the parameters described earlier.

The REM identified five elements of the reforms that would be critical to realising these policy objectives.⁹⁷ The first was the recognition of the full value of superannuation like any other asset. The second was the provision of clear guidance for both contested and negotiated property settlements. The third was that parties should have access to full information about superannuation and the fourth was the ability to achieve a clean break in the superannuation context. A fifth element of the reforms identified by the REM was that any proposals of the parties in relation to superannuation should increase financial certainty of the parties after separation and enable the parties to make informed decisions about their future financial situation.

Two further elements were identified by the REM.⁹⁸ The sixth was that the treatment of superannuation after separation should be consistent with government retirement incomes policy such that separated and divorced women would be able to access superannuation entitlements of greater value than was the case pre-reform. Finally the seventh element was that there should be minimal disruption and costs for the superannuation schemes administering the changes. This final element is beyond the scope of a doctrinal analysis. The *A-G's 1998 Position Paper* had earlier identified all of these elements of the reforms with the

⁹⁵ Above n 64, 5.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* 6–7.

⁹⁸ *Ibid.*

exception of increasing the financial certainty of the parties after separation.⁹⁹ The relationship between the parameters and each of these elements will be considered as part of the evaluation, with the emphasis placed on the first five elements.

D Limitations

It is acknowledged that the reforms are no substitute for broader policies that will enable women to accumulate comparable superannuation to men. It is also acknowledged that the implementation of the amendments will not alter the position that many men and women will not have adequate superannuation for a comfortable retirement, and indeed the reforms may reduce the amount of superannuation available to men on retirement. Any gains for women resulting from the reforms may have adverse effects upon the provision for retirement available to men.

Empirical methodologies that can produce estimates of the prevalence and quantum of superannuation splitting orders, and those that track the impact of settlements on women's (and men's) financial circumstances over time, are required to shed light on whether the post-reform treatment of superannuation is consistent with government retirement incomes policy. The present analysis of the case law can however examine whether this policy objective is a relevant factor in the discretionary process.

Concern about the present disadvantage for women settling property disputes may ebb with time. The gender disparity in superannuation could reduce markedly in the longer-term future as government policy promoting self-funded retirement continues to develop and men's and women's patterns of workforce participation change to become more homogenous.¹⁰⁰ It is also possible that superannuation and family law reform addressing disadvantage for women may come to benefit separated and divorced fathers who have taken extended periods of time out of full-time paid work during their relationship to care for their children.

The *2008 Evaluation* noted that couples who reach private agreements are a comparatively under researched group, although they make up a substantial proportion of men and women who divided property post-separation and divorce.¹⁰¹ It is, however, beyond the scope of the present doctrinal research to draw conclusions about whether and how private agreements, crafted in the absence of any legal advice or assistance, are influenced by the legislation and case law.

III APPROACH — SYNOPSIS

The research is doctrinal and provides a systematic exposition of the law in relation to the treatment of superannuation in family law, focussing on the possible resolution of established failings of the pre-reform law.

A critical study of the post-reform case law and principles is crucial because of the highly discretionary nature of the exercise of the power to make orders altering the property interests of the parties after separation in conjunction with the uneasy juxtaposition of the discrete

⁹⁹ Above n 67, 31–4.

¹⁰⁰ See above n 39 for the limits in analysing change in this disparity over time given the availability of current data based on national representative samples.

¹⁰¹ Above n 3, 213.

superannuation regime. The interrelationship of the discretion and the reforms is not necessarily self-evident from an examination of the legislation alone. When coupled with the fact that there is modest guidance to be obtained from the legislation about the exercise of the discretion to divide property and no overarching statement of principle to provide direction, an examination of case law is essential.

The findings of this doctrinal analysis will be used to understand the possible influence of the reforms and principles on the ‘intermediate’ function of the law,¹⁰² which enables separating couples to negotiate agreements. The statement that ‘there is a case for [the law] assisting parties to bargain in the *light* of the law rather than its shadow’¹⁰³ is particularly significant in the family law context and especially important in this difficult area.

The research presented is also reform-orientated and sets out to evaluate the direct regulation of superannuation and the adequacy of the current law in addressing the previous disadvantage. The findings are synthesised to inform recommendations for legislative change. The research is theoretical to the extent that the lens through which the present analysis seeks to understand and evaluate the application of the reforms is that of substantive equality for women.¹⁰⁴

Principals are identified and critiqued based upon an analysis of reported and unreported judgments from the start up time of the legislation until November 2011. Chapter 5, which is the first of the five chapters to evaluate the case law implementing the reforms, addresses at the outset in detail the approach selected to the analysis of the decided cases and also addresses the limitations of the analysis.¹⁰⁵ The case analysis focusses upon how superannuation is taken into account when evaluating the four step approach to property settlement disputes. In particular, the significance of the case data as a valuable indicator of trends is emphasised. The cases analysed reveal trends in outcomes relevant to the framework of this evaluation. However the limitations of the case data because of the multitude of factors and factual variations that are relevant to individual outcomes are also acknowledged.¹⁰⁶ While a comparison of pre and post-reform cases with truly comparable facts would be a useful adjunct to the analysis, due to the variety of factors and factual variations that come in to play in each decision this was not achievable.¹⁰⁷ Nevertheless, a detailed case study has been integrated into the thesis at each of the four steps to demonstrate the effects of the pivotal decisions upon each step.

Also there is a detailed excursus of the principal decision of the Full Court of the Family Court pre-reform.¹⁰⁸ This decision is used as a comparator and is reconsidered in the light of the implementation of the amendments.

¹⁰² Kaspiew et al, above n 13, 400.

¹⁰³ Dewar, ‘Regulating Families’, above n 1, 94.

¹⁰⁴ See Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) *Deakin Law Review* 83 for a discussion of three categories of legal research (doctrinal, reform orientated and theoretical).

¹⁰⁵ Below 120–2.

¹⁰⁶ Below 121

¹⁰⁷ *Ibid.*

¹⁰⁸ *Crapp & Crapp* (1979) ¶¶ 90-615 (‘*Crapp*’). See below 47–8, 242–4.

CHAPTER 2 HISTORICAL IMPETUS FOR REFORM

On 28 December 2002 the family law superannuation regime commenced operation, 18 months to the day after the *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth) (*FLLA(S)A*) received Royal Assent. The regime introduced fundamental changes to the way superannuation is dealt with in proceedings about property following the breakdown of a relationship. This followed dissatisfaction with the previous ad hoc approach long acknowledged to be unfair to women who commonly had accumulated no superannuation or comparatively little superannuation of their own.

I INTRODUCTION — THE NEED FOR CHANGE IN FAMILY LAW

Prior to 28 December 2002 the courts encountered considerable difficulties with taking the superannuation of separated couples into account in determining financial disputes. While a realised lump sum superannuation interest could be dealt with as property, a prospective superannuation interest, being inalienable and contingent in nature, was generally not considered to be property for the purpose of determining proceedings pursuant to s 79 of the *Family Law Act 1975* (Cth) (*FLA*).¹ This power applies only in relation to ‘property’ and the question whether superannuation constituted ‘property’ had tested the courts from the inception of the *FLA*. Moreover the courts had limited power to make orders binding third parties and this restricted the ability of the courts to order a division or transfer of superannuation that would be binding on trustees.² Furthermore, non-member spouses had no right to obtain information from superannuation funds about the superannuation interests of member spouses. Finally, there was no consistent, accurate scheme for the valuation of the various different types of superannuation. Minimal legislative change had been undertaken to alleviate these difficulties and the case law, whilst ingenious in approach at times, could not compensate for the lack of an explicit legislative framework that would enable superannuation to be given proper consideration.

The difficulties are deceptively simply stated but were of considerable magnitude and complexity and made the task of making just and equitable orders in proceedings about property and superannuation challenging.

Since the commencement of the *FLA* in 1976 the courts, with limited legislative guidance, took a variety of different approaches to superannuation in an effort to give it due consideration in proceedings about property. However, the uncertainty and inflexibility of these approaches resulted in increasing discontent. Frequently women complained that the superannuation of the parties had not been considered at all or that it was unclear if it had been taken into account.³ The complexity and uncertainty of valuing future superannuation together with the inability to divide it to effect a clean break contributed to the problem of undertaking an appropriate process of evaluation.

¹ *Crapp* (1979) ¶FLC 90-615.

² *Ascot Investments Pty Ltd v Harper* (1981) FLC ¶91-000.

³ See, eg, Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986) 199, 254 (*‘Settling Up’*); Law Reform Commission, *Matrimonial Property*, Report No 39 (1987) 87–8 [188] (*‘1987 Hambly Report’*); Senate Select Committee on Superannuation, Parliament of Australia, *Super and Broken Work Patterns* (1995) 135 (*‘Super and Broken Work Patterns Report’*).

When superannuation was taken into account by the courts, it was generally offset against the value of other assets. A common result for a family with an employed husband and a homemaker wife with a modest pool of assets was that the member spouse retained their superannuation and the homemaker spouse retained a significant share of the other assets. The member spouse retained a reduced share of the non-superannuation assets and the non-member spouse retained no superannuation other than their own for their retirement. However, this approach had no utility if superannuation was the only or principal asset. Then the only option was to share the entitlement upon receipt of the payment, usually at an unknown future time, which both offended the clean break principle⁴ and relied on the member spouse to comply with the order, a course anecdotally fraught with risk.

While the superannuation industry was in its infancy and had insignificant coverage and value, the lack of legislative power to deal with it after separation and the failure of the case law to provide fair outcomes were not pressing concerns. However, as the coverage of superannuation became more extensive and the value of superannuation began to increase both in absolute terms and compared to the value of other assets, this position became increasingly untenable. Extensive reports and reviews confirmed that women generally accumulated considerably less superannuation than men and consequently in the family law context the inability to fairly deal with superannuation after separation resulted in women sustaining a double disadvantage. In the public sphere women did not accumulate superannuation to the same extent as men and the imbalance was not rectified after separation in the private sphere.

At the same time government policy focused upon the escalating cost of providing the age pension. This is the most common source of retirement income for women who comprise the majority of age pension recipients.⁵ As a result of this focus considerable changes occurred in the 'public realm' or 'public sphere' relating to superannuation with a view to increasing women's membership in superannuation schemes and the benefits they received from these schemes. This social and economic policy activity took place seemingly without regard to the pressing need for change in the private sphere of family law and superannuation although the various reports about the need for change in each sphere generally acknowledged the other.⁶ The emphasis in the public sphere had been concentrated largely on regulatory law and taxation rather than on issues of family law.⁷ No coordinated approach had been taken to legislative change in these two spheres, even though women's limited access to superannuation was of direct and increasing concern in family law. Accordingly as a result of a failure of social and economic policy on the one hand and family law on the other to address gender disparity in access to superannuation the disadvantage in the public sphere was carried through to the private sphere.

⁴ *FLA*, s 81.

⁵ Ross Clare, 'Women and Superannuation' (Paper presented at the Ninth Annual Colloquium of Superannuation Researchers, University of New South Wales, July 2001) 11 [2.5]. See also Bruce Smyth and Ruth Weston, 'Financial Living Standards After Divorce: A Recent Snapshot' (Research Paper No 23, Australian Institute of Family Studies, December 2000) 8–10 that older divorced women are most financially disadvantaged after divorce and most likely to be living below the Henderson poverty line; De Vaus, David et al, 'The Consequences of Divorce for Financial Living Standards in Later Life' (Research Paper No 38, Australian Institute of Family Studies, February 2007) 21 confirmed that a higher proportion of men than women aged 55 to 74 years had superannuation.

⁶ See generally Jenni Millbank, 'Hey Girls, Have We Got a Super Deal for You: Reform of Superannuation and Matrimonial Property' (1993) 7 *Australian Journal of Family Law* 104, 105, cited in Kristie Dunn, 'Splitting the Difference: Superannuation Equality and Family Law' (1998) 12 *Australian Journal of Family Law* 1, 5.

⁷ *Ibid* 104–5.

It is acknowledged that ultimately, it is not possible for private sphere change to rectify the ongoing gender imbalance in the public sphere of superannuation. As Evatt said '[t]he law of matrimonial property is not an adequate substitute for policies which give each person a real opportunity to achieve economic independence.'⁸ It is, however, possible for the effects of public sphere inequality, exacerbated by the gendered division of labour within relationships, to be ameliorated after separation rather than increased. This requires that the significant contribution of the parent and homemaker be properly valued in this context and that the resulting depreciation of earning capacity and diminished ability to accumulate superannuation is appropriately evaluated and taken into account when property is redistributed on separation and divorce.

Reform of superannuation in family law had been under consideration since 1980 after the passage of the *FLA* and had been the subject of numerous reports.⁹ Against the background of an increasingly regulated and complex superannuation industry undergoing exponential growth, the need for reform became progressively more imperative. The significance of superannuation in family law was consequently destined to intensify. Change became essential to redress unfairness to women in the treatment of superannuation in family law which intensified as superannuation became more valuable.

II THE REVISED EXPLANATORY MEMORANDUM — DEFICIENCIES, GOALS AND CHANGES

The Law Reform Commission in 1994 observed that '[s]uperannuation has been a source of difficulty, inconsistency and injustice for women in family law'¹⁰ and noted that 'the fact that these issues are being addressed five years after the commencement of the compulsory award-based superannuation indicates that women's concerns in the private sphere have not been treated as an integral part of the superannuation system.'¹¹ Some seven years later the REM expressed similar sentiments and acknowledged that the existing unsatisfactory approach to superannuation in family law proceedings primarily had a detrimental effect upon women.¹² In this environment the *FLLA(S)A* introduced pt VIII B into the *FLA*, a legislative regime supported by the *Family Law (Superannuation) Regulations 2001* (Cth) ('*FL(S)R*'). This complex scheme is designed to address the inadequacies of the previous legislative and judicial treatment of superannuation in property proceedings. The deficiencies were outlined in the REM as follows:

valuation: there are difficulties in determining the value of superannuation interests, especially defined benefit schemes because the final benefit will depend upon events (eg retirement age, vesting rules, resignation, death, or changes in personal circumstances including remarriage and/or parenthood) that will not be known at the time of the settlement of the parties' financial affairs. While it is relatively

⁸ Elizabeth Evatt, 'Valuing Women's Work — The Role of Family Law' (Speech delivered at the Anne Conlon Lecture, Sydney, 19 July 1991, 4.

⁹ See below 54–9

¹⁰ Law Reform Commission, *Equality before the Law: Justice for Women* Report No 69 (1994) vol II, [2.32] ('*1994 Justice for Women Report*').

¹¹ *Ibid.*

¹² Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2001 (Cth) 4 ('REM').

simple to value an accrued interest in an accumulation plan, valuing an interest in a defined benefit plan is significantly more complicated;¹³

limited powers of the Family Court: the Family Court does not have clear power under the Family Law Act to make orders directed against third parties (for example, to a trustee of a superannuation fund, directing them to divide a superannuation interest);

legislative restrictions: the superannuation legislation does not allow the division of all superannuation interests between spouses after they have separated or at any other time;

insignificant other assets: in some cases there is no capacity to offset the value of a superannuation interest because there are no other significant assets (for example, equity in the former family home);

lack of access to information: information about a superannuation interest is often inaccessible to the non-contributing spouse and there is a real concern that people trade off superannuation interests for other assets without understanding the true value of accumulating income for retirement in a concessionally taxed environment;

impracticality: adjourning property proceedings is impractical except in cases where an interest is shortly to be paid out; and

weight: it has proved difficult for the Family Court to determine the weight to give to a party's superannuation interest when it is taken into account by the Family Court when considering what orders to make in respect of the property of the parties because of the problems of valuation.¹⁴

The difficulty identified by the REM of how the courts determined the weight to be given to superannuation resulted in inconsistency in the treatment of superannuation compared to other assets as well as in the treatment of different types of superannuation.

The deficiencies identified by the REM in relation to the legislative restrictions and limited powers of the courts as well as the information and valuation difficulties resulted in uncertainty about how superannuation would be treated in court proceedings.

Lastly the problems of offsetting superannuation in the absence of other assets and the impracticality of adjourning proceedings were deficiencies identified by the REM which impeded the fair outcomes. The deficiencies highlighted the lack of clarity in the pre-reform treatment of superannuation.

The REM stated that '[t]he main objective is to provide a coherent framework for addressing the shortcomings of current arrangements, while taking into account the range and complexity of superannuation plans.'¹⁵ Consistent with the main objective the amendments were required to encourage parties to reach their own agreements, to be cost effective and to be consistent with government retirement incomes policy.¹⁶ Consequently the legislation sought to attain the following objectives:

- consistent, transparent, fair valuation of most types of superannuation;
- guidance for parties agreeing on solutions;
- access to information;
- a clean break;
- consistency with retirement incomes policy;
- financial certainty following the separation of parties to a marriage;
- ease of administration for superannuation funds.¹⁷

¹³ See below 39–42 for a summary of the different types of superannuation including accumulation interests and defined benefit interests.

¹⁴ REM above n 12, 4–5.

¹⁵ Ibid 5.

¹⁶ Ibid.

¹⁷ Ibid 6–7.

As discussed¹⁸ five of these objectives are relevant to the parameters of consistency, certainty and fairness in the treatment of superannuation. However consistency with retirement incomes policy and ease of administration of superannuation funds are not. After the amendments, on the face of it, superannuation can be treated as property under the *FLA* in certain circumstances. It can be dealt with outside the court system by way of a complying agreement either as part of a pt VIIIA financial agreement or as a stand alone superannuation agreement. It can also be dealt with by way of court order made by consent or in contested proceedings. Non-member spouses can now obtain detailed information from superannuation funds about the superannuation interests of member spouses and trustees are obligated to provide this information. The *FL(S)R* prescribe methods for valuing various superannuation interests. These valuation methods rely upon the provision of prescribed information by the funds.

Crucially, the scheme provides for complying orders and agreements about superannuation to bind third party trustees. Thus parties to a marriage and, since 1 March 2009, parties to most de facto relationships¹⁹ can enter agreements or obtain orders that will ultimately achieve the split and transfer of superannuation. Also superannuation can be flagged in certain circumstances preventing any dealing by the trustee with the flagged interest until such time as the flag is lifted. These payment splitting and flagging orders and agreements will bind the trustees of superannuation funds.

Furthermore the amendments provide for adjustment of certain splitting orders and agreements in the event of any delay between the commencement of operation of a splitting order or agreement and the time of implementation. Where the order or agreement specifies that a cash amount is to be paid to the non-member spouse from the interest of the member spouse, the trustee is required to calculate and implement any adjustment in due course. Finally, in certain circumstances interest splitting may be a possible option for finalising a payment splitting order or agreement, thus affording a clean break. However, the amendments do not provide guidance about the weight that should be given to superannuation in property proceedings. Nor is guidance provided about when payment splitting is appropriate and in what proportions.

It is important to emphasise the increasing value of superannuation both as an asset for family law purposes and generally as a substantial economic influence. When presenting the draft Family Law Legislation Amendment (Superannuation) Bill 2000 (Cth) to the House of Representatives, the Attorney-General Daryl Williams estimated that the value of superannuation assets would reach \$1 trillion by June 2010.²⁰ As of June 2010 the estimate of the total value of superannuation assets was \$1.23 trillion notwithstanding the intervention of the global financial crisis.²¹ Thus the scale of the industry and its capacity for growth underlines the necessity for a coherent family law regime that acknowledges the increasingly valuable nature of superannuation and takes superannuation into account in a consistent, certain way that produces fair outcomes and provides clarity in contested proceedings and guidance in concluding formal and informal agreements.

¹⁸ Above 9–12.

¹⁹ *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 April 2000, 15890 (Daryl Williams, Attorney-General).

²¹ APRA, *Statistics: Annual Superannuation Bulletin* June 2010, 5.

III WOMEN AND SUPERANNUATION IN THE PUBLIC SPHERE

A *The Purpose of Superannuation*

In Australia, the ‘three pillar’ approach²² has been taken to retirement incomes policy comprising means tested publicly funded social security, privately funded compulsory superannuation savings and voluntary superannuation savings. Retirement incomes policy aims to reserve publicly funded social security for the population most in need.²³ The means tested age pension provides a basic payment, together with concessions, which is meant to provide modest support at just above the poverty level.²⁴ However, retirement incomes policy promotes self support in retirement by way of occupationally linked privately funded superannuation. Mandatory contributions to superannuation are made in respect of most employees under the employer superannuation guarantee scheme.²⁵ Also voluntary contributions are encouraged by both employers and employees and taxation concessions provide the incentive. Superannuation not only provides retirement benefits but can also provide death and disablement benefits.²⁶ Superannuation policy aims to achieve a more financially comfortable retirement than that afforded by the age pension alone.²⁷ Ideally, superannuation accumulated over a long working life provides the most comfortable financial support in retirement. However, if superannuation at retirement is inadequate it may be supplemented by an entitlement to social security. Indeed concern has been expressed that insufficient superannuation may do little more than reduce the age pension entitlement thus benefiting the public purse rather than the superannuitant.²⁸

Additionally superannuation provides an important source of funds for government capital.²⁹

Thus superannuation has the potential to provide benefits that are more valuable than social security and can be supplemented by the state in appropriate cases. However, those who are not engaged in conventional forms of long term full time paid employment, most frequently women, have been and can still be excluded from this potentially valuable type of retirement provision.³⁰

B *Early Experience — Access of Women to Superannuation*

Historically, the concept of superannuation commenced in a simple way. Employees received a payment, generally a lump sum, at the conclusion of a period of employment as a reward for their service. The lump sum could be disposed of at the behest of the recipient and was not required to be preserved for retirement. It was ‘... a voluntary reward on the part of the

²² World Bank, *Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth* (Oxford University Press, 1994), xiv, 15–16 provided the source of this model.

²³ Anne McDiarmid, ‘Taxation of Superannuation and Disposable Income in Retirement’ (Paper presented at the Women and Superannuation Seminar, Canberra, 24–25 February 1994) 3.

²⁴ Ross Clare, ‘The Age Pension, Superannuation and Australian Retirement Incomes’ (Research Paper, ASFA Research and Resource Centre, December 2008) 4–6, 10.

²⁵ *Superannuation Guarantee Charge Act 1992* (Cth) (‘SGCA’) and related legislation.

²⁶ Family Law Council, ‘Choices’ (Paper on Superannuation, Family Law Council, 1992) 3.

²⁷ Anne McDiarmid, above n 20, 3.

²⁸ Diana Olsberg, ‘Women and Superannuation: Still MS...ing Out’ (2004) 53 *Journal of Australian Political Economy* 162, 164.

²⁹ Miranda Stewart, ‘“Are you Two Interdependent?” Family, Property and Same-Sex Couples in Australia’s Superannuation Regime’ (2006) 28 *Sydney Law Review* 437, 470.

³⁰ See generally Therese MacDermott, ‘Linking Gender and Superannuation’ (1997) 2 *International Journal of Discrimination and the Law* 271, 287–92.

employer for loyal service on the part of the deserving employee.’³¹ Superannuation was occupationally linked and usually confined to professional, managerial or public service areas of employment.³² Superannuation favoured long serving employees because of lengthy vesting scales.³³

However, direct and indirect forms of discrimination against women proliferated and women were excluded from many superannuation schemes.³⁴ As recently as the late 1960s, women commonly faced an employment bar upon marriage.³⁵ If they married they were often expected to retire from employment and also from any superannuation scheme membership if they were fortunate enough to have it. Even where women were provided with the option of contributing to superannuation they commonly declined, especially if separated or divorced, because the cost of the contributions competed with immediate financial needs.³⁶ Therefore the design of early superannuation schemes reflected the times and contemplated the income earner as a married male income earner with dependent wife and children.³⁷ Women were not within the contemplation of these schemes as it was assumed that women would be dependent upon and supported by men.³⁸

Some employers paid a ‘marriage dowry’ sum to women leaving work to marry and, if they did not marry, enabled women to receive a small ‘dowry-type’ of benefit upon retirement.³⁹ Some schemes provided benefits to dependent women and children after the death of the member.⁴⁰ However, they did not and still do not allow divorced spouses to benefit from superannuation after the death of a member spouse because they are not categorised as dependents.⁴¹ Nonetheless, a subsequent spouse could obtain such a benefit thereby profiting from the efforts of the former spouse.⁴²

Furthermore, women were expected to retire at an earlier age than men⁴³ which, when coupled with their interrupted work patterns and lower earning capacity, aggravated the problem of accumulating adequate superannuation for their own retirement needs. As women tend to live longer than men, it was, and continues to be, an important concern that they have lower participation rates and smaller interests. This situation was exacerbated for single and separated women without the support of a partner’s superannuation in retirement. Women without male support generally required the support of social security upon retirement.⁴⁴

³¹ Human Rights Commission, ‘Superannuation and Insurance and the Sex Discrimination Act 1984: Part I — Superannuation’ (Report No 19, HRC, October 1986) 12 (*‘Superannuation and Insurance Report’*).

³² Ross Clare, ‘Superannuation and Contemporary Families — Issues of Dependence, Interdependence, and Self Reliance’ (Paper presented at the Families Matter 9th Australian Institute of Family Studies Conference, Melbourne, 9–11 February 2005) 1.

³³ Ibid.

³⁴ Rhonda Sharp and Ray Broomhill, *Short Changed: Women and Economic Policies* (Allen & Unwin, 1988) 135.

³⁵ Ibid. See, eg, *Larmar & Larmar* [2005] FamCA 132 [11] (*‘Larmar’*) where the wife was required to retire from her employment with the Commonwealth Government upon her marriage.

³⁶ Linda Rosenman and Sharon Winocur, ‘Australian Women and Economic Security’ (Research Report, University of Queensland, January 1989) 35.

³⁷ Sharp and Broomhill, above n 34, 137.

³⁸ Mary Owen, ‘Superannuation was not Meant for Women’ (1984) 56(4) *Australian Quarterly* 363, 366.

³⁹ Ibid 367. See generally, Clare ‘Women and Superannuation’, above n 5, 29–30.

⁴⁰ Owen, above n 38, 366.

⁴¹ Ibid 367–8.

⁴² Ibid 368.

⁴³ Ibid 363.

⁴⁴ Ibid 367.

As a result of women retiring earlier than men and living longer than men they constituted the majority of the retired population⁴⁵ and the majority of age pension recipients.⁴⁶ The lower levels of superannuation resulted in a greater reliance upon the government system of welfare which provided little more than subsistence support rather than a comfortable retirement.⁴⁷ This gender disparity began to be the subject of research, review and reform in the public sphere. The value of encouraging and retaining women in the workforce was increasingly recognised and constituted a significant shift away from the view of women as dependents.

Government policy began to focus on superannuation as a result of the realisation that the aging population profile necessitated greater private provision for retirement.⁴⁸ The government policy objectives were to have compulsory superannuation savings, to encourage voluntary superannuation savings by way of taxation concessions and to retain the means tested age pension, an unfunded retirement income system financed from government revenue, as a safety net.⁴⁹ The aim was not only to encourage individual responsibility for retirement but also to advance a higher standard of living in retirement than that afforded by the aged pension alone.⁵⁰ This required greater participation in the workforce by women, whether or not married or raising children.

C *Sex Discrimination and Superannuation*

Thus historically women had difficulty accessing and retaining superannuation and also accumulated less superannuation than men. In 1991 the Federal Sex Discrimination Commissioner Quentin Bryce stated the problem clearly:

The most obvious and plainest sign of sex discrimination in Australia is the earnings gap between men and women workers. This earnings gap in paid employment is also an earnings gap in superannuation, because superannuation is related to your earnings. Other things being equal, the more you earn, the more you will receive in superannuation. The less you earn, the less you will receive. And women do earn much less than men.⁵¹

The objects of the *Sex Discrimination Act 1984* (Cth) ('SDA') include the promotion of equality of men and women and the elimination of various forms of discrimination on the grounds of gender, marital status and actual or potential pregnancy in relation to work and the provision of services.⁵² However, originally the SDA provided an unlimited exemption from the anti discrimination provisions in relation to superannuation. This was envisaged to be temporary for a period of two years.⁵³ The reason for the exemption was due to the complexity of the superannuation industry, its interface with the insurance industry and its reliance upon actuarial information.

⁴⁵ Rosenman and Winocur, above n 36, iii, 1. See Australian Bureau of Statistics, *6361.0 — Employment Arrangements, Retirement and Superannuation*, Australia, April to July 2007, 10 — women still tend to retire earlier than men.

⁴⁶ Owen, above n 38, 363, Clare, 'Women and Superannuation', above n 5, 11.

⁴⁷ Owen, above n 38, 363.

⁴⁸ Pru Goward, 'Women and Savings' (Speech delivered at the ASFA 2004 National Conference and Super Expo, Adelaide, 11 November 2004) 2.

⁴⁹ David de Vaus et al, above n 5, 10.

⁵⁰ Anne McDiarmid, above n 23, 3.

⁵¹ Quentin Bryce, 'Women and Superannuation' (Paper presented at the 'Superwoman' — Women and Superannuation Conference, Sydney, 16 August 1991) 6.

⁵² SDA s 3.

⁵³ *Superannuation and Insurance Report*, above n 31, 39 [72]; *Super and Broken Work Patterns Report*, above n 3, 69 [7.18].

The recommendations for reform of this position made in the 1986 Report of the Human Rights Commission⁵⁴ were subsequently embodied to a limited extent in 1991 by the inclusion of ss 41A and 41B in the *SDA*.⁵⁵ The amendments removed the previous total exemption of superannuation funds from the anti-discrimination provisions. Currently both direct and indirect discrimination by superannuation fund conditions on the grounds of a person's sex is prohibited by the amendments. However there are exemptions from this prohibition that are significant for women.⁵⁶ These exemptions continue to permit indirect sex discrimination in superannuation fund conditions in relation to the vesting, preservation and portability of benefits. Historically these areas of sex discrimination have had a significant impact upon the ability of women to accumulate adequate superannuation.⁵⁷ Long qualifying periods before attaining membership of superannuation funds and minimum service periods before the vesting of the employer contribution were requirements that operated against women because of their broken work patterns.⁵⁸ The lack of portability of superannuation meant that multiple small interests, each subject to administrative costs, could not be consolidated thus eroding their value and impeding the benefits of compounding. Coupled with the absence of preservation requirements, the result was that women in short term employment tended to cash in their superannuation upon resignation. The amount paid did not generally include the employer component or a proper return by way of accumulated interest, a result beneficial to the other long term employees and their beneficiaries.⁵⁹ It was noted by Sharp and Broomhill in 1988 that preservation, portability and full vesting of benefits were all necessary to ameliorate the disadvantageous position of women in the public sphere.⁶⁰

In 1997 MacDermott noted that, although the obvious forms of discrimination had been dealt with, ongoing forms of discrimination were still permitted.⁶¹ The status of the anti-discrimination legislation vis-à-vis superannuation was summarised thus:

the first generational equality issue of mere access to superannuation has largely been dealt with, but ... the substantive equality issue of the ultimate benefit derived from superannuation schemes is still to be addressed. The application of the notion of formal equality to superannuation barely touches on the myriad of discriminatory practices that arise in this context.⁶²

Thus the inferior position of women in relation to the accumulation of superannuation had in part been sanctioned by legislation designed to proscribe it. In 2004 Olsberg opined that 'despite the removal of explicit discrimination which previously disadvantaged female employees in their access to employer funded superannuation Australian women are still 'MS...ing Out' when it comes to 'adequacy and equity' in superannuation.'⁶³

Despite the 1995 report of the Senate Select Committee on Superannuation recommending that the exemptions in relation to vesting, preservation and portability be removed by the end

⁵⁴ See *Superannuation and Insurance Report*, above n 31, 114–19.

⁵⁵ *Sex Discrimination Amendment Act 1991* (Cth) ss 1, 2 (assented to on 25 July 1991 and commenced operation two years later).

⁵⁶ See generally Bryce, above n 51, 10, 23.

⁵⁷ *SDA* ss 41A(1)(b)(iii), 41B(6). See generally, MacDermott, above n 30, 283–5; Clare, 'Women and Superannuation', above n 5, 24–8.

⁵⁸ Bryce, above n 51, 13; Millbank, above n 6, 107–8.

⁵⁹ Sharp and Broomhill, above n 34, 134.

⁶⁰ *Ibid* 137–40.

⁶¹ MacDermott, above n 30, 284–5.

⁶² *Ibid* 287.

⁶³ Olsberg, above n 28, 161.

of March 1997 and the superannuation legislation amended to provide for immediate vesting of all employer contributions,⁶⁴ to date the exemptions have not been removed.

Nevertheless, although the *SDA* continues to sanction discrimination against women in this context, changes have occurred including in the areas of vesting, portability and preservation. Ironically the *SDA* has yet to catch up with these developments.

IV A SYNOPSIS OF CHANGES IN THE PUBLIC SPHERE

A General

Many changes have been implemented in the public sphere to expand the coverage of superannuation and to increase the level of superannuation savings thereby increasing the standard of living in retirement.

Prior to 1986 contributions to superannuation were voluntary and encouraged by tax concessions. Coverage was limited. Employees covered by superannuation tended to be higher income earners, public sector employees and to a lesser extent the self employed.

During the 1980s union involvement resulted in wage increases being traded off for superannuation benefits.⁶⁵ With the commencement of award superannuation in 1986 superannuation coverage increased and became even more comprehensive with the commencement of the superannuation guarantee scheme in 1992.⁶⁶ Superannuation became a right of employment rather than a privilege volunteered by employers.⁶⁷ Also employees were encouraged by way of taxation concessions to make additional voluntary contributions as part of the push towards self funded retirement. Furthermore measures were introduced to encourage superannuation benefits being taken in the form of pension payments rather than as lump sums to reduce dependence upon the social security system. Since 1983, following the election of the Hawke Labor government, there have been continuous changes to the regulation and taxation of the superannuation industry in Australia, with the result that by 2007 it had become a very complex area.⁶⁸

B Superannuation Guarantee Scheme – Mandatory Contributions and Full Vesting

Building upon the expansion of superannuation coverage achieved by the negotiation of industrial awards by unions from 1986, a major change was introduced in 1992 with the implementation of the superannuation guarantee scheme.⁶⁹ This scheme requires compulsory superannuation contributions at a minimum prescribed level to be made by employers on behalf of most employees. As of July 2002 the minimum level of this contribution is nine per cent of the earnings base of employees.⁷⁰ The contributions must be made to a complying

⁶⁴ *Super and Broken Work Patterns Report*, above n 3, 72–6.

⁶⁵ See generally, MacDermott, above n 30, 274–6.

⁶⁶ *Super and Broken Work Patterns Report*, above n 3, 1, [1.2]; *SGCA* and related legislation.

⁶⁷ Bryce, above n 51, 6; MacDermott, above n 30, 274–6.

⁶⁸ See generally, James Leow, Shirley Murphy and Giles Hooper, *Australian Master Superannuation Guide* (CCH, 14th ed, 2010), 1–3 ¶1000; Linda Rosenman and Wayne Scott, ‘Financing Old Age: Why is There Still Gender Inequality?’ (2009) 62 *Australian Social Work* 287, 288.

⁶⁹ *SGCA, Superannuation Guarantee (Administration) Act 1992* (Cth) (‘*SG(A)A*’), *Superannuation Guarantee (Administration) Regulations 1993* (Cth) (‘*SG(A)R*’). See generally, MacDermott, above n 30, 276–8.

⁷⁰ Leow, Murphy and Hooper, above n 68, 820–1 ¶12-000.

fund that can be an accumulation fund or defined benefit fund.⁷¹ For the latter actuarial proof of compliance with the prescribed level of contribution is required.⁷² The scheme operates by imposing a tax upon the employer equal to the amount of any shortfall plus interest and any administration costs in the event of a failure by the employer to contribute the prescribed minimum level.⁷³ The scheme operates in tandem with industrial award superannuation and contributions made in satisfaction of the latter obligation are taken into account when assessing the superannuation guarantee obligation.

A considerable increase in superannuation coverage resulted from this major change which was beneficial to both men and women. Also the contributions are fully vested and this was a significant change for women with casual and part time work patterns.⁷⁴ The full amount of the employer contribution accumulates without a long vesting period.⁷⁵ However, an employer is not required to pay the superannuation guarantee if the employee is paid less than \$450 per month⁷⁶ thus reducing the impact of the change where the employee works part time or has multiple part time jobs. This is likely to occur in the areas of employment that are traditionally the domain of women.⁷⁷ Therefore the type of work undertaken by women still has the potential to impede adequate accumulation of superannuation. MacDermott noted:

[t]he SGC has not rendered gender an obsolete factor. Government policy explicitly states that a long term contribution to superannuation is required to fund an adequate retirement income, with a stated benchmark of forty years continuous contributions.⁷⁸

Thus although women increasingly participate in the workforce⁷⁹ the exemption from the obligation to pay the superannuation guarantee for very low income earners will result in some women continuing to have no superannuation at all.⁸⁰

C Preservation

An early problem with superannuation was that there was no requirement for it to be retained for retirement and upon resignation it could be cashed in and spent on unrelated expenses. For women working to supplement the family income with casual and part time work while also undertaking homemaker duties, cashing in any small superannuation interests to assist with family expenses was commonly a more attractive option than saving for retirement. The introduction of roll over funds in 1983 failed to encourage the retention of superannuation for retirement. Therefore preservation rules were progressively introduced to prevent access to superannuation entitlements until the satisfaction of a condition of release such as retirement. However, these changes resulted in such complexity that from 1 July 1999 all superannuation contributions and earnings were required to be preserved.⁸¹ Also an increase in the

⁷¹ Explanatory Memorandum, Superannuation Guarantee (Administration) Bill 1992 (Cth); Superannuation Guarantee Charge Bill 1992 (Cth) 2. (See below 40–3 for a summary of different types of superannuation.)

⁷² Ibid.

⁷³ Ibid 1

⁷⁴ Ibid 2.

⁷⁵ Ibid; *Super and Broken Work Patterns Report*, above n 3, 29 [3.18].

⁷⁶ *SG(A)A* s 27(2).

⁷⁷ MacDermott, above n 30, 277.

⁷⁸ Ibid.

⁷⁹ Clare, 'Women and Superannuation', above n 5, 6.

⁸⁰ Ibid, 23; Ross Clare, 'Retirement Savings Update' (Research Paper, ASFA Research & Resource Centre, February 2008) 5; House of Representative Standing Committee on Employment and Workplace Relations, Parliament of Australia, *Making it Fair: Pay Equity and Associated Issues Related to Increasing Female Participation in the Workforce* (2009) 252–7 ('2009 House of Representatives Fair Pay Equity Report').

⁸¹ See generally Leslie Nielson 'Superannuation and Taxation 2007–08' (Research Paper No 2, Parliamentary Library, Parliament of Australia, 1 August 2007) 23–5; Leow, Murphy and Hooper, above n 68, 100–19.

preservation age of 55 years is being phased in, so that for people born after June 1964 the preservation age will be 60 years by 2025.⁸² The preservation requirements ensure the retention of superannuation for retirement purposes and allow the benefits of compounding to be maximised. The increased stringency of the preservation rules assists both men and women to accumulate superannuation but is of particular benefit to women although immediate needs are subjugated.

D Portability

In addition to changes resulting in the full vesting and preservation of benefits, in 2004 compulsory portability of entitlements was introduced to enable multiple entitlements to be transferred into a single fund.⁸³ Reduced administration costs and improved compounding result from consolidating multiple accounts and this benefits both men and women but again is of particular benefit to women because part time and casual work patterns commonly result in the accumulation of multiple small entitlements.

E Taxation Developments

Prior to 1983 superannuation received very generous taxation treatment. Contributions to superannuation were deductible and earnings on contributions were generally exempt from taxation. Upon retirement, only five per cent of the lump sum was required to be included in the assessable income of the payee for taxation purposes. However, with greater superannuation coverage this changed. Providing taxation concessions to encourage superannuation savings comes at a considerable cost in lost revenue.⁸⁴ Government policy must balance the provision of concessions to encourage superannuation savings and the consequential loss of revenue against the benefit of reduced pressure upon social security resources in the future. Therefore taxation amendments in 1983 reduced the taxation concessions. Thereafter increasingly complex changes to the system of taxing superannuation continued until 1 July 2007. During that time in broad terms, contributions to superannuation were taxed at 15 per cent, income earned by the superannuation fund was taxed at 15 per cent and there was a further impost of 15 per cent upon exit from the fund. Nevertheless, the taxation at these three points was concessional in nature.⁸⁵

However, from 1 July 2007 major changes to simplify the taxation of superannuation and to improve the concessions were introduced.⁸⁶ The amendments were designed to further encourage superannuation savings and also encourage people to work for as long as possible.

Thus upon exit, generally no tax is now payable on lump sum and pension payments made from a taxed source after the member turns 60 years of age. In the event that benefits are paid before the age of 60 years they are subject to taxation. While benefits paid from an untaxed source after the age of 60 years continue to be taxed, the rate is reduced.

Also the reasonable benefit limit, which imposed a limit on the maximum amount of concessional tax superannuation that a person could receive in a lifetime, has been

⁸² Leow, Murphy and Hooper, above n 68, 112.

⁸³ Ibid 120.

⁸⁴ Stewart, above n 29, 439.

⁸⁵ Ibid 440.

⁸⁶ See generally, Commonwealth, 'A Plan to Simplify and Streamline Superannuation' (Detailed Outline, Treasury, 2006); Commonwealth, 'Simplified Superannuation – Final Decisions' (Outcomes of Consultation, Treasury, 5 September 2006); Nielson, above n 81; Leow, Murphy and Hooper, above n 68, 2–3, 643–644; CCH, *Australian Family Law & Practice*, vol 2 (at 536-7-11) ¶38-670, ¶38-700.

abolished. As well, there is no longer a requirement that superannuation be paid out upon reaching a certain age or work status. The effect of this is that a person can accumulate superannuation almost without limitation and is not required to access it at a particular age or work status. This enables women, who often do not start to earn a reasonable income until later in life when family responsibilities diminish, to work until later and make up lost ground.

Additional taxation changes designed to encourage superannuation savings were introduced in relation to small businesses and the superannuation surcharge. From 1 July 1997, if a small business is sold and the proceeds are invested in superannuation, then the proceeds are exempt both from income tax and capital gains tax thus providing an incentive to the self employed both to work and invest in superannuation.⁸⁷ Also the unpopular superannuation surcharge legislation has now been abolished in relation to superannuation contributions made on or after 1 July 2005.⁸⁸ The surcharge legislation introduced a tax on surchargeable superannuation contributions made by or on behalf of high income earners with effect from 20 August 1996. After the abolition of this legislation, surcharge obligations accrued prior to its abolition remained payable. However, the removal of this impost benefits women who return to work later in life and earn a high income.

The taxation of superannuation provides government with a considerable source of revenue. This is expected to increase as the mandatory system of superannuation contribution matures which is expected to take decades. However, the changes will also encourage women with insufficient superannuation to stay in employment and provide for their own retirement thus potentially reducing the impact upon the public purse.

F Other Public Sphere Changes

The provision of taxation incentives to encourage the accumulation of superannuation was accompanied by other changes designed to expand the coverage of superannuation and to guarantee the retention of superannuation for retirement. These changes have had mixed success in closing the gap between men and women in the public sphere. Indeed many of these changes arguably benefit high income earning men the most and are significantly publicly subsidised.

From 1 July 1997 the introduction of a spouse rebate entitlement allows a working spouse to claim a tax rebate for contributing up to a prescribed maximum amount of superannuation on behalf of a non working or low income earning spouse.⁸⁹ Certain conditions must be satisfied. The permitted level of income of the spouse is low, the level of rebate is low and the maximum allowable amount of contribution is limited. This type of assistance, which generally favours women, has been argued to continue the notion of the dependency of women. The reality has been that this initiative has not been popular.⁹⁰ The utility of this measure is limited to the circumstance where the principal breadwinner is a relatively high income earner with surplus income available for this purpose.⁹¹

⁸⁷ *Income Tax Assessment Act (1997)*(Cth) ss 152.300–152.310 ('ITAA'). See Liang P Leow and Shirley Murphy, *Australian Master Superannuation Guide* (CCH, 6th ed, 2002) 288–290.

⁸⁸ *Superannuation Laws Amendment (Abolition of Surcharge) Act 2005* (Cth).

⁸⁹ ITAA s 290.230. See also Leow, Murphy and Hooper, above n 68, 545–7.

⁹⁰ Clare, 'Women and Superannuation', above n 5, 14–15.

⁹¹ Olsberg, above n 28, 172.

A criticism of superannuation has been that it benefits the higher income earners more than low income earners.⁹² It is linked to paid employment and the superannuation guarantee scheme is payable as a percentage of income not a flat amount. The effect is therefore that a much smaller provision is made for low income earners than high income earners. The *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) addressed this issue to a limited extent by introducing a scheme whereby the government contributes a further amount of superannuation towards the entitlement of a low income earner who makes certain eligible contributions.⁹³ Although this will benefit women the amount of the benefit is minor.

From 1 July 2005 employers are required to provide to employees a choice of complying superannuation funds in which to invest the employer superannuation guarantee contribution on behalf of the employee.⁹⁴ There are penalties in the event of non compliance by the employer. This can allow the employee to have some degree of involvement in the management of their superannuation if so inclined which historically women have not been.⁹⁵ It remains to be seen if this will change in future.

In 2001 Clare recommended that the division of superannuation other than upon divorce would help achieve fairness for women in the public sphere⁹⁶ but noted the significant practical and constitutional difficulties.⁹⁷ Nonetheless, from 1 January 2006⁹⁸ an employee can split personal and employer contributions with their spouse upon certain conditions. In theory at least, this change could eventually remove or reduce the need for splitting orders.⁹⁹ However, the theory has yet to translate into practice.

An important change to the *SI(S)R* protects small superannuation accounts from being eroded by administration costs and ensures that they are maintained at a prescribed minimum level.¹⁰⁰ Previously small accounts could be extinguished altogether by these costs. The change is of particular benefit to women engaged in part time or casual work.

Furthermore the progressive increase in the eligibility age for the age pension to 67 years provides encouragement for both men and women to work longer.¹⁰¹ This change reduces the period of retirement and therefore the period of reliance upon superannuation and social security. It also dovetails with retirement incomes policy by reducing the cost of the age pension to government and is expected to increase the standard of living of retirees.¹⁰²

Lastly, the introduction of compulsory superannuation and the subsequent growth in the value of superannuation funds heralded an overhaul of the prudential rules introduced to protect the superannuation industry in the 1980s. In 1992 the *SI(S)A* was passed to strengthen this

⁹² Elizabeth Fletcher, 'Women with Family Responsibilities Need Not Apply' (1996) 21 *Alternative Law Journal* 230, 230.

⁹³ Leow, Murphy and Hooper, above n 68, 537–44.

⁹⁴ *SG(A)A* pt 3A. See Leow, Murphy and Hooper, above n 68, 830, ¶12-040.

⁹⁵ Rosenman and Winocur, above n 36, 1.2.

⁹⁶ Clare, 'Women and Superannuation', above n 5, 20.

⁹⁷ *Ibid* 20–1.

⁹⁸ *Superannuation Industry (Supervision) Regulations 1994* (Cth), reg 6.44 ('*SI(S)R*'). See Leow, Murphy and Hooper, above n 68, 547–52.

⁹⁹ Stephen Bourke, 'Super Splitting of Contributions' (2005) 17 *Australian Superannuation Law Bulletin* 72, 73.

¹⁰⁰ *SI(S)R* regs 5.17, 5.18; Clare, 'Women and Superannuation', above n 5, 37–8; Leow, Murphy and Hooper, above n 68, 96–7 ¶3-240.

¹⁰¹ *Social Security Act 1991* (Cth) s 23 (definition of 'pension age'), ss 23(5A)–(5D).

¹⁰² Clare, 'The Age Pension ...', above n 24, 5, 17.

protection. Although State and Territory public sector schemes are exempt from the *SI(S)A* regulation they nevertheless signed Heads of Agreement in 1996 with the Commonwealth undertaking to provide the same protection to their members and to comply with retirement incomes policy principles.¹⁰³

G *Persistent Inequality in the Public Sphere*

Thus in the public sphere government policy focused upon the regulation of the superannuation industry with the twin foci of raising revenue by way of taxation impost and mandating private provision for retirement to reduce reliance upon the social security system and to improve living standards in retirement. Nevertheless, concern continued about the size of the retired population, predominated by women, compared to the employed population.¹⁰⁴ The increase in the ageing population and the tendency of the ageing workforce to exit the workforce prior to retirement caused apprehension about the escalating future costs of government support.¹⁰⁵ Also, the growth of the retired population and the corresponding reduction in the workforce was predicted to cause a reduction in economic growth.¹⁰⁶ Therefore the Welfare to Work policy was implemented directed at increasing the retention of older workers in the workforce as part of a concerted effort to increase workforce participation.¹⁰⁷ As a result of concentrating upon increasing the working population and reducing the welfare reliant population, women are encouraged to return to work sooner and stay at work for longer.

Notwithstanding the many developments that have occurred in the public sphere, women continue to be disadvantaged with respect to their ability to accumulate superannuation for retirement. The acquisition of superannuation remains occupationally linked. The period of employment and level of contributions and earnings influence the ultimate entitlement. As a result the system of accumulating adequate superannuation for retirement continues to favour the higher income earner with a long-term history of employment. The important role undertaken by women of bearing children and caring for the family results in interrupted patterns of employment, often at lower rates of pay, which has an associated effect upon the accumulation of superannuation.¹⁰⁸ Interrupted work history also negatively impacts upon the crucial compounding effect of superannuation. Although women are increasingly engaged in paid employment¹⁰⁹ they continue to earn less than men.¹¹⁰ They generally have shorter working lives as a result of their parenting and domestic responsibilities, a factor which impacts upon the ability to accumulate adequate superannuation. The ASFA Research Centre estimated that for the year 2000 on average men work for 38 years and women work in paid employment for the equivalent of 20 years and that, although this difference was expected to diminish in the future to a limited extent, a significant difference would remain.¹¹¹ Women are

¹⁰³ Judith Olsen, 'The History of the Development of Superannuation in Australia' (Paper presented at the Hunter Valley Family Law Seminar, Pokolbin, 24–25 October 2008) 4–5.

¹⁰⁴ Rosenman and Winocur, above n 36, 1, Australian Bureau of Statistics, *6361.0*, above n 45, 10; Rosenman and Scott, above n 68, 287.

¹⁰⁵ Australian Bureau of Statistics, *6106.0.55.001 — ABS Labour Market Statistics*, Australia, 2003 [8]–[13].

¹⁰⁶ Australian Bureau of Statistics, *4102.0 — Australian Social Trends*, Australia, 2007 125.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Super and Broken Work Patterns*, above n 3, 26 [3.11]; Olsberg, above n 28, 164.

¹⁰⁹ MacDermott, above n 30, 280; *2009 House of Representative Fair Pay Equity Report*, above n 80, 18.

¹¹⁰ Clare, 'Women and Superannuation' above n 5, 11–12; Australian Bureau of Statistics, *6106.0.55.001*, above n 105 [34]. See generally Rebecca Cassells et al, 'The Impact of a Sustained Gender Wage Gap on the Economy' (Report, Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs, September 2009) ('*2009 Gender Wage Gap Report*'); *2009 House of Representative Fair Pay Equity Report*, above n 80.

¹¹¹ Ross Clare, 'Women and Superannuation', above n 5, 2.

less likely to have superannuation and their entitlements are generally less significant¹¹² although women are engaged in paid employment to a far greater extent than in the past.¹¹³ Accordingly, women continue to rely on government assistance to provide financial support in their retirement years to a greater extent than men.¹¹⁴

The child bearing potential of women has for a long time adversely impacted upon the workplace prospects of women.¹¹⁵ Gender continues to impact upon employment accomplishments of women, including single women without children, impairing the ability to accumulate superannuation¹¹⁶ as women continue to be paid less than men.¹¹⁷ Generally, men still tend to receive better remuneration than women even in the same areas of employment and this is not expected to change in the near future.¹¹⁸

Women do the majority of unpaid work.¹¹⁹ Undertaking the homemaker role does not result in the accumulation of any provision for retirement. In effect, this role is therefore undervalued in spite of its importance to the economy.¹²⁰ This leaves the homemaker to rely upon any small entitlements of her own, the entitlements of her spouse or upon social security, or a combination of these, if the need arises. The result of assuming unpaid domestic and parental responsibilities is a depreciation of earning capacity and a diminished provision for retirement that is crystallised upon separation.¹²¹

Mary Owen remarked in 1984 that a very small proportion of superannuation beneficiaries were women¹²² and it remains true that fewer women than men have superannuation and that it is of a lesser magnitude. Notwithstanding significant improvements in the public sphere, statistics continue to show that women accrue insufficient levels of superannuation to support themselves during retirement and that the value of this superannuation continues to be significantly less than the value of men's superannuation.¹²³ As discussed¹²⁴ average superannuation balances for 2009–10 for men were \$71 645 and women \$40 475 a significant improvement on the 2003–04 position when the average balance for men was \$56 400 and \$29 300 for women.¹²⁵ Average retirement payouts for 2009–10 were about \$198 000 for men

¹¹² Ross Clare, 'Why Can't a Woman be More Like a Man — Gender Differences in Retirement Savings' (Paper presented at the ASFA 2004 National Conference and Super Expo, Adelaide, 10–12 November 2004) 4–6 considering the results of a 2002 Household, Income and Labour Dynamics in Australia Survey; Australian Bureau of Statistics, *6361.0*, above n 45, 16–21; Rosenman and Scott, above n 68, 289–91.

¹¹³ Rosenman and Winocur, above n 36, [1.1].

¹¹⁴ Ibid [1.2]. See also Somali Cerise et al, 'Accumulating Poverty? Women's Experiences of Inequality over the Lifecycle' (Issues Paper, Australian Human Rights Commission, 2009) 22–3.

¹¹⁵ Goward, 'Woman and Savings', above n 48, 3.

¹¹⁶ Ibid.

¹¹⁷ Australian Bureau of Statistics, *6106.0.55.001*, above n 105 [34]–[35].

¹¹⁸ Ibid; Goward, 'Women and Savings', above n 48, 3.

¹¹⁹ Jenny Chesters, Janeen Baxter and Mark Western, 'Paid and Unpaid Work in Australian Households: Towards an Understanding of the New Gender Division of Labour' (Paper presented at the 10th Australian Institute of Family Studies Conference, Melbourne, 9–11 July 2008) 18. See also Michael Bittman, 'Parenthood Without Penalty: Time-Use and Public Policy in Australia and Finland' in Nancy Folbre and Michael Bittman (eds), *Family Time: The Social Organisation of Care* (Routledge, 2004).

¹²⁰ Evatt, above n 8, 2; *1994 Justice for Women Report*, above n 10 [2.6]–[2.9].

¹²¹ McDonald (ed), *'Settling Up'*, above n 3, 98.

¹²² Owen, above n 38, 363.

¹²³ Australian Bureau of Statistics, *6360.0 — Superannuation: Coverage and Financial Characteristics*, Australia, 17 September 2001, 4; Rosenman and Scott, above n 68, 289–90.

¹²⁴ See above 5.

¹²⁵ Ross Clare, 'Developments in the Level and Distribution of Retirement Savings' (Research Paper, ASFA Research & Resource Centre, September 2011) 3–6.

and \$112 600 for women and were projected to be \$250 000 for men and \$145 000 for women in June 2011.¹²⁶

Although women are engaging in paid employment more than ever before and are having fewer children later in life, nevertheless the work patterns of women are different to those of men, and this has been and continues to be reflected in their superannuation entitlements.¹²⁷

The fact that women generally accrue significantly less superannuation for their retirement does not necessarily become a major issue during cohabitation. Upon retirement the available entitlements can be shared and supplemented by any government pension in appropriate circumstances. However, Clare noted in 2001 that statistics suggested that 40 per cent of then marriages would end in divorce or breakdown.¹²⁸ He estimated that the numbers of divorced women entering retirement would significantly increase over the following five to 10 years as a result of higher divorce rates and that these women would be left to rely on their own, less significant superannuation resources.¹²⁹ When the impact of the de facto property amendments is considered, the potential magnitude of the influence of the superannuation amendments becomes clear.¹³⁰

Notwithstanding the plethora of changes in the public sphere, almost all of which improve the position of women, the disparity in the superannuation savings of men and women continues.¹³¹ The lack of mandatory superannuation prior to 1992 continues to have a significant impact upon the level of retirement savings of older women. It may be that in future decades when the effects of the maturation of the superannuation guarantee scheme are maximised, the gap will be further narrowed but it is estimated that it could take another three decades before the full effects of the superannuation guarantee scheme can be evaluated and even then there will be a group without superannuation.¹³² While there have been considerable developments since the time when women were required to resign upon marriage or when women did not receive equal pay for equal work, nevertheless there continues to be a significant difference in the retirement provision accumulated by women compared to men.

If the disparity between the value of men's and women's superannuation had attenuated in the public sphere then there may have been minimal pressure for change in the private sphere of family law. However, the ongoing unequal accumulation of superannuation by women in the public sphere makes fairness in its treatment in family law proceedings an imperative for women.

V THE CONCEPT OF EQUALITY

¹²⁶ Ibid 3, 10.

¹²⁷ *Super and Broken Work Patterns Report*, above n 3, 7 [2.9]; Goward, 'Women and Savings', above n 48, 1.

¹²⁸ Clare, 'Women and Superannuation', above n 5, 2, 3, 17.

¹²⁹ Ibid 19.

¹³⁰ Federal Magistrates Court of Australia, 'Annual Report 2011–2012' 43 reports that 46 031 applications for divorce were filed in 2011–12. While this is not necessarily an accurate indicator of the number of property settlements where superannuation is a relevant consideration it provides an indication of the potential significance of the issue.

¹³¹ Goward, 'Women and Savings', above n 48, 1.

¹³² Ross Clare, 'The Age Pension, Superannuation and Australian Retirement Incomes', above n 24, 21–2.

The fact that developments in the public sphere have failed to achieve substantive equality underscores the importance of the superannuation amendments. Public sphere changes have as yet failed to overcome the fact that reduced time spent in employment due to unpaid domestic work and child bearing and rearing results in lower superannuation entitlements for women. In other words ‘we have chosen an arrangement for retirement benefits that largely ignores the life experiences of women.’¹³³ This is particularly problematic upon relationship breakdown if the superannuation entitlements of the non home maker, who is usually the husband, are not properly taken into account. In this section differing views about the concept of equality and what it should strive to achieve will be considered.¹³⁴ The theoretical approach to equality selected to assess the success or otherwise of the reforms is identified.

In the *1994 Justice for Women Report* the LRC identified three approaches to equality in law and other areas.¹³⁵ The first was the formal or rule equality approach which proceeds on the basis that men and women are treated the same regardless of the actual outcome of the gender neutral treatment. This model of equality has the advantage of simplicity but, as demonstrated above, the disadvantage that it may entrench existing disadvantage and cannot respond to structural disadvantage.¹³⁶ This approach may also be labelled ‘gender neutral treatment’, ‘strict equal treatment’ or ‘sameness’ approach.¹³⁷

In the public sphere the reform initiative of the superannuation guarantee scheme is an example of a formal or rule equality approach. The scheme prescribes a minimum level of compulsory superannuation contribution calculated as a prescribed percentage of the earnings base and is identical for both men and women. In the public sphere of women and superannuation such an approach fails to recognise that because superannuation is occupationally linked women are at a disadvantage.¹³⁸ Also women need a greater amount of superannuation to achieve the same level of provision for retirement as men for reasons of longevity. Formal equality fails to recognise this need.

In the private sphere of superannuation, during the lead up to the creation of the superannuation regime the discretionary matrimonial property regime was also under review and a system of fixed sharing was under consideration. Ultimately, a system of fixed sharing in relation to matrimonial property generally and superannuation specifically, arguably a formal equality approach, was discarded and the discretionary system retained. There were concerns that equal sharing of the matrimonial wealth was unfair to women because such an approach would not take account of spouses’ post separation economic circumstances which would mainly disadvantage mothers whose earning capacity had been impaired by undertaking the role of homemaker and parent.¹³⁹ It was opined that such an approach would elevate the interests of government retirement incomes policy.¹⁴⁰ However one of the reform initiatives proposed during the lead up to the superannuation reforms, which is an example of a formal or rule equality approach, was a system of automatic equal division of the marital

¹³³ MacDermott, above n 30, 292.

¹³⁴ See generally Dunn, above n 6, 3–5.

¹³⁵ *1994 Justice for Women Report*, above n 10 [3.7]–[3.15].

¹³⁶ *Ibid* [3.9]; Regina Graycar and Jenny Morgan, ‘Thinking About Equality’ (2004) 27(3) *University of New South Wales Law Journal* 833, 834; Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2004) 109.

¹³⁷ Graycar and Morgan, ‘Thinking About Equality’, above n 136, 835.

¹³⁸ Above Chapter 1.

¹³⁹ See, eg, *1987 Hambly Report*, above n 3, 119–20 [272]–[273] recognising the importance of considering not merely formal equality but result equality.

¹⁴⁰ Dunn, above n 6, 10.

portion of any vested entitlement with limited grounds for departure proposed in the *A-G's Dept 1992 Discussion Paper*.¹⁴¹

The second approach identified by the LRC was the differences approach which concedes the differences between men and women may need special recognition but which can produce both equality and inequality as an outcome.¹⁴² This approach can also be described as the 'special treatment' approach.¹⁴³

Limited examples of the differences approach in the public sphere might include the introduction of both the spouse rebate entitlement, which allows a working spouse to claim a low tax rebate for contributing a limited amount of superannuation on behalf of a non working or low income earning spouse, and the government co contribution of a limited amount to the superannuation of a low income earner in certain circumstances.¹⁴⁴ These changes have helped to increase the superannuation savings of low income earners, the majority of whom are women, but have not closed the gender superannuation gap.¹⁴⁵ The government co-contribution does not apply to non working individuals.

In the private sphere the pre-reform law *Nolan & Ingram* 'needs' approach to the assessment of superannuation, which required an additional adjustment to be made of the other assets in favour of the non-member spouse if the division of these assets left them without adequate provision for the future, is an example of this approach.¹⁴⁶

Graycar and Morgan commented that both of these approaches use men as a benchmark and that '[e]mphasising women's similarities to, or differences from, men has the effect of distracting attention from the major issue of systemic inequality between women and men.'¹⁴⁷

The third approach identified was the subordination, dominance or disadvantage approach which examines the power distribution between men and women and considers the actual result.¹⁴⁸ This approach is also known as the 'substantive equality' approach or 'result' approach and examines the historical origins of how disadvantage was created in order to address women's disadvantage.¹⁴⁹ It has been described as requiring '[a] more nuanced understanding of equality'.¹⁵⁰

The removal of the exemption provided to employers not to pay the superannuation guarantee if an employee is paid less than \$450 per month would be an example of this approach in the public sphere of superannuation for the reason that this impacts mainly upon areas of employment undertaken by women.¹⁵¹

¹⁴¹ Above n 141. See below 56.

¹⁴² Graycar and Morgan, 'Thinking About Equality', above n 136, 834–5.

¹⁴³ *Ibid* 835.

¹⁴⁴ Above 30–1.

¹⁴⁵ See generally Ross Clare, 'Equity and Superannuation —The Real Issues' (Research Paper, ASFA Research and Resource Centre, September 2012) 4, 19.

¹⁴⁶ (1984) FLC ¶91-585. See below 49.

¹⁴⁷ Graycar and Morgan, 'Thinking About Equality', above n 136, 835.

¹⁴⁸ *1994 Justice for Women Report* above n 10, [3.13]–[3.16]; Morgan and Graycar, 'Thinking About Equality', above n 136, 835–6. See also Regina Graycar and Jenny Morgan, 'Equality Unmodified' (Research Paper, No 12/01, Sydney Law School, The University of Sydney, January 2012) 3.

¹⁴⁹ *Ibid*; Dunn, above n 6, 4.

¹⁵⁰ Belinda Fehlberg and Juliet Behrens, above n 136, 110.

¹⁵¹ Above 28.

In the private sphere the retention of the discretion and the treatment of superannuation like s 4(1) property in the implementation of the superannuation reforms had the potential to characterise an example of this approach.

The LRC noted that each of the different approaches can be useful in different circumstances and that care is required in analysing which is appropriate.¹⁵² The LRC concluded:

To achieve [substantive] equality for women the law must be capable of responding to the situation and experiences of women. This requires the starting point to be the effects of a law, policy or program and its social context. For that legal analysis must move away from principles that require a superficial comparison with men to a more substantive understanding of equality as a response to economic, social and political disadvantage of women.¹⁵³

There has been substantial academic and legal analysis of the gender bias of law;¹⁵⁴ more academic than judicial in Australia it has been said.¹⁵⁵ In the private sphere such discourse has focused upon the financial cost of undertaking the homemaker role which crystallises upon the breakdown of a relationship.¹⁵⁶ After separation the homemaker suffers a reduced standard of living due to reduced earning capacity and that of the breadwinner remains the same or improves. Women tend to have a lesser earning capacity both as a result of undertaking parenting and domestic responsibilities and due to gender issues in employment which have been discussed.¹⁵⁷ Not only can this result in women accumulating smaller entitlements during the period of cohabitation but also in having a diminished ability to catch up after separation. Taking breaks from employment to raise children and then returning to lower paid employment to accommodate family commitments has a critical effect on the accumulation of superannuation.

On the other hand, men benefit from this gender division of labour both in respect of developing the capacity to earn and in relation to the accumulation of superannuation. Fogarty J in *Waters and Jurek* stated that '[i]n most marriages, there is a division of roles, duties and responsibilities between the parties.'¹⁵⁸ His Honour noted that '[o]n separation, the partnership, and the division of roles and responsibilities which it produced, come to an end'¹⁵⁹ and '[p]ost separation the party who assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage.'¹⁶⁰ Further his Honour stated:

[a]n order under s. 79 would be unjust and inequitable in its operation if it failed to address the manner in which the value of the parties' roles, adopted in the course of, and for the purposes of, the marriage, can be altered by the fact of separation.¹⁶¹

Dunn remarked that such an acknowledgment provides support for a substantive or result equality approach to the making of a just and equitable order but that it was too soon to say if

¹⁵² 1994 *Justice for Women Report*, above n 10, [3.28].

¹⁵³ *Ibid* [3.29].

¹⁵⁴ See, eg, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002).

¹⁵⁵ Regina Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20 *Australian Feminist Law Journal* 23, 25.

¹⁵⁶ See generally, Hilary Charlesworth and Richard Ingleby, 'The Sexual Division of Labour and Family Property Law' (1988) 6 *Law in Context* 29; Hilary Charlesworth, 'Domestic Contributions to Matrimonial Property' (1989) 3 *Australian Journal of Family Law* 147.

¹⁵⁷ See above 4. See generally Rebecca Cassells et al, 'The Impact of a Sustained Gender Wages Gap on the Economy', above n 110.

¹⁵⁸ (1995) FLC ¶92-635, 82,379.

¹⁵⁹ *Ibid*. See also *Mitchell & Mitchell* (1995) FLC ¶92-601, 81,997.

¹⁶⁰ *Waters & Jurek* (1995) FLC ¶92-635, 82-379.

¹⁶¹ *Ibid*.

such an enlightened view would translate into reality.¹⁶² Bailey-Harris endorsed a proactive approach to addressing this result of marital breakdown but noted that what amounts to equality and how it is achieved are difficult issues.¹⁶³ Bailey-Harris considered that to redress this substantive inequality a proper value must be attributed to the non financial contributions of the parties as well as the financial contributions and a realistic account must be taken of the future financial impact of marriage and its breakdown.¹⁶⁴ Whether this is achieved in the superannuation context is assessed by evaluating the impact of the amendments upon the application of the orthodox four step approach to determining property settlement disputes.

While it has been noted that each of the three different approaches may be useful, depending on the circumstances, the thesis draws upon the substantive approach as a lens through which to evaluate the benefits afforded women by the superannuation and family law reforms. The thesis considers the expectations of a substantive equality approach to the implementation of the reforms. It would require a facilitative approach to the transitional provisions to enable the reach of the reforms to be maximised to include women disadvantaged by the pre-reform law. It would also require that superannuation be evaluated at step one in the list of assets together with all other forms of family wealth so that the subsequent links in the chain of legal reasoning achieve optimal effect. It would ensure that superannuation is not undervalued, including the complex valuable superannuation interests. A substantive equality approach would ensure that the homemaker contribution is properly valued at step two and not undervalued by comparison with contributions to superannuation. At step three it would compel the assessment of all relevant future economic factors enshrined by legislation and make an appropriate adjustment to the increased pool of family wealth including superannuation. Finally at step four a substantive equality approach would permit the flexibility to consider the greater need for current assets of a family or the greater need for a share of superannuation closer to retirement when the needs of the family are diminished. The retention of the discretionary approach coupled with the superannuation reforms was expected to ensure that the courts are well placed to address the previous disadvantage to women.

¹⁶² Dunn, above n 6, 3–4, 8–10.

¹⁶³ Rebecca Bailey-Harris, 'The Role of Maintenance and Property Orders in Redressing Inequality: Re-Opening the Debate' (1998) *Australian Journal of Family Law* 3, 3.

¹⁶⁴ *Ibid* 7–8, 12.

CHAPTER 3

EARLY LEGISLATIVE AND JUDICIAL TREATMENT OF SUPERANNUATION IN FAMILY LAW AND PROPOSALS FOR CHANGE

A study of the pre-reform history of the treatment of superannuation in family law proceedings confirms the double disadvantage sustained by women. The superannuation gap in the public sphere, crystallised at separation, was not corrected by the exercise of judicial discretion in the absence of comprehensive legislation. Substantive inequality in settlement outcomes continued, and indeed intensified in the private sphere as superannuation grew in absolute and relative value. It is instructive to consider the historical legal context in order to evaluate whether the issues that precipitated the legislative changes have been addressed by the reforms. It also permits an assessment to be made about whether the pre-reform law has any ongoing relevance.

I A BRIEF REVIEW OF SUPERANNUATION INTERESTS

To begin with the various different types of superannuation are considered. Historically there were many different types of superannuation entities¹ and this remains the case. An understanding of the most prevalent types is relevant to understanding the amendments.

Superannuation is managed by various types of entities, the main type of entity being the superannuation fund.² If the fund is a public sector fund it is established by an Act of Parliament or Ordinance and if it is a private sector fund, by a trust deed.³ The employee is entitled to have the trustee manage the superannuation fund in accordance with the terms of the trust deed, the governing rules or legislation. To obtain and retain taxation concessions superannuation funds must comply with the requirements of the *Superannuation Industry (Supervision) Act 1993* (Cth) ('*SI(S)A*'). There are two main forms of superannuation benefit provided by superannuation funds, namely, the defined benefit interest and the accumulation interest.⁴

A *Defined Benefit Interests*

The defined benefit interest, also known as the benefit promise interest,⁵ entitles the member to receive a benefit defined by a formula specified in the governing rules, trust deed or legislation usually fixed by reference to factors such as the employee's salary at or near to retirement and length of service. The contributions of the member do not usually fluctuate. The funding for these types of interests is unallocated. Actuarial advice is usually obtained in relation to the level of employer contribution necessary to meet expected liabilities having regard to employee contributions, investment income, costs and expenses. In the public sector the cost of defined benefit interests is unfunded and is met from public revenue.

¹ Commonwealth, *Occupational Superannuation in Australia*, Parl Paper No 70 (1977) 8–9 (*Occupational Superannuation Report*).

² Shirley Murphy, 'Superannuation' in John Fraser (ed), *Australian Master Financial Planning Guide 2003/04* (CCH, 6th ed, 2003) 172.

³ Ibid.

⁴ Ibid 9, National Superannuation Committee of Inquiry, Parliament of Australia, *National Superannuation in Australia* (1974) 24.

⁵ *Occupational Superannuation Report*, above n 1, 9.

When the member satisfies a condition of release, the prescribed formula determines the quantum of the benefit. The benefit can be a lump sum, a pension or a combination of both. However, if the employee voluntarily ceases to be a member then they will generally receive a lesser entitlement, namely an accumulation benefit only. The employer assumes any risk in relation to investment performance thereby insulating the interest of the employee from economic adversity. Thus the defined benefit interest was designed to encourage the retention of employees. This generous type of interest was more prevalent before the expansion of superannuation and was generally provided by public sector or large private sector employers.⁶ However, with the expansion of superannuation the incidence of the defined benefit interest both in the private sector and the public sector has diminished and is increasingly being replaced by the accumulation interest.⁷

B *Accumulation Interests*

The accumulation interest is also known as the defined contribution interest.⁸ This type of interest relies on allocated funding. The interest comprises an account in the name of the member funded by the contributions of the member and the employer. Investment earnings are paid into the account and costs and expenses are deducted from it. When the condition of release occurs, the member receives the balance of the account at that time. The member assumes the risk in relation to investment performance and with the more extensive coverage of superannuation this type of interest has become more prevalent than the expensive defined benefit interest. It is now portable and generally provides no inducement for the employee to remain with the same employer. The exception is the partially vested accumulation interest which has the same characteristics as the accumulation interest. However, further value is added to the interest at prescribed vesting points, for example, at five, 10 or 15 years of service. This type of interest can also be called a loyalty bonus scheme and is designed to provide some incentive to employees to remain in the same employment.

C *Additional Superannuation Fund Types*

In addition to understanding the two main forms of superannuation the amendments require an understanding of additional superannuation vehicles and interests and a brief review of these follows.

1 *Small Superannuation Accounts*

Changes in 1995 and 1997 facilitated the investment of superannuation on behalf of low income earners. Small superannuation accounts were introduced in 1995⁹ and were designed for the deposit of employer contributions in satisfaction of superannuation guarantee obligations. These accounts were designed to be limited to very small amounts. No interest is payable on amounts above \$1200 as a disincentive to members maintaining superannuation in this type of account. Small superannuation accounts form part of the Superannuation Holding Account Reserve ('SHAR') which is administered by the Australian Taxation Office ('ATO'). The system was intended to be an interim measure put in place pending the introduction of the retirement savings accounts scheme. However, it is yet to be closed down despite the

⁶ Judith Olsen, 'The History of the Development of Superannuation in Australia' (Paper presented at the Hunter Valley Family Law Seminar, Pokolbin, 24–25 October 2008) 1–2.

⁷ Ibid 3.

⁸ *Occupational Superannuation Report*, above n 1, 9.

⁹ *Small Superannuation Accounts Act 1995* (Cth).

commencement of the retirement savings accounts scheme.¹⁰ While the relevance of these accounts should diminish over time, the SHAR holds a considerable amount in unclaimed interests. Women may comprise a significant number of the owners of these interests because of their work patterns.

2 *Retirement Savings Accounts*

In 1997 the retirement savings accounts scheme was introduced which was designed for the short term investment of small sums for employees with periodical short term patterns of work.¹¹ Certain financial providers such as banks, building societies and life insurance companies supply this low risk and simple form of superannuation saving at minimal cost. They do not have a trust structure but are in the nature of a 'capital guaranteed' account.¹² Therefore, there is no negative return in poor economic periods but they do not perform well in times of economic prosperity. Retirement savings accounts are separately regulated and exist alongside the superannuation industry system. They also receive concessional taxation treatment. Although this type of superannuation has been promoted as beneficial to women it has not generally proved popular and by its nature is unlikely to provide for a comfortable retirement.¹³ It may be phased out upon the introduction of the Mysuper product.¹⁴

3 *Self Managed Superannuation Funds*

Self managed superannuation funds are personal superannuation funds set up by self employed people or people who want to retain control over the investment of their superannuation. They are regulated by the ATO which ensures that these funds comply with prudential requirements and are properly administered for retirement purposes. The requirements to be complied with for self managed superannuation funds depend upon whether the fund is a multi member fund or a single member fund.¹⁵ Multi member funds must comply with five requirements. Each fund must have two to four members and each member must be a trustee (or director of the corporate trustee). Each trustee (or director of the corporate trustee) must be a member. No member can be an employee of another member unless they are related. No trustee (or director of the corporate trustee) can be remunerated for services undertaken in relation to the fund. Single member funds can have a corporate trustee with a single director or a maximum of two directors. If there are two directors then the second non-member director must either be a relative or must not be an employee of the member. If the single member fund does not have a corporate trustee then there must be two trustees. The second non-member trustee must either be a relative or must not be an employee of the member. No trustee (or director of the corporate trustee) can be remunerated for services undertaken in relation to the fund.

This type of superannuation investment vehicle is most useful where there are sufficient resources to warrant the considerable set up costs and ongoing administration costs.

¹⁰ Garry Watts, Stephen Bourke and Michael Taussig, *Super Splitting on Marriage Breakdown* (CCH, 2002), 238–9.

¹¹ *Retirement Savings Accounts Act 1997* (Cth).

¹² Watts, Bourke and Taussig, above n 10, 20.

¹³ Ross Clare, 'Women and Superannuation' (Paper presented at the Ninth Annual Colloquium of Superannuation Researchers, University of New South Wales, July 2001), 34.

¹⁴ James Leow, Shirley Murphy and Giles Hooper, *Australian Master Superannuation Guide* (CCH, 14th ed, 2010) 743, ¶10-000.

¹⁵ *SI(S)A* ss 10(1) (definition of 'self managed superannuation fund'), 17A.

4 *Approved Deposit Funds*

Approved deposit funds ('ADFs') are indefinitely continuing funds having Australian Prudential Regulation Authority ('APRA') approved trustees.¹⁶ They are designed to receive superannuation rollover funds and invest them until the funds are withdrawn or the member attains the age of 65 years or dies. Members are unable to contribute to an interest in an approved deposit fund. Approved deposit funds are designed to encourage the retention of superannuation until the age of 65 by providing a concessional tax environment to retain it in. The benefit must be paid by way of lump sum.

5 *Pooled Superannuation Trusts*

Pooled superannuation trusts are unit trusts maintained by APRA approved corporate trustees. Individual investors are unable to invest in pooled superannuation trusts. They are investment vehicles used only to invest assets for regulated superannuation funds, ADFs and life offices.¹⁷

6 *Public Sector Funds*

Public sector funds are indefinitely continuing funds established by or under the authority of Commonwealth, State or Territory law for the purpose of payment of superannuation, retirement or death benefits.¹⁸ They must be part of a public sector superannuation scheme.¹⁹ Public sector funds may be unfunded by employee contributions and therefore funded by the employer or funded by employee contributions or a combination of both.²⁰ Public sector schemes are entitled to concessional taxation treatment if they are regulated or exempt or constitutionally protected.²¹

7 *Public Offer Superannuation Funds*

Public offer superannuation funds²² are superannuation funds which offer superannuation to the public on a commercial basis. They are chiefly offered by banks, life offices and investment companies. They are APRA approved and are required to maintain certain levels of capital as well as comply with additional prudential requirements.²³

8 *Summary*

Prior to the amendments an understanding of the different superannuation vehicles and benefit structures was less important. However, because the amendments are required to encompass a complex array of superannuation interests to achieve optimum application a significantly greater general knowledge of superannuation is required to understand the treatment of superannuation under the *FLA* prior to and post reform.

¹⁶ *SI(S)A* s 10(1) (definition of 'approved deposit fund'). See generally Leow, Murphy and Hooper, above n 14, 37, ¶2-320.

¹⁷ *SI(S)A* s 10(1) (definition of 'pooled superannuation trust'). See generally Leow, Murphy and Hooper, above n 41, 39.

¹⁸ *SI(S)A*, s 10(1) (definition of 'public sector fund').

¹⁹ *SI(S)A*, s 10(1) (definition of 'public sector superannuation scheme').

²⁰ See generally, Shirley Murphy, above n 2, 176.

²¹ Watts, Bourke and Taussig, above n 10, 21.

²² *SI(S)A* ss 10(1) (definition of 'public offer superannuation fund'), 18. See generally Shirley Murphy, above n 2, 176.

²³ Leow, Murphy and Hooper, above n 14, 52.

II THE RELEVANT LEGISLATION

Since the commencement of the *FLA* in 1976 the courts exercised considerable ingenuity in endeavouring to properly take account of superannuation interests in the course of determining matrimonial property proceedings. This was required by the combination of the legislative framework within which the courts operated and the intrinsic nature of superannuation interests. The *FLA* gives the courts jurisdiction in relation to matrimonial causes²⁴ defined by s 4(1) to include proceedings ‘with respect to the property of the parties to the marriage or either of them.’²⁵ The difficulty arose from the interpretation of the definition of ‘property’ in s 4(1). Section 4(1) defines property to mean ‘property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.’²⁶ Section 79 is the source of the substantive power to alter the interests of parties to a marriage with respect to property.²⁷ In order to exercise this power it is necessary for the court to be satisfied that, indeed, there is property in respect of which the power can be exercised. This is not generally difficult but it was a problematical exercise in relation to superannuation that did not qualify for immediate payment.

III THE CASE LAW — SUPERANNUATION AS S 4(1) PROPERTY

Thus the challenge for the courts was to determine whether an interest in superannuation constituted ‘property’ within the meaning of the s 4(1) definition for the purpose of enabling a s 79 order to be made. The s 4(1) definition of property provides no guidance about what constitutes property and it has been left to the courts to interpret its ambit. The Full Court in *Duff & Duff* said that ‘the Act is to be read and construed widely and liberally with words and expressions being given their ordinary meanings as far as possible ...’²⁸ and further stated ‘“property” means property both real and personal and includes choses in action’.²⁹

However, the problem with treating superannuation as ‘property’ for the purpose of matrimonial property proceedings was that it was considered to be ‘very much of the future, has real elements of uncertainty about it and is highly subjective in its evaluation’.³⁰ McGovern J in *Stacy & Stacy* considered some of the obstacles.³¹ Payment may be subject to contingencies. Death, dismissal for misconduct, early retirement and incapacity can reduce or eliminate an entitlement. Nevertheless, his Honour did comment, without elaborating, that it was possible for superannuation to constitute property in certain circumstances, even where the entitlement was not immediately available.³² The majority in *Bailey & Bailey* agreed³³ and said:

²⁴ *FLA* ss 39(1), (1A), (2). See also *FLA* ss 39A, 39B in relation to de facto financial causes.

²⁵ *FLA* s 4(1) (definition of ‘matrimonial cause’). See also *FLA* s 4(1) (definition of ‘de facto financial cause’).

²⁶ See also *FLA* s 4(1) (definition of ‘property’) in relation to parties to a de facto relationship.

²⁷ *FLA* s 90SM is the equivalent provision in relation to de facto relationships.

²⁸ (1977) FLC ¶90-217, 76,127, 76,131 (*‘Duff’*).

²⁹ *Ibid* 76,133.

³⁰ *Crapp & Crapp* (1979) FLC ¶90-615, 78,186.

³¹ (1977) FLC ¶90-324, 76,707 (*‘Stacy’*).

³² *Ibid*, 76,708–9.

³³ (1978) FLC ¶90-424, 77,147 (*‘Bailey’*).

Whether the superannuation benefit is property within the meaning of sec 79 will depend on the provisions of the deed or legislation setting up those benefits. In most cases the right to superannuation is not immediately realisable and therefore seldom able to be dealt with directly under sec 79. It is however, always a very important factor to be taken into account when the adjustment of property rights between spouses is sought, although the quantification of such a factor can be very difficult.³⁴

The inference to be drawn from this statement is that if superannuation is immediately realisable then it can be dealt with pursuant to s 79.³⁵ The majority emphasised the importance of:

[d]ocumentary evidence about the nature of the entitlement, the terms of any trust, the contingencies if any which might give rise to entitlement, the disqualifying factors if any, or the fate of the entitlements should he die before retirement. In the absence of such evidence it is difficult to determine whether the entitlement could be considered as an interest in property. If the fund were held in the form of a discretionary trust, which is commonly the case, the husband would strictly have no present entitlement, and his interest would depend upon the exercise of discretion by the trustees.³⁶

Subsequently Fogarty J in *Crapp* stated:

It appears to me that generally an interest in a superannuation fund or the like is not “property” as defined in sec 4 of the *Family Law Act* or at all. It is normally a contingent interest only; until he actually receives it in his hands he has no control over it; he is unable to alienate it in the meantime and in the event of his death prior to retirement the right does not form part of his estate. In my view such an interest falls outside the term “property” as ordinarily understood or as defined in sec 4 of the *Family Law Act* ... No doubt it would be possible to amend the definition of property in the Act to encompass contingent interests ...³⁷

Nor was it considered relevant that the member spouse could resign to transform the superannuation entitlement into property.³⁸

Nevertheless, the Full Court in *Wunderwald & Wunderwald* considered that there could be an exception to the general rule that superannuation is not property:

[w]here parties can clearly put themselves in a position of obtaining their entitlements to a superannuation fund without suffering any detriment, such as the loss of the opportunity to continue with their career and in a case, such as this one, where the trustee of the superannuation fund is clearly the creature of the parties or one of them, it seems to us to be quite unreal to treat such an entitlement as other than property which is available for distribution pursuant to s 79. In such a case it seems to us that the distinction between ‘property’ and ‘financial resource’ is a distinction without a difference.³⁹

It was significant that the fund was a self managed superannuation fund of the parties and their interests could be quantified with certainty and dealt with without detriment to the parties. The decision was said to be consistent with the decision of the High Court in *Ascot Investments Pty Ltd v Harper*⁴⁰ that there is an exception to the prohibition against the Family Court interfering with the rights and obligations of third parties where the third party is a sham, puppet or alter ego of a party.⁴¹ However, the decision had a limited impact upon

³⁴ Ibid 77,145.

³⁵ Richard Ingleby, ‘Superannuation and Divorce’ (1990) 64 *Australian Law Journal* 244, 244 observed that the s 4(1) definition of ‘property’ poses no problem where a party has received superannuation.

³⁶ *Bailey* (1978) FLC ¶90-424, 77,146.

³⁷ (1979) FLC ¶90-615, 78,181.

³⁸ Ibid 78,182.

³⁹ (1992) FLC ¶92-315, 79,361 (*Wunderwald*). See also *Stay v Stay* (1997) FLC ¶92-751, 84,130 (*Stay*).

⁴⁰ (1981) FLC ¶91-000.

⁴¹ Watts, Bourke and Taussig, above n 10, 49.

redressing the inability of the courts to treat superannuation as property and the detrimental impact of this upon women.

Various commentators expressed differing views about superannuation as property prior to the reforms. Ingleby concluded that in broad terms the effect of the case law was that future superannuation was not encompassed by the definition of 'property' unlike superannuation that was immediately realisable.⁴² Nonetheless, Dickey considered that, as the common law recognises both vested and contingent interests as property, the *FLA* might be interpreted to apply to such interests.⁴³ Justice Graham Hill when considering the nature of the interest of a member in a superannuation fund concluded:

that the true nature of the employee's interest in the normal scheme, whether contributory or non-contributory, and whether the benefits may be accumulations or defined end benefits, is a beneficial interest in a trust estate governed wholly ... by the law of trusts.⁴⁴

His Honour noted that in the area of family law superannuation was not considered to be property for the purpose of s 4(1) if the member had not retired because it was contingent in nature and could not be alienated.⁴⁵ His Honour noted that although the court had developed different oblique approaches to the problem, a legislative solution was required to facilitate explicit consideration of superannuation.⁴⁶

Thus, unless superannuation was immediately available, generally it could not be treated as property for the purpose of property proceedings. Therefore the courts developed alternative techniques in an attempt to take it into account.

IV JUDICIAL APPROACHES TO THE TREATMENT OF SUPERANNUATION

In 1991 Evatt observed that although the *FLA* resulted in greater value being attributed to the homemaker contribution after separation, which contributed to substantive equality in the private sphere,⁴⁷ the treatment of superannuation remained unsatisfactory to the detriment of principally women despite its significance.⁴⁸ Millbank was more strident in her criticism of the treatment of superannuation by the courts and said that in the decided cases 'divisions have been haphazard and decisions inconsistent' and that is where superannuation was taken into account at all.⁴⁹

Prior to the reforms a variety of approaches developed in an endeavour to give superannuation due consideration.⁵⁰ They took into account the circumstances of each case including the

⁴² Ingleby, 'Superannuation and Divorce', above n 35, 245–6.

⁴³ Anthony Dickey, *Family Law* (Lawbook, 4th ed, 2002) 616–7.

⁴⁴ Hill, Justice Graham, 'The True Nature of a Member's Interest in a Superannuation Fund' (2002) 5 *Journal of Australian Taxation* 1, 16.

⁴⁵ *Ibid* 6.

⁴⁶ *Ibid*.

⁴⁷ Elizabeth Evatt, 'Valuing Women's Work — The Role of Family Law' (Speech delivered at the Anne Conlon Lecture, Sydney, 19 July 1991) 5.

⁴⁸ *Ibid* 10–11.

⁴⁹ Jenni Millbank, 'Hey Girls, Have We Got a Super Deal for You: Reform of Superannuation and Matrimonial Property' (1993) 7 *Australian Journal of Family Law* 104, 111.

⁵⁰ See generally Michael Errington, 'Superannuation in Property Applications: Having Your Spouse's Cake and Eating Your Own' (1991) 6(3) *Australian Family Lawyer* 14.

characteristics of the particular superannuation interest. Rarely was superannuation treated as property.

The decisions highlight the competing considerations that faced the courts, namely the inability to treat superannuation as property for the purpose of making s 79 orders in most cases, the legislative mandate to take superannuation into account in an undefined way,⁵¹ coupled with the obligation in s 81 to sever financial relations between separating spouses as far as possible. The task of the courts was made more difficult where insufficient information was provided to enable an assessment of whether superannuation was ‘property’ to be made.⁵² The results achieved by the application of the different approaches corroborated the need for major urgent reform.

A *Superannuation as a Chose in Action*

While as a general rule superannuation was not usually considered to be property, a number of decisions considered whether superannuation was a chose in action and therefore property within the meaning of *Duff*.⁵³ The nature of the chose in action was the right of the employee to have the superannuation fund properly administered in accordance with the terms of the trust deed or legislation.

The Full Court in *Perrett & Perrett* considered this argument in relation to an uncommutable DFRDB pension paid to the husband.⁵⁴ Notwithstanding that the entitlement was vested and in the payment phase it was not treated as property. The Full Court also declined to treat it as a chose in action for a capitalised sum and held that the husband only had a right to sue for each fortnightly payment. Therefore it was treated as a resource under s 75(2) and an adjustment to the wife representing two years of pension payments was made.⁵⁵ The decision foreshadowed an ongoing area of difficulty, namely the appropriate treatment of pensions in the payment phase.

In a subsequent decision of *Evans & Public Trustee (WA)* it was noted:

there has always been a consistent strand of judicial thinking in the Court which suggests that the right of a member with respect to a fund constitutes a chose in action and is thus property ... The chose in action identified under this view is normally a right to have the fund administered in accordance with the deed or legislation as distinct from a right to a specific sum of money or other benefit ...⁵⁶

However, the Full Court considered this approach unhelpful because of the practical problem of evaluating the interest. The approach received apparent endorsement in the later decision of *Stay*⁵⁷ but otherwise did not gain currency. The observation has been made that the value of such a chose in action, if established, would be negligible⁵⁸ and therefore the approach was of doubtful utility. The approach has been described as ‘a limited and generally unhelpful approach which tends to provide no practical answer in specific cases’.⁵⁹

⁵¹ *FLA* ss 79(4)(e), 75(2)(b), (f), (o).

⁵² *Bailey* (1978) FLC ¶90-424, 77,146.

⁵³ (1977) FLC ¶90-217.

⁵⁴ (1990) FLC ¶92-101, 77,659–60 (*Perrett*).

⁵⁵ *Ibid*, 77,660.

⁵⁶ (1991) FLC ¶92-223, 78,548. See also *Harris & Harris* (1991) FLC ¶92-254, 78,709–10.

⁵⁷ (1997) FLC ¶92-751, 84,129.

⁵⁸ Justice John Faulks, ‘The Division of Property and Superannuation under the Family Law Act 1975 — A Practical Consideration of the Evidence which should be Presented to a Court with Particular Reference to the Question of Superannuation’, *Family Court of Australia*, 1998, 20.

⁵⁹ Ian Kennedy, ‘Lump Sum was Divisible Property’ (1992) 3 *Australian Superannuation Law Bulletin* 73, 79.

B *The Take into Account Approach*

The most popular approach to the treatment of superannuation prior to the reforms was the 'take into account' approach. The approach required superannuation to be taken into account in an indeterminate way as a resource at step three when assessing future economic factors in respect of the other property. It did not require a precise offset of the interest against other assets supported by a formal valuation. The difficulty was that it required a nebulous and subjective assessment of the weight to be given to the interest, a particular problem if retirement was a considerable time away.

In the early decision of *Bailey*⁶⁰ the Full Court commented that superannuation contributions are family monies that have been diverted into making provision for retirement at the expense of day to day family support and that the inability to share in provision for retirement is a significant consequence of marriage breakdown. The majority pointed out that s 75(2)(f) of the *FLA* requires the superannuation entitlements of either party to be taken into account. Although s 75 factors are relevant to claims for spousal maintenance, s 79(4)(e) requires consideration of relevant s 75(2) factors in relation to property proceedings. The approach of the majority to the treatment of superannuation has been described as the 'take it into account in an unspecified manner' approach.⁶¹

The deficiencies with this approach are well illustrated by the important decision of the Full Court in *Crapp*.⁶² This decision was the most influential decision about superannuation prior to the reforms. In that case the husband was a Qantas pilot having a superannuation interest with a net approximate value of \$76 500. If the husband retired at age 55, some 9 years later, the payment was expected to be approximately \$300 000. The husband also had net long service leave and annual leave entitlements of approximately \$27 800. He assumed responsibility for a matrimonial debt of approximately \$6000. The matrimonial home in which the wife and the two children of the marriage resided, was valued at approximately \$90 000 with a mortgage of approximately \$14 000. Thus the current value of the superannuation was equivalent to the equity in the home but would increase significantly in the future.

The trial Judge ordered that the husband transfer his interest in the matrimonial home to the wife and be responsible for the mortgage, as well as pay the wife \$40 per week by way of maintenance for each of the two children. The wife was to retain the contents of the home and the husband was to retain responsibility for the debt of \$6 000. The husband appealed and argued that his superannuation interest was not property and should be completely disregarded.

The Full Court disagreed with the trial Judge that the husband's superannuation could be treated as property either in possession or as a chose in action.⁶³ However, the Full Court also disagreed with the husband that it should be entirely disregarded as an uncertain contingency and commented that the fact that the amount of the benefit could not be ascertained with certainty did not detract from the fact that the husband would, in due course, receive a benefit of considerable magnitude.⁶⁴ The Full Court considered that it should be taken into account

⁶⁰ (1978) 90-424, 77,145.

⁶¹ Bill Hughes, 'Superannuation and Family Law' (1992) 6 *Australian Journal of Family Law* 207, 208.

⁶² (1979) FLC ¶90-615. See generally Errington, above n 50, 17-18.

⁶³ *Crapp* (1979) FLC ¶90-615, 78,169, 78,181-2.

⁶⁴ *Ibid* 78,169-70, 78,183

when considering the orders that should be made in relation to the other property⁶⁵ and relied upon ss 75(2)(b), (f) and (o).⁶⁶

The lengthy reasons of Fogarty J summarised the difficulties faced by the courts in relation to the appropriate treatment of superannuation entitlements. His Honour provided a detailed analysis of the case law as well as a considered assessment of the problems and recommended that there be reform to achieve fairness.⁶⁷ His Honour favoured the ‘take into account’ approach that had been adopted in most of the cases reviewed.⁶⁸ Fogarty J declined to take a deferral approach or a mathematical approach.⁶⁹

His Honour then stated:

The result frequently is that the Court is forced into a position which of its very nature is incapable of producing a satisfactory result to the parties in many cases, and often resulting in a real sense of grievance in one or both of the parties.⁷⁰

Ultimately the Full Court ordered that the matrimonial home be sold and that the wife receive the greater of \$56 000 or 74 per cent of the proceeds and the furniture. The decision was significantly less favourable to the wife, who was left with an inferior earning capacity, lost the home and received no share of the superannuation for retirement. On the other hand the husband was left with a lesser share of the presently available assets expected to amount to about \$20 000, superannuation with a burgeoning value, his employment benefits of about \$27 800, a debt of \$6000 and a comparatively valuable earning capacity.

Fogarty J referred to the sum of \$56 000 to be paid to the wife as ‘a substantial capital sum’⁷¹ which leads to speculation about how the husband’s overall position might be described. It would not be surprising if the wife was left with ‘a real sense of grievance’ at this outcome.

The decision illustrates the vague and indeterminate nature of the ‘take into account’ approach. Following a clear and detailed analysis, the result appears to be as arbitrary as the decision of the trial Judge and lends support to his Honour’s criticism of the position that the courts were placed in and the difficulty of achieving a fair result. Indeed it is arguable that the superannuation received little consideration.

Subsequent cases took the approach outlined by Fogarty J, with variations and additions.⁷² Reform of the position recommended by Fogarty J also received support.⁷³

It has been suggested that this approach may have continued relevance after the reforms.⁷⁴ The significant difficulty with it is that the non-member spouse, usually the wife, may be left feeling that the superannuation interest has been insufficiently taken into account or not taken

⁶⁵ Ibid 78,170.

⁶⁶ Ibid 78,169, 78,183.

⁶⁷ Ibid 78,174–81.

⁶⁸ Ibid 78,184–85.

⁶⁹ Ibid 78,184

⁷⁰ Ibid 78,185

⁷¹ Ibid 78,187

⁷² Commonwealth, ‘The Treatment of Superannuation in Family Law’ (Discussion Paper, Attorney-General’s Department, March 1992) 5 (*A-G’s Dept 1992 Discussion Paper*); *Whitehead & Whitehead* (1979) FLC ¶90-673 (*Whitehead*); *Coulter & Coulter* (1990) FLC ¶92-104 (*Coulter*); *Mitchell & Mitchell* (1995) FLC ¶92-601 (*Mitchell*); *Harrison & Harrison* (1996) FLC ¶92-682 (*Harrison*).

⁷³ *Mitchell* (1995) FLC ¶92-601, 81,991.

⁷⁴ Watts, Bourke, and Taussig, above n 10, 43.

into account at all because of its imprecise nature. However, if the ‘take into account’ approach continues to be a relevant approach then it should be capable of a greater degree of certainty and deliver fair outcomes for women when applied by the courts post reform. One of the criticisms of this approach is that, apart from its subjectivity, it has no utility where there is little or no other property. This deficiency at least is cured by the operation of the new regime.

C *The Realisable Value Approach*

The ‘realisable value’ approach was so described because it relied on the notional entitlement of the member spouse in the event of resignation rather than retirement⁷⁵ which can disadvantage the non-member spouse if the superannuation interest is not of the straightforward accumulation interest variety.⁷⁶ Resignation value gives no value to any unvested portion of the interest which prior to the amendments had been an issue in relation to defined benefit interests. The approach proved to be of limited application in particular in the absence of other property.

D *The Needs Approach*

The ‘needs’ approach was another unpopular approach to the assessment of superannuation. This approach did not rely on a valuation of superannuation. It required an additional adjustment of the other assets to be made in favour of the non-member spouse if the division of these assets left the non-member spouse without adequate provision for the future.⁷⁷ The approach was criticised for being both subjective and uncertain.⁷⁸ The manner in which its relevance was assessed was unclear and it had negligible utility where there were no other assets. The approach was of limited application and did not flourish.

E *The Mathematical Approaches*

Various mathematical approaches evolved in an attempt to evaluate the increasingly complex array of superannuation interests appropriately in matrimonial property proceedings. Gee J in *Thomas & Thomas*⁷⁹ and also in *Jenner & Jenner*⁸⁰ endorsed a complex mathematical approach based on a present day valuation of future benefits referable to the period of cohabitation discounted for various possible exigencies such as dismissal, ill health, death, redundancy or early retirement. The resulting amount was then adjusted out of other assets. His Honour acknowledged in *Jenner* that valid criticisms of this approach had been made but said that such an approach was a useful ‘rough guide’ although not ‘determinant’.⁸¹ The approach was criticised for being complicated and requiring actuarial assistance.⁸² It was also criticised for being speculative and of negligible use in the absence of other assets against which to make an adjustment.⁸³

The Full Court in *Prestwich & Prestwich*⁸⁴ noted that a mathematical approach was not an approach to be rigidly adhered to in every case.⁸⁵ A different mathematical approach was

⁷⁵ *Woolley & Woolley [No 2]* (1981) FLC ¶91-011.

⁷⁶ See generally Watts, Bourke and Taussig, above n 10, 44.

⁷⁷ *Nolan & Ingram* (1984) FLC ¶91-585.

⁷⁸ Watts, Bourke and Taussig, above n 10, 41–2.

⁷⁹ (1981) FLC ¶91-018.

⁸⁰ (1984) FLC ¶91-544 (*‘Jenner’*).

⁸¹ *Ibid* 79,409.

⁸² Watts, Bourke and Taussig, above n 10, 45–46.

⁸³ *Ibid*.

⁸⁴ (1984) FLC ¶91-569.

adopted in that case. A proportion of the notional resignation benefit, calculated as at the date of separation, referable to the period of cohabitation was taken into account.⁸⁶ Purvis J in *Webber & Webber*⁸⁷ undertook a similar mathematical approach but took into account the notional resignation benefit as at the date of hearing rather than at the date of separation.

The leading case was *West & Green*⁸⁸ a decision of Kay J in relation to a marriage of some 20 years where the husband had accumulated a significant superannuation entitlement available to him at the compulsory age of retirement some 15 years later. The parties agreed that an order should be made establishing the wife's entitlement to a proportion of the husband's superannuation to take effect upon payment of the interest. The order contained a formula to the effect that the wife should receive 50 per cent of the net marital portion of the superannuation payment ultimately received by the husband. The formula equally divided a proportion of the resignation benefit calculated by reference to the number of years of cohabitation in relation to the number of years of membership of the fund. This approach was endorsed by Kay J in preference to the take into account approach or to a deferral approach.⁸⁹

It has been said that the approach was 'the closest the Family Court got to super splitting between 1976 and 2002' and that it provided a useful guide for negotiations.⁹⁰ It has also been described as a practical and common sense approach.⁹¹ However, it is also arguable that such an order is not appropriate or feasible if superannuation that is not realisable is not 'property' within the meaning of s 4(1). This impediment was not dealt with by the Court. Alternatively it may also be argued that such an order does not take effect until superannuation is realised and becomes property.

There are two additional major criticisms of this type of approach. Firstly it overvalues the contributions made by the member spouse in the early years because the effect of the approach is that it presumes an even accrual of the entitlement throughout. Secondly it quarantines a pre relationship contribution to superannuation and protects it from the application of erosion principles unlike the position in relation to other assets.

Subsequent cases have commented upon this formulaic approach rather less favourably. The Full Court in *Harrison* stated:

It must first be said that in most cases a spouse's entitlement to superannuation is not property and therefore is not capable of any order under the provisions of s 79. See *Crapp and Crapp* (1979) FLC ¶90-615, *Coulter and Coulter* (1990) FLC ¶92-104 and *Mitchell and Mitchell* (1995) FLC ¶92-601. The various attempts which trial Judges, in their ingenuity, have made to take superannuation entitlements into account by reference to precise mathematical calculations, although perhaps desirable from a practical point of view, nevertheless do not enable or entitle them to include such sums as part of the property of the parties, however calculated. ... in most cases the proper approach to be taken by trial judges, when dealing with a party's entitlement to superannuation in proceedings for alteration of property interests ... is to adjourn the proceedings under s 79(5) with or without the making of any order under s 79(6) or, in the alternative, to treat the superannuation entitlement as a resource, pursuant to the provisions of s 75(2)(f) or (j).⁹²

⁸⁵ Ibid 79,602.

⁸⁶ Ibid 79,601.

⁸⁷ (1985) FLC ¶91-648, 80,225-6.

⁸⁸ (1993) FLC ¶92-395.

⁸⁹ Ibid 80,037-41.

⁹⁰ Watts, Bourke and Taussig, above n 10, 47.

⁹¹ Michael Taussig, 'Current Developments in Superannuation' (1992) 7(4) *Australian Family Lawyer* 10, 14.

⁹² (1996) FLC ¶92-682, 83,084. See also *Bartlett & Bartlett* (1996) FLC ¶92-721; *Tomasetti & Tomasetti* (2000) FLC ¶93-023 ('*Tomasetti*').

After the reforms attempts were made to retain the mathematical approaches as a means of taking into account contributions to superannuation made by the member spouse prior to and after cohabitation which were subject to criticism.

F The Deferral Approaches

There are deficiencies with the deferral approaches that have been referred to both in the decided cases and by commentators.⁹³ These approaches were generally implemented when superannuation was the major or sole asset.

1 Order for Payment upon Receipt of Superannuation

One type of deferral approach required a cash payment to be made by the member spouse to the non-member spouse when the superannuation was paid.⁹⁴ However, this type of approach did not take account of possible future contingencies such as the performance of the fund and the exigencies of employment of the member. It required an estimate of the future value of the fund and did not take account of possible fund changes. It offended the 'clean break' principle imposed by s 81 and there were risks with any delay in implementation. Such an order was not binding upon the trustee and relied upon the cooperation of the member spouse which anecdotally was not always forthcoming. Also the death of the member prior to retirement could hinder its operation. The approach may have had the appearance of simplicity and practicality but had significant limitations.

2 Section 79(5) Adjournment With or Without Interim Orders

The other type of deferral approach required the deferral of proceedings until the time of payment with or without orders about the other property and arguably remains an option after the reforms although an unlikely one.⁹⁵ After an amendment in 1983 matrimonial property proceedings could be adjourned for substantial periods of time to enable superannuation to be paid.⁹⁶ Section 79(5) enables the court to adjourn proceedings where there is likely to be a significant change in financial circumstances such that there is a greater likelihood of justice between the parties and provided the adjournment is reasonable. Section 79 (7) specifies that an entitlement to superannuation is a relevant consideration. Section 79(6) enables appropriate interim or other orders to be made where a s 79(5) order is to be made. These provisions were not changed by the superannuation amendments. The nature of s 79(5) was elucidated by the important decision of *Grace v Grace*.⁹⁷ The Full Court reiterated that s 79(5) is not an adjournment power of a procedural nature. It is substantive in nature and because its exercise has serious consequences it is better described as a power of deferral. The introduction of the power to flag superannuation would almost certainly reduce the impact of s 79(5) in this context.

Gee J in *Turner & Turner*⁹⁸ considered that a prima facie claim to the superannuation interest must be established before granting a s 79(5) adjournment. His Honour further commented that the wife must establish what deprivation she had suffered as a result of contributions

⁹³ See Michael Taussig, 'An Update on Superannuation: Quo Vadis?' (1987) 2(4) *Australian Family Lawyer* 6, 9–10; Law Reform Commission, *Matrimonial Property*, Report No 39 (1987) 204–5 ('1987 Hamblly Report'); *A-G's Dept 1992 Discussion Paper*, above n 72, 6.

⁹⁴ *Sharp v Sharp* (1978) FLC ¶90-470; *Crosthwaite & Crosthwaite* (1981) FLC ¶91-082.

⁹⁵ Watts, Bourke and Taussig, above n 10, 181–82.

⁹⁶ *FLA* ss 79(5), (6), (7).

⁹⁷ (1998) FLC ¶92-792 ('*Grace*'). See also *Martin & Martin* (1986) FLC ¶91-737.

⁹⁸ (1984) FLC ¶91-528, 79,283.

being made to superannuation by the husband.⁹⁹ This is an intriguing requirement reminiscent of the comment of Baker J in *Whitehead*¹⁰⁰ who said that it was relevant to note that the family in that case had not suffered a reduced standard of living as a result of the contributions made to superannuation. This type of requirement did not gain favour.

The cases demonstrated a willingness to adjourn proceedings for lengthy periods where present assets were negligible and the superannuation was significant.¹⁰¹ However, before granting a long adjournment a court would have to be satisfied that otherwise ‘serious and irreparable injustice would be done to a party’.¹⁰² An adjournment was considered an inappropriate option if proper provision could be made out of current assets.¹⁰³ This type of deferral approach was subject to similar criticisms about the problems that can occur in the intervening period.

G *The Inadequacy of the Prior Legislative and Judicial Treatment of Superannuation to Achieve Substantive Equality*

The limited legislative change and the assortment of judicial approaches which had evolved failed to produce consistency, certainty or a fair result for women in property proceedings involving superannuation. Little or no weight had been given to superannuation by the courts. The case law developed a variety of inconsistent approaches to the treatment of superannuation and there was uncertainty in the valuation of entitlements and ultimate payment of superannuation received by women. The courts could not make direct orders in relation to superannuation except in very limited circumstances. The deferral approaches prevented a s 81 ‘clean break’ and invited the complication of events subsequently intervening such as death or redundancy. The adjournment of proceedings to enable superannuation to vest remained problematical particularly in the absence of other s 4(1) property. Making orders to take effect when the entitlement was eventually received by the member spouse was similarly risky and relied upon the member spouse to cooperate and comply. The valuation of interests, in particular the complex defined benefit interests, was problematical and rarely undertaken. Orders binding the trustee could not be made.

The approaches developed by the courts for dealing with superannuation underscore the difficulties faced by the courts in the absence of any explicit legislative framework. They confirm that women who were disadvantaged in their ability to access and accumulate superannuation in the public sphere were then further deprived of a fair share of their husband’s superannuation in the private sphere.

The various reports and reviews leading up to the superannuation reforms acknowledged the shortcomings of the treatment of superannuation by the courts and reiterated the need for change.

V THE EVOLUTION OF REFORM

⁹⁹ Ibid.

¹⁰⁰ (1979) FLC ¶90-673, 78,583.

¹⁰¹ See *O’Shea & O’Shea* (1988) FLC ¶91-964 (*‘O’Shea’*); *Kearney & Kearney* (1991) FLC ¶92-208; *Evans & Public Trustee (WA)* (1991) FLC 92-223; *Carson v Carson* (1999) FLC 92-835. See generally Ian Kennedy, ‘Current Treatment of Super in the Family Court’ (1993) 5 *Australian Superannuation Law Bulletin* 39.

¹⁰² *O’Shea* (1988) FLC ¶91-964, 76,982.

¹⁰³ *Tyson & Tyson* (1993) FLC ¶92-368, 79,847–8.

Recognition of the need for reform was complicated by the difficult and diverse nature of superannuation which prevented a straightforward resolution of the issue of appropriate legislative amendment. A considerable amount of research, inquiry, consultation and reporting was undertaken by various organisations prior to the commencement of the new family law superannuation regime. The observation has been made that '[t]he history of the reform process for the splitting of superannuation is littered with discarded policy ideas'.¹⁰⁴ The various reviews were conducted against a background of review of the discretionary approach to matrimonial property division generally, a factor contributing to the delay in implementing change. Ultimately the discretionary system remains unchanged. At the same time, parallel reviews and reforms of the superannuation industry were being undertaken without genuine collaboration.¹⁰⁵ Any consideration of the relevance and impact of proposed changes in each sphere upon the other appeared to be incidental.

Superannuation policy focused on increasing the level and coverage of superannuation and safeguarding it for the retirement of the member. A fixed approach of splitting marital superannuation after separation addresses to some extent the gender disparity in the accumulation of superannuation in the public sphere. This helps to relieve the pressure of providing government funded retirement assistance to women who require the majority of this assistance. It treats superannuation as an investment in future income.

The family law focus was different and concentrated on the treatment of superannuation as a form of family wealth. This would require that superannuation be viewed as a current asset to which the parties have contributed and in respect of which an adjustment on account of future economic factors can be made rather than an investment in future income.

The unique characteristics of superannuation complicated the achievement of the main policy objective of providing 'a coherent framework for addressing the shortcomings of the current arrangements.'¹⁰⁶ A brief examination of the various issues, reports and recommendations leading up to and underpinning the new legislative regime assists in understanding its operation. The universal theme of the various studies, reports and recommendations was that the treatment of superannuation in family law was particularly detrimental to women.

Apart from the 1983 amendments,¹⁰⁷ which did not address the fundamental issues but provided the courts with powers to defer proceedings in relation to superannuation and to make appropriate interim orders, no relevant amendments were made to the *FLA* prior to the commencement of the new regime. However, almost from the commencement of the *FLA*, there were numerous recommendations resulting from many reports of various bodies. The recommendations of the early reports proceeded cautiously. However, as the superannuation industry grew, along with the importance of superannuation in family law proceedings, the treatment of superannuation on relationship breakdown became increasingly difficult to ignore and, the recommendations for change became more comprehensive. The gestation period of the new regime was a long and convoluted one and the benefits for women to result from the amendments were not easily predicted at the time of the early reports. An examination of the evolution of the new regime discloses the many options for change proposed and the increasing recognition of the importance of achieving fairness. The history commences with relatively uncomplicated recommendations that steered clear of any

¹⁰⁴ Watts, Bourke and Taussig, above n 10, 4.

¹⁰⁵ See above 27–32; Millbank, above n 49, 105.

¹⁰⁶ Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2001 (Cth) 3 ('REM')

¹⁰⁷ *FLA* s 79 (5), (6), (7).

significant change that would facilitate any direct dealing with superannuation and concludes with the exhaustive codification of the process of superannuation payment splitting eventually endorsed.

A *Early Reports and Recommendations for Reform*

In 1980 the Family Law Council in its Working Paper warned against exaggerating the problems with the treatment of superannuation in family law.¹⁰⁸ Consequently its recommendations for reform were modest. It recommended a power to defer proceedings pending the payment of a superannuation entitlement.¹⁰⁹ Otherwise, the Paper recommended that superannuation be treated the same as other property and subject to the same principles. The 1980 report of the Joint Select Committee supported these recommendations but noted the risk to the non-member spouse in the event of the death of the member spouse prior to the payment of the benefit.¹¹⁰ Subsequently the power to defer proceedings was introduced in 1983.

In 1986 research on the economic consequences of marriage breakdown by the Australian Institute of Family Studies, *Settling Up* was published.¹¹¹ An extensive survey had been conducted of separated couples. The study concluded that both the depreciation of earning capacity of the homemaker spouse and the resulting imbalance in superannuation accrual were matters that were inadequately recognised in property proceedings.¹¹² The study found that both men and women devalued the homemaker contribution compared to the income earning contribution.¹¹³ It confirmed the serious extent of the lack of consideration of superannuation after separation.¹¹⁴ Separated spouses' reports of their experience ranged from concern that superannuation had not been considered at all, which was the experience of the majority, to concern that it had been taken into account in a vague and undefined way.¹¹⁵ Proper valuation of superannuation was also an issue for the couples surveyed.¹¹⁶ The 1983 deferral amendments appeared to have had no impact upon these concerns and proper consideration of superannuation was recommended to address the disadvantage to homemaker spouses.¹¹⁷

Nothing had changed by the time of the report of the follow up study, *Settling Down*, in 1993.¹¹⁸ The issue of superannuation remained inadequately dealt with¹¹⁹ and the study concluded that the 'full economy of marriage' should be evaluated in relation to property and superannuation upon relationship breakdown.¹²⁰ The 1999 *Working Paper* confirmed the

¹⁰⁸ Family Law Council 'Superannuation and Family Law' (Working Paper No 8, Family Law Council, 1980) vi.

¹⁰⁹ Ibid vii–viii, 40.

¹¹⁰ Joint Select Committee, Parliament of Australia, *Family Law in Australia* (1980) vol 1, 96.

¹¹¹ Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice Hill, 1986) ('*Settling Up*').

¹¹² Ibid 93.

¹¹³ Ibid 240.

¹¹⁴ Ibid 199.

¹¹⁵ Ibid.

¹¹⁶ Ibid 173.

¹¹⁷ Ibid 200.

¹¹⁸ Kathleen Funder, Margaret Harrison and Ruth Weston, 'Settling Down: Pathways of Parents after Divorce' (Monograph No 13, Australian Institute of Family Studies, 1993) ('*Settling Down*').

¹¹⁹ Ibid 195.

¹²⁰ Ibid 241.

failure to address these concerns about the treatment of superannuation as the value of superannuation increased over time.¹²¹

B *Gathering Momentum for Change*

Nevertheless, after the 1986 study the various reviews and reports began to focus upon the problems of superannuation in family law in earnest and to make substantial recommendations for change. Competing public sphere/private sphere considerations became evident in the recommendations.

The *1987 Hambly Report* recommended innovative change after a more thorough analysis of the issues than hitherto.¹²² In the broader context the Report rejected a system of prescribed equal sharing of property without regard to the post-separation circumstances of spouses for the reason that this would be detrimental to custodial parents and women whose earning capacity had been impaired by marriage.¹²³ It was accepted that a fixed system of equal sharing of property based upon a formal view of the equal status of the parties to a marriage may not result in a fair share¹²⁴ whereas an approach of substantive equality rather than formal equality enables the disparity in the former husband and former wife's economic circumstances at the end of the marriage to be taken into account.¹²⁵ Therefore the Report recommended that the discretionary matrimonial property regime be retained but changed to a more structured discretion with a starting point of equal sharing subject to departure on specific grounds including the ground of post-separation economic circumstances.¹²⁶ In relation to superannuation specifically, the Report recommended that the notional net resignation value, generally assessed at the date of the hearing, be taken into account in property proceedings.¹²⁷ However, the recommendation was limited to that portion of the entitlement referable to the period of the marriage.¹²⁸ The effect of this was to treat superannuation differently to other assets and undervalue it relative to other assets. The *1987 Hambly Report* recommended that any unvested entitlement be excluded from consideration rather than the full value of the entitlement being taken into account. However despite evincing a tendency to undervalue superannuation the Report also made the significant recommendation that any pension entitlement be given a lump sum value and taken into account.¹²⁹ It recommended the retention of the existing provisions that enabled the deferral of proceedings and the continued treatment of superannuation as a resource.¹³⁰ The Report recommended that any notional taxation liability be deducted when assessing the value of the entitlement.¹³¹

In summary, the recommendations were private sphere focused, and did not direct the courts to ensure that women are adequately provided for on retirement — a largely public sphere concern. The option of splitting superannuation was not included in the recommendations. The recommendations did, however, enable the future economic impact of the marriage and separation to be considered also in relation to superannuation. While some aspects were to be found in the amendments, the overall approach was quite different.

¹²¹ John Dewar, Grania Sheehan and Jody Hughes, 'Superannuation and Divorce in Australia' (Working Paper No 18, Australian Institute of Family Studies, 1999) 1–2 ('*1999 Working Paper*'). See below 59.

¹²² *1987 Hambly Report*, above n 93.

¹²³ *Ibid* xxvii, 119–20.

¹²⁴ *Ibid* 120.

¹²⁵ *Ibid*.

¹²⁶ *Ibid* xxx–xxxi.

¹²⁷ *Ibid* 155, 210–11.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*.

¹³⁰ *Ibid* 211–13.

¹³¹ *Ibid*.

A more radical approach was recommended in the *A-G's Dept 1992 Discussion Paper*.¹³² This followed significant changes in the superannuation industry and a greater government focus on retirement incomes policy. An automatic 'deemed reallocation' of the marital portion of any vested entitlement with a discretion to the court to depart from equal division of the entitlement in very limited circumstances was recommended.¹³³ It was proposed that the reassigned portion be subject to the same conditions as superannuation generally and that any unvested portion be taken into account as a resource.¹³⁴ The sole focus of these recommendations was to bring the treatment of superannuation in family law proceedings into line with retirement incomes policy and to effect an equal sharing of marital superannuation entitlements consistently with the government policy of encouraging self-provision for retirement.¹³⁵ An assessment of equal contributions during marriage may be implied in this proposal — a private sphere concern. Superannuation was to be treated separately from other matrimonial property and the economic impact of marriage and child rearing was not discussed or recognised. The effect of the recommendations was that the pendulum had swung back in favour of public sphere considerations. Superannuation was treated as an investment for retirement rather than a current family asset and the effect of the recommendations was first and foremost to increase the level of superannuation of women in the public sphere, but not necessarily to ensure that women received a fair share of the family wealth by taking into account their contributions to superannuation and the economic consequences of marriage and circumstances post separation. The *A-G's Dept 1992 Discussion Paper* recommendations had little impact on the current regime.

The *1992 Law Reform Commission Report* reported on superannuation generally¹³⁶ and also made recommendations about the treatment of superannuation after separation which developed the theme of the *A-G's Dept 1992 Discussion Paper*. The *1992 Law Reform Commission Report* acknowledged the importance of recognising the equal contributions of the homemaker to the accumulation of superannuation and recommended that any superannuation accumulated during the period of cohabitation be equally divided after separation.¹³⁷ A formula was recommended to enable the equal division of defined benefit interests.¹³⁸ It also recommended that the interest of the non-member spouse be transferred to an approved deposit fund and be subject to the usual preservation requirements.¹³⁹ The Report recommended that the court have limited power to depart from equal sharing and that the division be binding upon the trustee.¹⁴⁰ The constitutional difficulties associated with binding the trustee were addressed by relying on a combination of the marriage, divorce and matrimonial causes powers and the pensions and corporations powers.¹⁴¹ The recommendations whilst predominantly public sphere focused in nature, integrated public and private sphere concerns. The focus was the equal division of superannuation accumulated during the marriage and the preservation of it for retirement. This was considered to be a fair way to recognise the equal contributions of the spouses¹⁴² but again the differential economic impact of marriage and child rearing on separated men and women was glossed over. There

¹³² *A-G's Dept 1992 Discussion Paper*, above n 72.

¹³³ *Ibid* 11–12.

¹³⁴ *Ibid* 12.

¹³⁵ *Ibid* 10.

¹³⁶ Law Reform Commission, *Collective Investments: Superannuation*, Report No 59 (1992) ('*1992 Law Reform Commission Report*').

¹³⁷ *Ibid* 211.

¹³⁸ *Ibid* 217.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* 213.

¹⁴² *Ibid* 212.

was no recommendation for offsetting or for adjustment on account of future economic factors. To the extent that the binding division of superannuation subject to preservation requirements was recommended, this Report had some impact. The analysis of a basis for addressing the constitutional issues may also have been influential.

However, the *1992 Family Law Council Report* opposed equal division of marital superannuation by operation of law but recommended equal division with an overriding discretion to depart from it where injustice would result.¹⁴³ The Council recommended that vested, unvested, allocated and unallocated funds should be treated the same¹⁴⁴ and that the division of superannuation should take place at the time of hearing.¹⁴⁵ The Council recommended that trustees be bound by any division of superannuation¹⁴⁶ and that superannuation be subject to the same discretion as other assets.¹⁴⁷ The recommendations noted that a fixed formula might introduce certainty but if the courts could not adjust the redistribution of family wealth to meet individual requirements this would introduce inflexibility. However there was no discussion or detailed analysis of the need for reforms to achieve fairness for women disadvantaged by the pre-reform position. The emphasis was upon increased regulation of superannuation in property settlement proceedings and the maintenance of the discretion.

The *1992 Joint Select Committee Report* made recommendations that matrimonial property generally be subject to a regime of equal sharing with a limited discretion to depart from it in certain circumstances.¹⁴⁸ The Report also recommended that the *FLA* be amended to treat superannuation as property and that the notional realisable value of the marital portion of the superannuation be taken into account.¹⁴⁹ The Report differed from previous reports because it recommended that the power to divide superannuation be discretionary.¹⁵⁰ It also recommended that any division of superannuation be binding upon the trustee.¹⁵¹ The approach was expected to recognise the direct and indirect contributions of both parties to superannuation in the private sphere of family law and provide for the future retirement needs of both parties in the public sphere of superannuation.¹⁵²

Thus a private sphere balance starts to dominate in these later reports as the treatment of superannuation is integrated into the discretionary regime for dividing property. Some aspects of the various recommendations contribute elements to the final form of the new regime.

C *The Blueprint for Reform*

The *A-G's 1998 Position Paper* provided the major blueprint for reform which nevertheless differed significantly from the eventual form of the new regime¹⁵³ and in summary recommended that superannuation be considered separately from but in tandem with the

¹⁴³ Family Law Council, 'Choices' (Paper on Superannuation, Family Law Council, 1992), 7 ('*1992 Family Law Council Report*').

¹⁴⁴ Ibid 8.

¹⁴⁵ Ibid 7.

¹⁴⁶ Ibid 6.

¹⁴⁷ Ibid 7.

¹⁴⁸ Joint Select Committee, Parliament of Australia, *The Family Law Act 1975: Aspects of its Operation and Interpretation* (1992) xxiii ('*1992 Joint Select Committee Report*').

¹⁴⁹ Ibid.

¹⁵⁰ Ibid xxiv.

¹⁵¹ Ibid.

¹⁵² Ibid 251.

¹⁵³ Commonwealth, *Superannuation and Family Law* (Position Paper, Attorney-General's Department, 1998) ('*A-G's 1998 Position Paper*').

matrimonial property regime.¹⁵⁴ The *A-G's 1998 Position Paper* acknowledged the disadvantage sustained by women as a result of the difficulties encountered in relation to the evaluation of superannuation.¹⁵⁵ A separate scheme of managing superannuation was endorsed to address the difficulties and meet other policy objectives particularly the retirement incomes policy.

The *A-G's 1998 Position Paper* encouraged parties to reach their own agreement about superannuation including whether or not superannuation should be divided and in what proportions.¹⁵⁶ To that end it recommended that parties be able to enter into a prescribed written agreement requiring court registration about the division of superannuation.¹⁵⁷ In default of an agreement, if the parties commenced proceedings, then a presumption of equal sharing of the portion of superannuation referable to the marriage would apply subject to a broader range of exceptions than recommended in previous reports.¹⁵⁸

The *A-G's 1998 Position Paper* proposed mandating the use of prescribed methods of valuing superannuation unless an alternative valuation method had been approved.¹⁵⁹ For defined benefit interests the prescribed method of valuation would not only value the vested benefit but also the unvested component.¹⁶⁰ The *A-G's 1998 Position Paper* proposed that standard methods of valuation be developed with actuarial assistance that would recognise the exigencies of death, invalidity, retirement and resignation and other future events in relation to the unvested component.¹⁶¹ The *Position Paper* proposed that trustees be authorised to provide information to the non-member spouse about the interest to enable a valuation to be undertaken.¹⁶² However, significantly, the recommendations did not apply to superannuation interests in the payment phase because '[i]ssues that arise relating to superannuation interests that are already being paid out will be addressed in the property reforms' which reforms did not eventuate.¹⁶³

The *Position Paper* proposed that before making a superannuation order the trustee be notified of the terms of the order and given the chance to object to the order being made.¹⁶⁴ Once made, the court would be required to provide the order to the trustee.¹⁶⁵ The *Paper* proposed that generally the interest of the non-member spouse comply with the usual preservation rules¹⁶⁶ and that each party be responsible for any tax liability in relation to their interest.¹⁶⁷

The recommendations of the *A-G's 1998 Position Paper* were taken up in several respects by the new regime.

¹⁵⁴ Ibid 1–2.

¹⁵⁵ Ibid 9.

¹⁵⁶ Ibid 41.

¹⁵⁷ Ibid 48.

¹⁵⁸ Ibid 53–8.

¹⁵⁹ Ibid 61.

¹⁶⁰ Ibid 39–41.

¹⁶¹ Ibid.

¹⁶² Ibid 38.

¹⁶³ Ibid 5.

¹⁶⁴ Ibid 60.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid 74.

¹⁶⁷ Ibid 72.

The Family Court considered the recommendations of the *A-G's 1998 Position Paper* and supported the need for reform.¹⁶⁸ However, the Family Court opposed any fettering of its discretion and recommended that superannuation be subject to the discretion of the court in the same way as other matrimonial property.¹⁶⁹ The Family Court also objected to being confined to considering only the marital portion of any superannuation entitlement.¹⁷⁰ These objections were ultimately taken into account.

The urgent need for reform was further reiterated by the AIFS in its *1999 Working Paper* which reported on the results of a survey about divorcing couples and the significance of their superannuation *inter alia*.¹⁷¹ The *1999 Working Paper* confirmed the continuing existence of gendered inequality in relation to superannuation ownership in the public sphere and stated '[t]he issue of superannuation is so heavily gendered that we have not found it possible to use gender-neutral language in this report'.¹⁷² More than a decade on from the findings reported in *Settling Up* the majority of separated and divorced women and men were still failing to consider superannuation when dividing their property.

One of the findings of the *1999 Working Paper* was that the proportion of couples at least one of whom had an entitlement to superannuation had risen to 81 per cent with men accounting for the majority of the ownership.¹⁷³ Not only had ownership of superannuation increased but also the relative value of superannuation as a family asset had increased since the 1986 report of the AIFS, *Settling Up*.¹⁷⁴ Nevertheless the research concluded that the median value of superannuation owned by women upon divorce was significantly less than men.¹⁷⁵ Despite the increasing value of superannuation the research found that it continued to be considered in a minority of cases. It was divided or taken into account in only 46 per cent of survey responses.¹⁷⁶ The research found that superannuation was more likely to be taken into account if the absolute value of the interest was great or if the value of the interest relative to the value of the asset pool was great.¹⁷⁷ However superannuation was least likely to be taken into account by couples resolving their affairs privately who were also most likely to have low assets.¹⁷⁸ The *1999 Working Paper* noted that where superannuation was not considered there was a greater likelihood that the respondents reported that it should not be considered when distributing family wealth 'which may also reflect an attitude towards the legitimacy of including superannuation as an asset for division.'¹⁷⁹

Concern was expressed that while women might be better off overall with an equal share of superannuation this would depend upon the existing approach to the division of the other assets remaining the same.¹⁸⁰ The complexity of this issue was recognised.¹⁸¹

¹⁶⁸ Family Court of Australia, 'Superannuation and Family Law' (Response to Position Paper, 1998) 1.

¹⁶⁹ *Ibid* 2–4.

¹⁷⁰ *Ibid* 10–11.

¹⁷¹ See generally *1999 Working Paper*, above n 121.

¹⁷² *Ibid* 1–2.

¹⁷³ *Ibid* 27.

¹⁷⁴ *Ibid* 28.

¹⁷⁵ *Ibid* 27.

¹⁷⁶ *Ibid* 24, 27.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid* 24.

¹⁷⁹ *Ibid* 21.

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid* 25–7.

D Conclusion

The evolutionary period leading up to the legislative change was protracted. The momentum for change increased as the superannuation industry continued to proliferate and the aged population increased. Both retirement incomes policy and increasing dissatisfaction with the existing approach to the treatment of superannuation after separation increased the pressure for change. The recommendations for change made during that time reflected a tension between superannuation policy in the public sphere and private sphere concerns in family law. The government grappled with the public concerns and the law reform agencies looked to the private concerns while seeking to maintain the discretion reflecting the difficult balance of considerations. There are public and private elements in a number of the recommendations.

The different recommendations were considered and factored into the superannuation regime to varying degrees. The *A-G's 1998 Position Paper* constituted the major blueprint for reform. Nevertheless, the eventual form of the reforms differed in material respects from the *A-G's 1998 Position Paper*. The most material difference was that the discretion of the courts was retained. This represented a shift away from the precedence of retirement incomes policy and back towards the private sphere and priorities of family law.

Ultimately the various proposals for reform prior to the changes fell short of aiming for substantive equality. In particular reforms about superannuation did not explicitly prioritise the importance of giving due consideration to the post separation economic circumstances of separating couples.

CHAPTER 4 SUPERANNUATION REFORMS — A NEW ERA IN FAMILY LAW

I INTRODUCTION TO THE NEW REGIME

The final form of the new regime resulted from a thorough process of widespread review, consultation and deliberation over a considerable period of time.¹ When the final form of the legislation was debated the importance of achieving fairness and addressing the injustice to women of the previous treatment of superannuation after separation was emphasised.² The statistics confirming the vulnerable position of women in relation to the accumulation of superannuation in the public sphere were also noted.³

The new regime is implemented by a suite of legislation. The *FLLA(S)A* introduced pt VIII B into the *FLA* which outlines the operative requirements for splitting or flagging agreements or orders and specifies the rights and obligations of both the parties and the superannuation funds. Superannuation payments may be split by agreement or court order whether the superannuation interests are in the growth phase or in the payment phase. Also, flagging agreements or orders, which prevent a trustee from making a splittable payment, may be made. A fundamental characteristic of the regime is that complying superannuation agreements or orders are binding upon superannuation trustees.⁴

The complex *FL(S)R* form part of the new regime. The *FL(S)R* proscribe superannuation payments or interests that cannot be split. In addition, the precise nature of the information that the trustee of a superannuation fund is obligated to provide at the request of a member or non-member spouse in order to undertake a valuation of the interest is specified. Standardised valuation methods for many types of superannuation interests are also prescribed. As well, the procedure for calculating the entitlement of the non-member spouse when particular superannuation orders or agreements are to be implemented is stipulated.

The *Family Law Legislation Amendment (Superannuation) (Consequential Amendments) Act 2001* (Cth) makes provision for the taxation treatment of superannuation that is the subject of a splitting order or agreement. In general, the interest of the non-member spouse will receive the same taxation treatment as the interest of the member spouse with some exceptions.

Part 7A of the *SI(S)R* applies to certain superannuation interests, namely accumulation interests, once a splitting order or agreement is made. Obligations are imposed upon the trustee to provide prescribed information to both the member and non-member spouse. Importantly in certain circumstances the *SI(S)R* permit the splitting of superannuation interests to achieve a clean break. This can take the form of establishing a new superannuation interest in the name of the non-member spouse, or paying out the interest if a condition of release has been satisfied or transferring or rolling over the interest. Similarly, in respect of interests other than accumulation interests, many funds have amended their governing rules, trust deeds or legislation to enable interest splitting.

¹ Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2001 (Cth) ('REM'), 5, 12.

² See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 2001, 26979–82 (Mrs Moylan); Commonwealth, *Parliamentary Debates*, Senate, 23 October 2002, P5582 (Senator Mackay).

³ Ibid.

⁴ REM, above n 1, 3.

Furthermore, consequential changes in the areas of bankruptcy, social security, veterans' affairs, superannuation complaints and retirement savings to name a few have ensured the smooth implementation of the new regime.

The new regime is said to have its genesis in the *A-G's 1998 Position Paper*.⁵ While the amendments do incorporate various aspects of the *A-G's 1998 Position Paper* the ultimate structure of the system differs quite considerably. Most importantly the new regime retains the discretion of the court to decide whether or not to make a splitting order and in what proportions. The court is not fettered by a legislative presumption of equal sharing of superannuation subject to prescribed exceptions. The retention of the discretion is of further significance in allowing step three play a role in achieving substantive equality. Nor does the legislation require that superannuation be considered separately from but in tandem with other property as proposed by the *A-G's 1998 Position Paper*. Nevertheless, the differential treatment of superannuation has been a significant issue in relation to the interpretation of the statutory scheme by the courts.

Stephen Bourke, the principal architect of the reforms, stated that the amendments attempt to balance a number of competing considerations, namely fairness, administrative convenience, certainty and simplicity.⁶ The policy objectives outlined in the REM have been discussed and the main objective was 'to provide a coherent framework for addressing the shortcomings of current arrangements, while taking into account the range and complexity of superannuation plans.'⁷ The REM stated that the concurrent policy objectives of the new regime were to encourage agreement, to attempt to keep costs to a minimum and to strive for consistency with government retirement incomes policy.⁸ However, the REM recognised that there might be tensions between the policy objectives, for instance where parties might wish to access superannuation for current needs.⁹

As noted the REM outlined the elements against which the policy objectives were to be assessed.¹⁰ The eventual structure of the reforms were expected to achieve fairness and consistency in relation to the valuation of superannuation particularly in relation to the more complex interests having both vested and unvested components.¹¹ Standardised formulae for valuing superannuation interests were to be supported by access to prescribed information about individual superannuation interests by spouses in appropriate circumstances. The regime was intended to promote self regulation by parties of their financial affairs by virtue of having a clear system of dealing with superannuation in place and aims to achieve a clean break as far as possible. Furthermore the costs to superannuation funds of setting up and implementing the new regime were expected to be minimal. The funds were required to pay the infrastructure costs relating to any changes in information technology and systems of administration.¹² However, the parties were expected to pay the reasonable costs of the provision of information and the implementation of superannuation orders and agreements. As

⁵ Commonwealth, 'Superannuation and Family Law' (Position Paper, Attorney-General's Department, 1998) (*A-G's 1998 Position Paper*). See above 57–8.

⁶ Stephen Bourke, 'The New Super Splitting Laws' (Paper presented at the 10th National Family Law Conference, Melbourne, March 2002) 165.

⁷ REM, above n 1, 5–7.

⁸ Ibid.

⁹ Ibid 4, 6.

¹⁰ Ibid 6–7.

¹¹ Ibid.

¹² Ibid 12.

previously noted the assessment of whether post-reform costs have been prohibitive is beyond the scope of a doctrinal analysis.¹³

Finally the new regime was expected to dovetail with retirement incomes policy because when a splitting order or agreement is made generally the non-member spouse must preserve any resulting entitlement for their retirement. The cost to government of the lost revenue resulting from the concessions provided to both the member spouse and the non-member spouse was expected to be outweighed by the reduced need for social security benefits in the long term.¹⁴

II CONSTITUTIONAL FOUNDATIONS

Initially there was uncertainty about the constitutionality of the new regime and whether it extended beyond the bounds of family law. There is no explicit head of power enabling the Commonwealth Parliament to legislate in relation to superannuation. The corporations and pensions powers provide the constitutional foundation for legislation about superannuation in the public sphere.¹⁵ In relation to family law, the Commonwealth has the power to legislate in relation to marriage,¹⁶ divorce and matrimonial causes¹⁷ and matters incidental thereto.¹⁸ Early authority required a sufficient connection before laws could be made in reliance upon the marriage power. In the High Court decision of *Re Lambert; Ex Parte Plummer*¹⁹ Gibbs J required that there be a 'close connexion with, the marriage relationship'²⁰ and that 'in reality and substance'²¹ the law be a law with respect to marriage.

The new regime enables orders to be made that affect third party trustees. In *Ascot Investments Pty Ltd v Harper*²² the High Court found that while the Family Court has power to make orders affecting third parties in some circumstances, the Court does not have the power to adversely affect the rights of third parties. Gibbs J said of the authorities '[t]hey do not establish that any such order may be made if its effect will be to deprive a third party of an existing right or to impose on a third party a duty which the party would not otherwise be liable to perform'²³ adding the qualification that there is an exception in the case of sham/alter ego transactions.²⁴

In *Gazzo v Comptroller of Stamps (Vic)* Gibbs CJ said:

The question in each case is whether the connexion between the law and the marriage relationship is sufficiently close to enable it to be said that the law is in truth one with respect to the relationship. It is not enough that the law incidentally touches upon marriage...²⁵

¹³ See above 15.

¹⁴ REM, above n 1, 13.

¹⁵ *Australian Constitution* ss 51 (xx), (xxiii).

¹⁶ *Ibid* s 51 (xxi).

¹⁷ *Ibid* s 51 (xxii).

¹⁸ *Ibid* s 51 (xxxix).

¹⁹ (1980) FLC ¶90-904.

²⁰ *Ibid* 75,691.

²¹ *Ibid* 75,692.

²² (1981) FLC ¶91-000.

²³ *Ibid* 76,061.

²⁴ *Ibid*.

²⁵ (1981) FLC ¶91-101, 76,719-.

However, in *Gould & Gould; Swire Investments Ltd*²⁶ Fogarty J, with whom Nicholson CJ and Finn J agreed, examined the above authorities and concluded that ss 51 (xxi) and (xxii) should not be given a more limited interpretation than other heads of Commonwealth power and said:

According to settled principles a grant of legislative power to the Commonwealth is to be construed with all the generality that the words permit and without an assumption that any particular content of power is reserved to the States and without making implications or imposing limitations not to be found in the express words ... The words “with respect to” in s 51 have been consistently interpreted so as to require no more than that the law should have a sufficient relevance to or connection with a grant of power. Provided the law answers that description it is not relevant that it may also be described as a law with respect to a subject matter which falls outside Commonwealth power. Similarly, if the subject matter of the law is within power it remains within power notwithstanding that it operates upon third parties.²⁷

The amendments provide for agreements and orders about superannuation to be made binding upon third parties namely the trustees. However, it is significant that the amendments are limited to payment splitting orders and agreements and do not extend to the splitting of interests. This is carried out separately pursuant to the *SI(S)R* or any rules, trust deed or legislation governing the fund. Otherwise the splitting of defined benefit interests might breach the ‘just terms’²⁸ provision.²⁹ It is therefore significant that the new regime limits the jurisdiction of the court to making payment splitting orders and does not purport to give the court the power to make interest splitting orders.

As yet there has been no constitutional challenge in relation to the validity of the legislation although this was widely predicted. Indeed, there have subsequently been a number of legislative changes which arguably extend the reach of third party reforms in family law beyond the scope of the superannuation reforms.³⁰ It has been suggested that, while the superannuation funds may have greater administrative obligations as a result, there are no substantive disadvantages that flow from the superannuation changes.³¹ Accordingly the legislation does not appear to be at risk of constitutional challenge.

Constitutional constraints also affected the extent of the coverage of the new regime which was initially confined to separating married couples.³² De facto couples, including same sex couples, were covered by a variety of state legislative provisions. However, the *FLA* now applies in all States and Territories with the exception of Western Australia, to regulate the property disputes of separating de facto couples including same sex couples, from 1 March 2009, and in South Australia from 1 July 2010. Thus the potential influence of the new regime to remedy the earlier unfairness to women is far reaching.

²⁶ (1993) FLC ¶92-434.

²⁷ Ibid 80,440.

²⁸ *Australian Constitution* s 51 (xxxii).

²⁹ Garry Watts, Stephen Bourke and Michael Taussig, *Super Splitting on Marriage Breakdown* (CCH, 2002) 193; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 2001, 26 984 (Robert McClelland, Shadow Attorney-General).

³⁰ See *FLA* ss 4A, 90K(1)(aa) enabling creditors to set aside financial agreements; *FLA* pt VIII A enabling orders and injunctions to be made binding third parties. See generally, Martin Bartfeld, “‘So Long Mr Harper’: Third parties in Family Law Property Proceedings’ (2004) 10 *Current Family Law* 115; Tom Altobelli, ‘Third Parties in Family Law: Even More Invited Guests and Gate-crashers’ (2004) 17(4) *Australian Family Lawyer* 7; Paul Brereton, ‘Third Party Property’ (Paper presented at the 11th National Family Law Conference, Gold Coast, September, 2004).

³¹ Watts, Bourke and Taussig, above n 29, 192–3.

³² *FLLA(S)A* s 5(1).

III TRANSITIONAL PROVISIONS LIMIT THE APPLICATION OF PART VIII B

An unfortunate effect of the transitional provisions is that the very women whom the amendments are designed to assist have, in certain circumstances, encountered difficulties accessing pt VIII B because of the lack of retrospectivity of the amendments. These difficulties have marred what has proved to be a relatively smooth transition given the complexity of the changes.

The transitional provisions provide that if there is a s 79 order or a s 87 agreement in force prior to the startup time of the legislation then the parties cannot access pt VIII B after the startup time³³ whether or not superannuation has been dealt with. ‘Section 79 order’ is defined to mean ‘an order (other than an interim order) made under section 79 of the Family Law Act’³⁴ and this definition has contributed to the difficulties. If the s 79 order is set aside³⁵ or the s 87 agreement is revoked³⁶ subsequent to the startup time, other than by consent or agreement, then pt VIII B can apply. The transitional provisions also provide that pt VIII B does not apply where a pt VIII A financial agreement was made prior to the startup time.³⁷ The REM explains that the policy intention was to exclude from the operation of the amendments property settlements that had previously been finalised by s 79 order or s 87 agreement, with the exception being where the s 79 order or s 87 agreement was set aside or revoked other than by consent.³⁸ There were concerns about an inundation of applications and the impact of this upon the superannuation industry.

Thus where a s 79 order had been made prior to the startup time then pt VIII B could not apply unless the order was an interim order or the order was set aside other than by consent which proved to be challenging. Arguably legal practitioners and parties were placed in a difficult position both leading up to the passage of the legislation and during the 18 month interregnum.³⁹ Problems emerged in two respects. The first arose where parties had adjourned consideration of superannuation in anticipation of the new regime and obtained orders about the balance of the property. The second came about where parties had obtained final orders about all property prior to the new legislation and the orders about superannuation either provided for division upon vesting or were drafted in anticipation of the amendments or both in the alternative.

A *Impact upon Pre Startup Time Adjournments of Superannuation*

The first problem occurs where orders have been made about all s 4(1) property pursuant to s 79(6) but the superannuation issue has been properly adjourned pursuant to s 79(5) either to enable the interest to vest or in anticipation of the amendments. Obtaining a s 79(5) adjournment is not without difficulty as certain threshold requirements must be satisfied and it is more akin to a substantive deferral than a procedural adjournment.⁴⁰ The applicant must

³³ Ibid s 5(2).

³⁴ Ibid s 4 (definition of ‘section 79 order’).

³⁵ Ibid s 5(3) under ss 79A(1)(a)–(d) but not by consent pursuant to s 79A(1A).

³⁶ Ibid s 5(4) under ss 87(8)(a), (c) or (d) but not by agreement pursuant to s 87(8)(b).

³⁷ Ibid s 5(5).

³⁸ REM, above n 1, 14.

³⁹ See generally Garry Watts and Stephen Bourke, ‘Superannuation – What to do between now and 28 December 2002’ (2001) 15(3) *Australian Family Lawyer* 7; Watts, Bourke and Taussig and above n 29, 74–85.

⁴⁰ *Grace v Grace* (1998) FLC ¶92-792, 84,888–9 (‘*Grace*’).

establish a likely significant change in financial circumstances so that it is reasonable to adjourn the proceedings and that the change is more likely to enable the court to do justice between the parties. A change of circumstances resulting from superannuation ownership is specified as a possible relevant change by s 79(7).

If the orders about the s 4(1) property could be interpreted to be ‘interim’ orders within the meaning of the transitional provisions, pt VIIIIB could be accessed. Prior to the amendments there had been disagreement in the decided cases about whether there was a distinction to be drawn between ‘interim’ and ‘partial’ property orders.⁴¹ If such a distinction existed then arguably the existence of partial s 79 orders made prior to the startup time would exclude the application of pt VIIIIB. Nonetheless, the case law developed in a pragmatic way evaluating the real nature of any s 4(1) order regardless of any description or lack thereof, thereby facilitating access to pt VIIIIB.⁴²

The issue has now been decisively addressed in the decision of the Full Court in *Gabel & Yardley*⁴³ a case where orders about non-superannuation property had been made in 1999 and the wife's application for orders about the husband's superannuation adjourned pursuant to s 79(5). The trial Judge decided that the wife could not access pt VIIIIB but that orders could nevertheless still be made about the superannuation because it was in the payment phase and therefore was property and could be dealt with under the law that existed prior to pt VIIIIB.⁴⁴ The non-superannuation assets were valued at approximately \$233 000 and the husband's superannuation at approximately \$700 000 and therefore if pt VIIIIB could not be accessed, this would have a significant effect on the final outcome.

Apart from the question whether pt VIIIIB applied, the Full Court addressed the further issue of whether the 1999 orders could be varied, whether or not pt VIIIIB was found to be enlivened. Bryant CJ and Coleman J in a joint judgment noted that the superannuation amendments caused the question of whether an order is interim in nature to assume greater prominence.⁴⁵ Having regard to s 90MS(2), their Honours found that if the wife's application in relation to the husband's superannuation could not be determined pursuant to pt VIIIIB then no order could otherwise be made about the entitlement pursuant to s 79 and disagreed with the trial Judge that because the entitlement was in the payment phase it could be dealt with under the previous law.⁴⁶ However, aside from this matter, their Honours expressed the view that a broad interpretation of ‘interim’ is appropriate⁴⁷ and held that the critical issue is not whether there is a distinction between partial and interim orders but rather whether the exercise of the s 79 power is spent or exhausted.⁴⁸ The single exercise of s 79 power is not necessarily concluded at one time but continues until completed in relation to all of the property of the parties. Thus orders made earlier in the process can be varied without resorting to the s 79A or appeal processes.⁴⁹

⁴¹ See, eg, *Burridge & Burridge* (1980) FLC ¶90-902; *Harris & Harris* (1993) FLC 92-378; *Bassi & KD Sales Force Specialists Pty Ltd v Maas* (1999) FLC ¶92-867.

⁴² *Gardner & Gardner* [2003] FamCA 249 (‘*Gardner*’); *PAJ & GMJ* [2003] FamCA 751; *Bernsden & Smith* [2003] FamCA 653.

⁴³ (2008) FLC ¶93-386.

⁴⁴ *Ibid* 82,948 [2].

⁴⁵ *Ibid* 82,955 [51].

⁴⁶ *Ibid* 82,956 [55].

⁴⁷ *Ibid* 82,957 [56].

⁴⁸ *Ibid* 82,957–8 [57]–[67].

⁴⁹ *Ibid* 82,959 [72].

In a concise judgment Finn J agreed that in the circumstances of the case where there had been an adjournment specifically to deal with anticipated superannuation entitlements, the wife could access pt VIII B and until the exercise of the s 79 power had been concluded, then the earlier orders could be varied.⁵⁰

The result of this decision appears to be that the distinction between ‘partial’ and ‘interim’ orders is no longer germane.⁵¹ Rather the focus is on whether the exercise of the s 79 power has been spent. However, it is regrettable that the women in these cases that had been properly adjourned had to incur additional expense through no fault of their own. Any other result would appear to disregard the fact that s 79(7) specifically provides that the court may have regard to the fact that a significant change in financial circumstances by virtue of a superannuation entitlement is relevant to granting a s 79(5) deferral. The REM expressed no intention to bar parties from accessing pt VIII B where they had properly adjourned, or more correctly, deferred the proceedings pursuant to s 79(5).

B Impact upon Superannuation Orders Made Prior to the Reforms

In relation to the second problem the transitional provisions have continued to be a source of difficulty. Orders about superannuation were made in the lead up to the passage of the legislation as well as during the transitional period during which time the precise detail of the nature of the regime was not widely known or understood. They were often in the form of a formulaic order enabling the entitlement of the non-member spouse to be calculated when the entitlement vested. Also, orders about superannuation were made, often in conjunction with and as an alternative to the formulaic order, in anticipation of the amendments. However, superannuation funds are unable to implement these orders as if they were pt VIII B orders.

The transitional provisions prevent a consent order being made pursuant to s 79A(1A) *FLA* to set aside such an order for the purpose of replacing it with a pt VIII B order which the funds will implement.⁵² Replacement with a pt VIII B order is important because it provides greater protection to the non-member spouse for many reasons and does not rely on the cooperation of the member spouse. Once pt VIII B commenced, various attempts were made to dispose of such orders, other than via s 79A(1A), so that a pt VIII B order could be made for the benefit and protection of the non-member spouse, which was after all an important objective of the new regime. These attempts have frequently been made with the consent of the member spouse.

The issues that arose fell into three categories. The first was whether such orders were valid in the first place. If the order was valid then the second issue was whether one of the grounds could be established under s 79A(1) to enable such an order to be set aside and replaced with a pt VIII B order, given that the transitional provisions prevented this by consent pursuant to s 79A(1A). If a s 79A ground could not be established, then thirdly whether an extension of time could be granted for the purpose of enabling the order to be reviewed with a view to setting aside the pre startup time order and replacing it with a pt VIII B order. This course is only possible if the original order was made by a Registrar or Judicial Registrar.⁵³

⁵⁰ Ibid 82,970 [129]–[131].

⁵¹ See also *Lippman & Lippman* (2010) FLC ¶93-439, 84,863 [46].

⁵² *FLLA(S)A* s 5(3).

⁵³ *Family Law Rules 2004* (Cth) (*FLR*) pt 18.2.

1 *Order to Take Effect upon Vesting – Validity*

The issue of whether an order made before the startup time is valid, which provides for the non-member spouse to be paid a sum once the superannuation has vested in the member spouse, was discussed in two cases with diametrically opposed views. The first view was that such an order could not be valid because it purported to alter an entitlement to unvested superannuation that was not property.⁵⁴ The second view was that since such an order does not take effect until the entitlement is vested then it is valid.⁵⁵

These types of orders had been made for some time prior to the amendments and there had been no suggestion in the case law that they were not valid although the preferable approaches were to defer consideration of superannuation pursuant to s 79(5) or consider the entitlement at step three.⁵⁶ It is submitted that the second view is the correct view. There has been no suggestion that if an attempt to set aside a pre startup time order about superannuation fails, then the non-member spouse is without recourse and cannot rely on the order. Rather the non-member spouse must wait until the entitlement vests and rely on the member spouse to comply with the order.

The issue of the validity of pre-startup time orders has not been a significant one to date in this context.

2 *S 79A(1) Grounds for Setting Aside Pre-Startup Time Orders*

Since the transitional provisions do not permit the parties to consent to an order to set aside a pre-startup time order about superannuation and replace it with a pt VIIIIB order, attempts have been made to establish one of the s 79A(1) grounds for this purpose. In particular, the cases have considered whether there has been a miscarriage of justice⁵⁷ or whether circumstances have arisen since the order was made which make it impracticable to implement.⁵⁸

In relation to the first ground it is accepted that a miscarriage of justice requires the existence of circumstances significant to the integrity of the judicial process at or before the order was made to be established.⁵⁹ However, there is disagreement about whether a miscarriage of justice can be established where consent orders have been made on an incorrect basis or have indeterminate effect. Specifically, there is a difference of opinion about whether pre-startup time orders, which either provide for a payment to the non-member spouse to be made when the entitlement of the member spouse vests or attempt to anticipate the amendments in a poorly drafted way, suffice.

There is a view that a poorly drafted order of indeterminate effect which attempts to anticipate the amendments may suffice to establish a ground for setting the order aside pursuant to s 79A(1)(a), because there was no power to make such an order and this might constitute a miscarriage of justice by reason of ‘any other circumstance’.⁶⁰

⁵⁴ *Hackett & Hackett* [2007] FamCA 1618 [5] (*‘Hackett’*).

⁵⁵ *Greetham & Greetham* [2010] FamCA 246, [32]–[40] (*‘Greetham’*).

⁵⁶ *Ibid* [34]–[36].

⁵⁷ *FLA* s 79A(1)(a).

⁵⁸ *Ibid* s 79A(1)(b).

⁵⁹ *Hackett* [2007] FamCA 1618 [17]–[18]; *Greetham* [2010] FamCA 246 [41]–[44].

⁶⁰ *Hodgkin & Hodgkin* [2005] FamCA 226 [31]–[35] (*‘Hodgkin’*).

There is also a view that a pre startup time order that provides for a payment to the non-member spouse when the entitlement vests is not valid because it alters an interest in superannuation, a power that the court did not have prior to the amendments.⁶¹ On this view this is sufficient to establish a miscarriage of justice by reason of ‘any other circumstance’.⁶² However, there is another view that such an order is a valid order if it is expressed to take effect when the interest has vested⁶³ and in any event if the order was not valid, then s 79A(1)(a) would have no application as the order would be void *ab initio*.⁶⁴ As noted by Strickland J such orders were ‘not uncommon’ prior to the startup time and there was no authority to the effect that they were beyond the power of the courts.⁶⁵

In relation to the second ground, s 79A(1)(b) requires that circumstances be established that have arisen since the order was made which make the order impracticable to carry out and which could not have been foreseen at the time the orders were made. Poorly drafted orders attempting to anticipate the amendments will not be adequate to establish this ground.⁶⁶ Nor will the subsequent discovery that the entitlement will be available to the non-member spouse later than anticipated suffice.⁶⁷

3 *Extension of Time to Review Pre-Startup Time Orders?*

In summary, there has not been a great deal of success establishing a s 79A ground to enable a pre-startup time order to be set aside. However, there has been greater success obtaining an extension of time to review a pre-startup time order of a Registrar or Judicial Registrar.⁶⁸ Nevertheless, there have been divergent views. It has been held that it is not appropriate for this procedure to be used to, in effect, circumvent the policy of the transitional provisions to exclude pt VIIB from application where there is an existing s 79 order.⁶⁹

The alternative view, based upon a comprehensive examination of the case law, is that the fundamental basis for granting an extension of time is that justice between the parties requires it.⁷⁰ On this view, the policy of the transitional provisions per se is not a reason relevant to the exercise of the discretion to extend time. Relevant to this view is the fact that the amendments did not specifically preclude a review of a pre-startup time order of a Registrar or Judicial Registrar in order to preclude the application of pt VIIB.⁷¹ The negative aspect of this approach is that if the pre-startup time order about superannuation is made by a Judge the review process does not apply. The parties are then left with the option of attempting to establish a ground pursuant to s 79A(1).⁷² Alternatively the parties must wait until the interest vests, an option that leaves the non-member spouse, which the case law suggests is invariably the wife, at considerable risk. However, the majority of orders are consent orders made by Registrars and in this fairly narrow context this may not be a significant issue.

⁶¹ *Hackett* [2007] FamCA 1618 [5]–[6].

⁶² *Ibid* [34]–[36].

⁶³ *Greetham* [2010] FamCA 246, [26]–[36].

⁶⁴ *Ibid* [30].

⁶⁵ *Ibid* [30] [34].

⁶⁶ *PAJ & GMJ* [2003] FamCA 751 [47]–[50]; *Hodgkin* [2005] FamCA 226 [26]–[30].

⁶⁷ *Greetham* [2010] FamCA 246 [47].

⁶⁸ *Hodgkin* [2005] FamCA 226; *Greetham* [2010] FamCA 246.

⁶⁹ *Lehear & Lehear* [2009] FamCA 645 [23]–[24] (*‘Lehear’*).

⁷⁰ *Hodgkin* [2005] FamCA 226 [35]–[44]; *Greetham* [2010] FamCA 246, [49]–[73].

⁷¹ *Greetham* [2010] FamCA 246 [70].

⁷² *Ibid* [69].

4 *Conclusions — Transitional Provisions and Pre Startup Time Orders*

There are a number of disadvantages that flow from the lack of retrospectivity of the amendments and they principally impact upon women although the member spouse will also be disadvantaged by involvement in any costly legal proceedings. The transitional provisions sought to prevent the provisions of pt VIII B being accessed at will where the parties had already finalised s 79 proceedings prior to the startup time. This was due to concerns of the superannuation industry about the volume of superannuation orders that might otherwise require implementation and the effect of dealings with superannuation which had already occurred. Legal proceedings about this issue could be substantially avoided if the parties were able to set aside such orders by consent. Large numbers of applications have not eventuated and where proceedings have been undertaken there is a high incidence of cooperation by the member spouse.⁷³ However, for the women affected by the pre startup time orders the legal proceedings are costly.

There is also considerable uncertainty about the possible outcome of undertaking proceedings. This is a deterrent to women undertaking proceedings and can be particularly disadvantageous where couples are not cooperative. Despite the fact that the importance of this issue will diminish over time, there is considerable incongruity in women being disadvantaged in this way when a substantial improvement could result from a straightforward legislative amendment.

Preventing the parties from discharging orders made prior to the startup time by consent pursuant to s 79A(1A) was draconian with the benefit of hindsight given the relatively small numbers that have come to the attention of the courts. The requirement of procedural fairness provides an opportunity for the trustee to object to a pt VIII B order if necessary. Although the number of matters has proved to be relatively small, the cost to the parties is high. It is usually women who will benefit from being able to access pt VIII B. Not only will a splitting order protect their entitlement but it may also be possible for them to achieve an interest split. Consider the position of a wife having an order in relation to the defined benefit superannuation entitlement of her husband which was made prior to the passage of the amendments and which requires that she wait until he receives payment of his entitlement before she can receive payment. The husband remarries and separates from the second spouse who has access to pt VIII B in relation to the same entitlement. The legislation governing the entitlement enables interest splitting to occur. If the second wife obtains a pt VIII B splitting order which is implemented before the entitlement of the first wife is implemented, then the effect of the lack of retrospectivity is that the entitlement of the first wife could be seriously jeopardised and if the husband marries for a third time the first wife could be at a very serious disadvantage. The trustee and the subsequent spouses may not be aware of the entitlement of the first wife. The first wife is at a considerably greater disadvantage than the subsequent wives. She is also effectively at the mercy of the husband and in ‘somewhat of “a no-man’s land”’,⁷⁴ a consequence that was probably unintended.

⁷³ See, eg, *Hodgkin* [2005] FamCA 226; *Hackett* [2007] FamCA 1618; *Lehear* [2009] FamCA 645; *Greetham* [2010] FamCA 246.

⁷⁴ *Hodgkin* [2005] FamCA 226 [43].

IV APPLICATION OF THE SUPERANNUATION LEGISLATION

The new regime has very broad application and applies to almost all types of superannuation interests except overseas superannuation.⁷⁵ Stephen Bourke, the architect of the scheme, opined that '[it] is difficult to conceive of a form of superannuation that is not covered.'⁷⁶ The mechanism by which this coverage is achieved is contained in s 90MC of the *FLA* which provides:

90MC Extended meanings of *matrimonial cause* and *de facto financial cause*

- (1) A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4.
- (2) A superannuation interest is to be treated as property for the purposes of paragraph (c) of the definition of *de facto financial cause*

'Superannuation interest' is defined to mean:

an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest.⁷⁷

This definition is not specific and requires an examination of the definition of 'eligible superannuation plan' for guidance which is defined as being any of:

- (a) a superannuation fund within the meaning of the SIS Act;
- (b) an approved deposit fund;
- (c) an RSA;
- (d) an account within the meaning of the *Small Superannuation Accounts Act 1995*;
- (e) a superannuation annuity (within the meaning of the *Income Tax Assessment Act 1997*)⁷⁸

and these terms are defined by the legislation. It is important to note that 'superannuation fund' is defined to be:

- (a) a fund that:
 - (i) is an indefinitely continuing fund and
 - (ii) is a provident, benefit, superannuation or retirement fund; or
- (b) a public sector superannuation scheme.⁷⁹

Thus the reference to 'a superannuation fund within the meaning of the SIS Act' is not limited to regulated superannuation funds but has more extensive application and includes funds that fail to comply with the *SI(S)R*.⁸⁰ The majority of superannuation funds choose to be regulated by and comply with the *SI(S)A* to obtain taxation concessions which can be lost in the event of non compliance. A superannuation fund must also be either a constitutional corporation to

⁷⁵ Stephen Bourke, 'The New Scheme to Divide Superannuation on Marriage Breakdown' (Paper presented at the Law Society of South Australia Continuing Legal Education, Adelaide, 6 September 2001) 8; *Lesbirel & Lesbirel* (2006) FLC ¶93-301[10]–[12] ('*Lesbirel*').

⁷⁶ Bourke, 'The New Scheme ...', above n 75, 8. The coverage of pt VIII B was extended by the *Family Law Amendment (Annuities) Act 2004* (Cth) to include superannuation-like annuity products, a limited interest previously thought to be excluded from the operation of the scheme.

⁷⁷ *FLA* s 90MD (definition of 'superannuation interest').

⁷⁸ *Ibid* s 90MD (definition of 'eligible superannuation plan').

⁷⁹ *SI(S)A* s 10 (definition of 'superannuation fund').

⁸⁰ Watts, Bourke and Taussig, above n 29, 17.

establish a connection with s 51(xx) of the *Australian Constitution* or have the provision of old age pensions as its sole or primary purpose to establish a link with s 51(xxiii).

In addition to regulated funds superannuation is provided by other types of funds, such as approved deposit funds, retirement savings accounts, self-managed superannuation funds, small superannuation accounts, pooled superannuation trusts, public sector funds and public offer funds, which comply with prudential requirements entitling them to concessional tax treatment.

Because there are many different varieties of superannuation interests the new regime is not straightforward. The relevant legislative pathway depends upon the type of superannuation interest. The legislation applies to accumulation interests which are now the simplest and most widespread form of superannuation interest.⁸¹ For the purpose of the amendments the definition of ‘accumulation interest’ is exclusionary. It is an interest or component of an interest which is ‘not a defined benefit interest or a small superannuation accounts interest’.

The legislation also applies to partially vested accumulation interests. An accumulation interest is defined to be a partially vested accumulation interest ‘if the withdrawal benefit ... is less than the total amount notionally or actually allocated to the member spouse at that date’.⁸² There are three exceptions, namely, where the withdrawal amount is less than the notional amount because of reductions for any outstanding surcharge, insurance costs or other fees, taxes or charges.⁸³

As well the legislation applies to defined benefit interests. A defined benefit interest is defined to be a superannuation interest the whole or a component of which is determined by multiplying either a specific amount or an amount relating to the member’s salary, at retirement or averaged over a prior period of time, by an accrued benefit multiple depending upon years of membership of the scheme.⁸⁴

Prior to the amendments the difficult task of fairly evaluating superannuation was compounded by the fact that the resignation value of partially vested accumulation interests and defined benefit interests did not include a value for the unvested component of the entitlement and therefore did not provide a proper basis for valuation of the entitlement. The amendments seek to specifically address this issue.

The amendments apply to approved deposit funds,⁸⁵ small superannuation accounts,⁸⁶ retirement savings accounts,⁸⁷ self managed superannuation funds,⁸⁸ public sector interests,⁸⁹ annuities and pensions. Hybrid interests are also covered. The amendments apply whether the interests are in the growth phase or the payment phase.

As well a new category of interest for the purpose of implementing the amendments is created. The percentage-only interest is defined as ‘a superannuation interest prescribed by the

⁸¹ *FL(S)R* reg 3 (definition of ‘accumulation interest’).

⁸² *Ibid* regs 3 (‘definition of ‘partially vested accumulation interest’), 9.

⁸³ *Ibid* reg 9(2).

⁸⁴ *Ibid* regs 3 (definition of ‘defined benefit interest’), 5.

⁸⁵ *Ibid* reg 3 (definition of ‘approved deposit fund’), *FLA* s 90MD (definition of ‘approved deposit fund’).

⁸⁶ *Ibid* reg 3 (definition of ‘small superannuation accounts interest’).

⁸⁷ *Ibid* reg 3; *FLA* s 90MD (definition of ‘RSA’).

⁸⁸ *FL(S)R* reg 3 (definition of ‘self managed superannuation fund’).

⁸⁹ *Ibid* reg 3 (definition of ‘public sector superannuation scheme’).

regulations for the purposes of this definition'.⁹⁰ The list of prescribed percentage-only interests was initially confined to the interests of judges and parliamentarians having extreme 'cliff vesting' scales.⁹¹ Generally the value of such an interest increases greatly upon the occurrence of a particular event or the fulfilment of a specified condition. However, in 2005 this category of interest was extended to certain superannuation-like annuity products purchased wholly out of rolled over amounts.⁹² This was to ensure that such interests were captured by the requirements of pt VIII B rather than pt VIII A A relating to third parties. Percentage-only interests, as the name suggests, can only be split by reference to a percentage of future payments. The number of these types of interests is comparatively small and is likely to remain limited.

Thus the amendments apply to almost all types of superannuation. The characteristics of particular entitlements are relevant to their treatment in property proceedings as is the impact of any decision to make a splitting order in respect of a particular entitlement.⁹³ The amendments therefore require a much greater understanding of the complexities of superannuation than previously.

V THE SCHEME ESTABLISHED BY PART VIII B

It is clearly stated that the object of pt VIII B is to allow splittable payments in respect of a superannuation interest to be allocated between parties to a marriage or de facto relationship by agreement or court order.⁹⁴

It is fundamental to the operation of pt VIII B to comprehend the difference between two concepts. The amendments facilitate payment splitting only, that is, the splitting of a superannuation payment when it is ultimately made to the member spouse.⁹⁵ Interest splitting, that is, hiving off the interest of the non-member spouse prior to payment of the entitlement to the member spouse, is a different concept. This action is undertaken by trustees in appropriate cases and results in the creation of a new interest for the non-member spouse or the transfer or roll over of the interest of the non-member spouse to another fund or payment to the non-member spouse if they satisfy the relevant requirements. Interest splitting is not undertaken pursuant to pt VIII B. For accumulation interests it is undertaken pursuant to pt 7A of the *SI(S)R*. For defined benefit interests this is undertaken pursuant to the relevant governing rules, trust deeds or legislation where amended to enable this to occur.

Also the amendments permit payment splitting only in respect of splittable payments. The definition of 'splittable payment'⁹⁶ is broad and is not confined to a payment to the member spouse. It includes a payment made to another person for the benefit of the member spouse which captures the circumstance where a member moves a superannuation interest to another fund.⁹⁷ It also includes a payment made to the legal personal representative of the member spouse after the death of that spouse, a payment made to a reversionary beneficiary after the

⁹⁰ *FLA* s 90MD (definition of 'percentage only interest'); *FL(S)R* regs 3 (definition of 'percentage-only interest'), 9A.

⁹¹ See generally, REM, above n 1, 17.

⁹² *FL(S)R* reg 9A(f).

⁹³ *Gibbons & Gibbons* [2007] FamCA 26 [108]–[109] [120].

⁹⁴ *FLA* s 90MA.

⁹⁵ *Wrigley & Wrigley* [2003] FamCA 888 [20].

⁹⁶ *FLA* ss 90MD (definition of 'splittable payment'), 90ME.

⁹⁷ *Ibid* s 90ME(1)(b); REM, above n 1, 18.

death of a member spouse or a payment made to the legal personal representative of the reversionary beneficiary after the death of the reversionary beneficiary.⁹⁸

Not all payments are splittable and the *FL(S)R* prescribe the types of payments that are not splittable payments.⁹⁹ These payments may be made without notice to the non-member spouse even if a splitting or flagging order or agreement is in force.¹⁰⁰ Payments that are not splittable are:

- payments made on compassionate grounds;¹⁰¹
- payments made because of severe financial hardship;¹⁰²
- payments made on the ground of permanent incapacity;¹⁰³
- payments made after a period of two years where payments are made due to temporary incapacity for a continuous period of two years;¹⁰⁴
- insured benefits in certain circumstances;¹⁰⁵
- payments made by either of the PSS or CSS schemes where a member is being assessed for permanent incapacity;¹⁰⁶
- payments made by the Queensland State Public Sector scheme by way of income protection benefit or incapacity benefit or pension;¹⁰⁷
- payments made by the SHAR to a member spouse subsequent to compliance with a superannuation order or agreement;¹⁰⁸
- payments made after the death of a member spouse to a reversionary beneficiary who is a child, or for the continuing educational or special needs expenses of a beneficiary who was a child at the time of death but has since turned 18 years of age or payments made to a reversionary beneficiary on behalf of such a child on the same bases;¹⁰⁹ and
- payments made to the member spouse after satisfaction of any obligation to the non-member spouse.¹¹⁰

In addition to delineating when a superannuation payment is an unsplittable payment, the *FL(S)R* may prescribe superannuation interests that are unsplittable and unflaggable.¹¹¹ A superannuation interest with a withdrawal benefit of less than \$5000 is unsplittable. Similarly certain pensions paying less than \$2000 per annum are unsplittable.¹¹² The only superannuation interest to be prescribed as unflaggable to date is a superannuation interest in the payment phase.¹¹³

⁹⁸ *FLA* ss 90ME (1)(c)–(e).

⁹⁹ *FL(S)R* regs 12, 13, 14.

¹⁰⁰ Watts, Bourke and Taussig, above n 29, 111–12, 319.

¹⁰¹ *FL(S)R* regs 12(1)(a), (d), (da).

¹⁰² *Ibid* reg 12(1)(b).

¹⁰³ *Ibid* reg 12(1) (c). Note Watts J in *Trott & Trott* (2006) FLC ¶93-263, 80,473 referred to reg 12(1) (c) as a ‘tortuously worded regulation’ and provided considerable clarification in relation to its interpretation.

¹⁰⁴ *FL(S)R* reg 12(1)(c).

¹⁰⁵ Watts, Bourke and Taussig, above n 29, 112, 319.

¹⁰⁶ *FL(S)R* reg 12(1)(e).

¹⁰⁷ *Ibid* reg 12(1)(ea).

¹⁰⁸ *FL(S)R* reg 12(1)(f).

¹⁰⁹ *Ibid* reg 13.

¹¹⁰ *Ibid* reg 14.

¹¹¹ *FLA* s 90MD (definition of ‘unsplittable interest’ and ‘unflaggable interest’).

¹¹² *FL(S)R* reg 11.

¹¹³ *Ibid* reg 10A.

Thus the preliminary provisions of pt VIIIIB underscore the fact that the amendments enable the division of superannuation payments and not the underlying superannuation interests. These provisions also clarify that only splittable payments can be the subject of payment splitting orders or agreements. Certain payments made on compassionate grounds or due to hardship or for various reasons of ill health or incapacity or to or on behalf of a child by way of reversionary interest are not splittable payments. Although these types of payments are unsplittable this does not prevent splitting of the underlying interest and must be differentiated from unsplittable interests. The amendments proscribe the splitting of certain small interests and also proscribe the flagging of interests in the payment phase.

Part VIIIIB then sets out the provisions relating to payment splitting or flagging by agreement¹¹⁴ separately from the provisions relating to payment splitting or flagging by court order.¹¹⁵

Note that pt VIIIIB prevails in the event of any inconsistency with other Commonwealth, State or Territory laws or trust deed or instruments thereby maximising the application of the regime. Protection is provided to trustees who comply with pt VIIIIB but contravene the governing rules or Commonwealth, State or Territory law in the process.¹¹⁶ Such a breach will not be treated as a contravention.

VI PART VIIIIB — AGREEMENTS

Part VIIIIB enables superannuation to be flagged or split either by court order or by agreement. The policy intention of the amendments is that parties should be encouraged to reach their own agreement about superannuation and that court orders about superannuation can be made in default of an agreement. This is consistent with the trend towards private ordering already established in the *FLA* in relation to both financial disputes and disputes about children.¹¹⁷

The new regime enables agreements to deal with superannuation interests of the parties ‘as if those interests were property’¹¹⁸ which is a significant advance on the previous position. While entering into an agreement about superannuation provides the parties with a degree of autonomy about the agreement reached, nevertheless there is still a significant degree of regulation with which the agreement must comply. The terms of the agreement cannot be at large. The regulation differs depending upon whether the agreement provides for payment splitting, payment flagging, flag lifting with or without a payment split or termination of a flag lifting agreement. The policy intention is that the payment split provisions for superannuation agreements or flag lifting agreements should reflect the payment split provisions for court orders¹¹⁹ and to a large extent that is the case.¹²⁰ The payment flag provisions for agreements also mirror the payment flag provisions for court orders.¹²¹ However, with splitting agreements there is no requirement that the interest be valued in accordance with the *FL(S)R*, that procedural fairness be accorded to the trustee or that the agreement be fair.

¹¹⁴ *FLA* pt VIIIIB div 2.

¹¹⁵ *Ibid* pt VIIIIB div 3.

¹¹⁶ *Ibid* s 90MB(2).

¹¹⁷ *Ibid* pts VIIIA, VII.

¹¹⁸ *Ibid* ss 90MH(1), 90MHA(1).

¹¹⁹ *REM*, above n 1, 21.

¹²⁰ *Cf FLA* ss 90MJ, 90MT.

¹²¹ *Cf FLA* s 90ML(4) and (5) with s 90MU(1)(a) and (b).

A *Formal Requirements*

A 'superannuation agreement' is defined to be that part of a financial agreement that 'deals with' the superannuation interests of either or both of the parties.¹²² Superannuation agreements may provide for the splitting or flagging of superannuation payments. Such agreements may form part of financial agreements dealing with financial matters including superannuation.¹²³ Otherwise they may be stand alone agreements dealing only with superannuation.¹²⁴ They are required to comply with the pt VIIIA and pt VIIIAB requirements for financial agreements as well as the additional requirements of pt VIIIB div 2. The requirements for flag lifting agreements and termination agreements, which are not superannuation agreements, differ.¹²⁵ Flag lifting agreements lift a previous flag with or without a payment split and where the flag lifting agreement provides for a payment split it can be terminated by the parties by means of a termination agreement.

To be binding a financial agreement must be signed by all parties and state that each party has received independent legal advice about the effect of the agreement on the rights of that party as well as the advantages and disadvantages to the party, at the time the advice was given, of making the agreement.¹²⁶ Either before or after signing the agreement each party must receive a signed statement from their legal advisor stating that the advice has been provided and a copy of the statement must be provided to the other party or their lawyer. The agreement must not have been terminated or set aside by a court. But the interpretation of these formal requirements has resulted in considerable complexity and confusion to the extent that the utility and effectiveness of financial agreements is in doubt.¹²⁷

Because flag lifting agreements and termination agreements are not superannuation agreements they must comply with separate requirements.¹²⁸ They must be signed by both spouses and must contain a statement for each spouse that independent legal advice about the legal effect of the agreement has been obtained.¹²⁹ The legal advice requirements are less onerous than for financial agreements. These types of agreement will generally be made when all other financial issues have been resolved and therefore the need for more exacting requirements is probably absent.¹³⁰ Legal advisors must sign a certificate to the effect that legal advice has been given which must be attached to the agreement. Each spouse must be provided with a signed copy of the agreement. As well, a flag lifting agreement must not have been set aside or terminated.¹³¹

As a superannuation agreement is a type of financial agreement or forms part of a financial agreement, it can be entered into before marriage,¹³² during marriage,¹³³ after marriage breakdown¹³⁴ or after divorce.¹³⁵ Similarly in relation to de facto relationships, financial

¹²² Ibid ss 90MD (definition of 'superannuation agreement'), 90MH, 90MHA.

¹²³ Ibid pts VIIIA, VIIIAB.

¹²⁴ Mark MacDiarmid, 'What Species of Asset? (2009) *Law Society Journal* 71 for a different view.

¹²⁵ Ibid s 90MN(3).

¹²⁶ Ibid ss 90G, 90UJ.

¹²⁷ Below 86.

¹²⁸ REM, above n 1, 26 [130]. The definition of 'in force' in s 90MG differentiates between a financial agreement, a pt VIIIAB financial agreement, a superannuation agreement and a flag lifting agreement.

¹²⁹ *FLA* s 90MN(3).

¹³⁰ Watts, Bourke and Taussig, above n 29, 91.

¹³¹ *FLA* s 90MG(3).

¹³² Ibid s 90B.

¹³³ Ibid s 90C

¹³⁴ Ibid.

¹³⁵ Ibid s 90D.

agreements may be entered into before entering into a de facto relationship,¹³⁶ during a de facto relationship¹³⁷ or after the breakdown of a de facto relationship.¹³⁸ They can deal with superannuation that is not yet in existence¹³⁹ although the description must necessarily be general.¹⁴⁰ Otherwise, the description of the superannuation interest to which the agreement applies should be sufficiently specific¹⁴¹ and this information can be obtained from the fund.¹⁴²

Once a binding superannuation agreement is ‘in force’¹⁴³ and has been served the trustee must comply with it from the ‘operative time’.¹⁴⁴ A superannuation interest dealt with by the agreement cannot then be the subject of a s 79 or s 90SM order.¹⁴⁵ Nonetheless, this does not prevent the court taking the superannuation interests into account when making an order about other property of the parties.¹⁴⁶ Also the court has jurisdiction to make ss 79 and 90SM orders about superannuation where the parties are unable to conclude their own agreement or where the agreement has been terminated or set aside.

B Forms of Payment Split — Superannuation Agreement or Flag Lifting Agreement

Further legislative constraint is imposed upon the form of payment splitting permitted in superannuation agreements and flag lifting agreements.¹⁴⁷ Payment splitting of a superannuation interest that is ‘dealt with’ in a financial agreement is not mandated. But when the agreement provides for a payment split, the form of the payment split is not at large and the parties to the agreement must comply with the statutory requirements. Separate requirements are imposed depending upon whether the interest is a percentage-only interest or not.

1 Percentage-only Interests

The theme throughout pt VIII B is that separate provision is made for percentage-only interests, which constitute a very small (albeit very valuable) minority of superannuation interests, and non percentage-only interests. There are two options for percentage-only interests and both involve the application of an agreed percentage to the payment.¹⁴⁸ Percentage splitting is considered the most equitable approach because the extreme ‘cliff vesting’ of these interests makes actuarial valuation difficult.¹⁴⁹ The appropriate approach depends upon whether the interest has reached full vesting or not.

The first option is generally appropriate where the interest has not attained full vesting and has therefore not undergone the extreme increase in value characteristic of these types of interests. The effect is that a portion only of the accrued entitlement is subject to the agreed

¹³⁶ Ibid s 90UB.

¹³⁷ Ibid s 90UC.

¹³⁸ Ibid s 90UD.

¹³⁹ *FLA* ss 90MH(1), 90MHA(1). Sections 90MH(5), 90MHA(5) provide that a superannuation interest is treated as being acquired when the party first becomes a member of the eligible superannuation plan.

¹⁴⁰ *Watts, Bourke and Taussig*, above n 29, 89.

¹⁴¹ *FLA* ss 90MJ(1)(a), 90ML(1)(a).

¹⁴² Ibid s 90MZB.

¹⁴³ Ibid ss 90MG(1), (1A), (2).

¹⁴⁴ Ibid s 90MI.

¹⁴⁵ Ibid s 90MO(1)(a).

¹⁴⁶ Ibid s 90MO(2).

¹⁴⁷ Ibid s 90MJ.

¹⁴⁸ Ibid ss 90MJ(1)(b)(i), (ii).

¹⁴⁹ *REM*, above n 1, 21 [79], 22 [83].

percentage division. This is calculated by ascertaining the accrued benefit multiple as at separation and the accrued benefit multiple as at the date of payment.¹⁵⁰ The calculation gives some credit to the member for any post separation increase in the entitlement. The marital proportion is then divided according to the agreed percentage. This option is appropriate where the entitlement was not entirely accrued during the relationship. The second option applicable to percentage-only interests is to apply an agreed percentage to all splittable payments in respect of that interest.¹⁵¹ This option would generally be used where the interest has attained full vesting. The result of this option is that the agreed percentage is applied to the whole of the benefit payable and is appropriate if the separation occurred after full vesting occurs and if the interest was acquired wholly or substantially during the course of the marriage.

2 *Non Percentage-only Interests*

For non percentage-only interests there are three payment splitting options including one option that is not available for splitting orders and two options that are not available in relation to percentage-only interests.¹⁵²

The first option¹⁵³ is for the agreement to specify a base amount, a concept which is fundamental to the operation of the new regime but which is not clearly defined.¹⁵⁴ However, by inference it is a cash amount that the non-member spouse should receive from the interest of the member spouse.¹⁵⁵ This method would generally be used where the interest is in the growth phase to ensure that the non-member spouse does not receive the benefit of ongoing contributions made by the member spouse. ‘Growth phase’ means that no condition of release has been met in respect of the interest; or a condition of release has been met, no payment has been made and no steps have been taken to obtain the payment; or a condition of release has been met and some but not all of the payment has been made.¹⁵⁶

The second option enables the agreement to specify the method by which the base amount is to be calculated when the agreement is served upon the trustee.¹⁵⁷ The legislation does not prescribe what method might be used and therefore the parties can agree upon the appropriate approach. This approach might be utilised where the interest is in the growth phase and the parties wish to divide only the amount accumulated during the period of cohabitation and exclude any pre marital or post separation contributions by the member spouse.¹⁵⁸ When this option is utilised, in addition to the agreement and relevant divorce/separation documentation, the trustee must be served with a document setting out the amount calculated using the agreed method. This option is unavailable in relation to splitting orders.

The third option allows the agreement to specify a percentage that is to apply to all splittable payments¹⁵⁹ and this option is generally appropriate where the superannuation interest is in the payment phase.¹⁶⁰

¹⁵⁰ *FLA* s 90MJ(1)(b)(i); *FL(S)R* reg 19.

¹⁵¹ *FLA* s 90MJ (1)(b)(ii).

¹⁵² *Ibid* s 90MJ(1)(c).

¹⁵³ *Ibid* s 90MJ(1)(c)(i).

¹⁵⁴ See Watts, Bourke and Taussig, above n 29, 93; *FL(S)R* reg 45.

¹⁵⁵ See below 90.

¹⁵⁶ *FL(S)R* regs 3 (definition of ‘growth phase’), 6, 7.

¹⁵⁷ *FLA* s 90MJ(1)(c)(ii).

¹⁵⁸ Watts, Bourke and Taussig, above n 29, 95–6 for examples.

¹⁵⁹ *FLA* s 90MJ(1)(c)(iii).

¹⁶⁰ *FL(S)R* regs 3 (definition of ‘payment phase’), 8.

Whichever splitting option is specified in the agreement, when a splittable payment becomes payable, then the entitlement of the member spouse must be reduced by the amount of the payment to the non-member spouse.¹⁶¹ Unless the amount of the payment to the non-member spouse is to be calculated by way of a percentage split applying to all splittable payments, the amount of the payment to the non-member spouse is to be calculated in accordance with the regulations.¹⁶²

Trustees are protected in the event that payment splitting commences pursuant to an agreement which then ‘later ceases to be in force’.¹⁶³ An application can be made for a court order to terminate the operation of a payment split.¹⁶⁴ The termination takes effect in relation to splittable payments payable after the date specified in the order.¹⁶⁵ Whether a court order would be made will depend upon all the circumstances. The effect of such an order on the trustee and any arrangements already set in place by the trustee would be relevant considerations.

C Operative Time Requirements — Payment Splitting by Agreement

Once the superannuation agreement or flag lifting agreement providing for the payment split is in force and therefore binding upon the parties¹⁶⁶ it must be appropriately served on the trustee for the purpose of implementation.¹⁶⁷ The time when the trustee is required to give effect to the agreement is referred to as the ‘operative time’ and it is linked to the date of service of the relevant documentation on the trustee. Sufficient time is required to enable implementation of the split by the trustee and therefore the operative time is defined as the beginning of the fourth business day after the day on which the trustee is served with the required documents.¹⁶⁸ The documents to be served are a copy of the agreement, a copy of the divorce order or separation declaration, if the agreement specifies a method for calculating a base amount, a document setting out the calculation and finally, any further prescribed form of declaration.¹⁶⁹ Any payments made by the trustee to the member spouse before the operative time will not be in breach of the agreement and therefore prompt service of the relevant documentation upon the trustee is important.

D Proof of Separation — Divorce Order or Separation Declaration

The trustee is not required to give effect to the agreement until such time as adequate proof is provided that the marriage or de facto relationship has broken down at the operative time.¹⁷⁰ Proof must be provided that the parties are either divorced or separated. The requirement to establish either divorce or separation is imposed to ensure the parties are bona fide and are not entering the superannuation agreement for the purpose of financial gain. The splitting of superannuation payments does provide the member spouse and non-member spouse with a financial advantage due to the application of concessional taxation provisions.¹⁷¹ The effect of payment splitting is that the parties have the benefit of two separate low rate cap amounts. A

¹⁶¹ *FLA* s 90MJ(3).

¹⁶² *Ibid* s 90MJ(4).

¹⁶³ *Ibid* s 90MJ(5).

¹⁶⁴ *Ibid* s 90MV.

¹⁶⁵ *Ibid*.

¹⁶⁶ *Ibid* s 90MG.

¹⁶⁷ *Ibid* s 90MZF.

¹⁶⁸ *Ibid* s 90MI.

¹⁶⁹ *Ibid* s 90MI(1). At present there is no form of declaration prescribed.

¹⁷⁰ *FLA* s 90MJ(1)(da), (db).

¹⁷¹ REM, above n 1, 27.

copy of the divorce order provides incontrovertible proof of separation but not all separating couples apply for a divorce order after separation. For this reason an alternative method of proving separation is provided for by means of a separation declaration.¹⁷² Proving separation has become more significant after the de facto financial amendments. Comparable provision is made for de facto relationships with some necessary differences.¹⁷³

There are two levels of separation declaration provided for. The standard of proof of separation is higher where the total withdrawal value of all of the superannuation interests of the member exceeds the low rate cap amount.¹⁷⁴ The separation declaration must be written and signed by at least one of the spouses.¹⁷⁵

Where the lower standard of proof is required, the separation declaration must state either that the spouses are married or had lived in a de facto relationship, and are separated at the declaration time.¹⁷⁶ Where the higher standard of proof is required, the requirements of the declaration are more onerous. The declaration must state that the parties are married or lived in a de facto relationship, and must also state that the parties have been separated for a continuous period of 12 months immediately before the declaration time with no reasonable likelihood of cohabitation being resumed.¹⁷⁷ The declaration time is defined to be the time when the declaration was signed or signed by the last spouse if both parties signed it.¹⁷⁸ The declaration must be made no more than 28 days before service upon the trustee.¹⁷⁹ There is a penalty of up to 12 months imprisonment for the offence of knowingly making a declaration that is false or misleading in a material particular to a trustee¹⁸⁰ which prompted one commentator to note that '[it] would be interesting if such a provision were introduced into s 48 of the *Family Law Act* for couples who incorrectly state a separation date in an application for dissolution of marriage'.¹⁸¹ As the financial advantage of payment splitting by agreement is considerable, the penalty for making a false assertion of separation is severe. By contrast, the requirement of a separation declaration or divorce order to establish bona fide separation is not imposed in relation to payment splitting by court order.

E Payment Flagging

The amendments introduced the process of payment flagging which prevents the trustee making a splittable payment to the member spouse and requires the trustee to notify both the non-member spouse and the member spouse within 14 days of a splittable payment becoming payable.¹⁸² Failure to give the required notice is an offence except if the trustee had already given notice in respect of an earlier splittable payment in respect of the same interest.¹⁸³ The trustee is only required to provide the notification once.¹⁸⁴ The notification by the trustee should prompt the parties to address the flag.

¹⁷² *FLA* s 90MI(1)(c). As yet no form of declaration has been prescribed.

¹⁷³ *Ibid* s 90MP(2A)–(6)(marriages), (7)–(12) (de facto relationships).

¹⁷⁴ *Ibid* s 90MQ, *FL(S)R* reg 20.

¹⁷⁵ *FLA* ss 90MP(1), (2).

¹⁷⁶ *Ibid* ss 90MP(4), (9).

¹⁷⁷ *Ibid* ss 90MP(3), (8). Section 90MP(5) provides that s 48 in relation to divorce is relevant to the consideration of whether separation is established in relation to a marriage.

¹⁷⁸ *FLA* s 90MD (definition of 'declaration time').

¹⁷⁹ *Ibid* s 90MI(2).

¹⁸⁰ *Ibid* s 90MZG.

¹⁸¹ Garry Watts, 'Family Law and Superannuation: A Simple Introduction to the New Scheme' (2002) 13 *Australian Superannuation Law Bulletin* 73, 76.

¹⁸² *FLA* ss 90ML(4), (5).

¹⁸³ *Ibid* s 90ML(5).

¹⁸⁴ *Ibid* s 90ML(6).

A flagging agreement will generally be utilised when superannuation is due to be paid in the near future, thus establishing its value accurately.¹⁸⁵ It postpones any decision about superannuation and is only recommended where the parties have a reasonable on-going relationship because once a flagging agreement is made the flag will have to be dealt with at some stage in the future when a splittable payment becomes payable.¹⁸⁶ If the parties are unable to reach an agreement at that time then proceedings to obtain a court order must be undertaken.

It is possible to have multiple flags in respect of the same superannuation interest.¹⁸⁷ If a member spouse separates and the non-member spouse flags the superannuation interest and the member spouse repartners and separates again, the subsequent non-member spouse must also flag the interest because their interest is not protected by the earlier flag. Accordingly, once the earlier flag has been concluded then the later flag operates to protect the interest of that spouse.

There are specific requirements for a flagging agreement. The first is that the superannuation interest to be flagged must be identified by the agreement.¹⁸⁸ The agreement must also specifically provide that the interest is to be subject to a payment flag under pt VIII B.¹⁸⁹ It must be in force¹⁹⁰ at the operative time.¹⁹¹ The interest dealt with by the agreement cannot be an unflaggable interest.¹⁹² As noted only interests in the payment phase are currently prescribed as unflaggable.¹⁹³

The operative time requirements are slightly different to those in respect of splitting agreements.¹⁹⁴ The operative time for a payment flag in relation to an interest in a self managed superannuation fund is the service time.¹⁹⁵ This is because the members and trustees are effectively the same, these funds are comparatively small and therefore no delay for the purpose of notification and implementation is necessary. Otherwise, the operative time is the beginning of the fourth business day after the service time.¹⁹⁶ The requirements in relation to the proof of separation or divorce to be served upon the trustee with the flagging agreement are the same as those applicable to a payment split by way of superannuation agreement or flag lifting agreement.¹⁹⁷

While the flag remains in operation the trustee is prohibited from making any splittable payment and breach of this prohibition is an offence.¹⁹⁸ However, the prohibition extends only to splittable payments and not to payments which are not splittable, which can be made without notice to the non-member spouse. Also the existence of a flag does not operate to prevent a successor fund transfer by a trustee in certain circumstances.¹⁹⁹ The flag is

¹⁸⁵ REM, above n 1, 24 [108].

¹⁸⁶ Bourke, 'The New Super Splitting Laws', above n 6, 160.

¹⁸⁷ Watts, Bourke and Taussig, above n 29, 111.

¹⁸⁸ *FLA* s 90ML(1)(a).

¹⁸⁹ *Ibid* s 90ML (1)(b).

¹⁹⁰ *Ibid* ss 90MG(1), (1A), (2).

¹⁹¹ *Ibid* s 90ML(1)(c).

¹⁹² *Ibid* s 90ML(1)(d).

¹⁹³ *FL(S)R* reg 10A.

¹⁹⁴ Cf *FLA* ss 90MK, 90MI.

¹⁹⁵ *Ibid* s 90MK(1)(a).

¹⁹⁶ *Ibid* s 90MK(1)(b).

¹⁹⁷ *Ibid* s 90MK(2).

¹⁹⁸ *Ibid* s 90ML(4).

¹⁹⁹ *Ibid* s 90MLA.

transferred in operation from the original interest in the old eligible superannuation plan to the new interest in the new eligible superannuation plan.

The flag continues until the happening of two events. The first is that a court order is made setting aside a financial agreement which includes a flagging agreement.²⁰⁰ The second event is that the parties terminate the operation of the payment flag by entering into a flag lifting agreement.²⁰¹ The flag lifting agreement can provide that the flag should cease operating with a payment split or without.²⁰²

If the flag is removed by a flag lifting agreement, and subsequently the flag lifting agreement is terminated by a termination agreement, the termination of the flag lifting agreement does not restore the operation of the flag²⁰³ and the parties will be required to implement a fresh flag.

The death of either party does not terminate a flag. The legal personal representative of the deceased spouse has all the rights of the deceased spouse including the right to enter into a flag lifting agreement.²⁰⁴ It has been observed that if a flag has been set without the commencement of s 79 proceedings and the surviving spouse declines to enter into a superannuation agreement, the legal personal representative has no right to commence proceedings for property settlement.²⁰⁵ However, an application can be made by the member to set aside the flag.²⁰⁶

Flagging agreements cannot be served upon the trustee until after separation and cannot be implemented until such time as they are appropriately served upon the trustee.²⁰⁷

F Enforcement

A splitting or flagging agreement can only be enforced under pt VIIB²⁰⁸ and this is in keeping with the 'self contained' nature of the superannuation provisions.²⁰⁹ The court has the power to make 'such orders as it thinks necessary' to enforce a splitting or flagging agreement.²¹⁰ Enforcement action may need to be taken against either the trustee or the member spouse in the event of non compliance with the terms of the agreement. If enforcement proceedings are to be undertaken against the trustee then procedural fairness must be accorded to the trustee by giving notice of any hearing and providing an opportunity to be heard. The range of powers includes contractual remedies and ch 20 enforcement powers.²¹¹

The court also has the power to determine whether a superannuation agreement or flag lifting agreement is valid, enforceable or effective.²¹² Section 90MR is in similar terms to s 90KA relating to the enforceability of financial agreements, s 90UN in relation to the enforceability

²⁰⁰ Ibid ss 90ML(2)(a), 90MM.

²⁰¹ Ibid ss 90ML(2)(b).

²⁰² Ibid s 90MN(1)(a) and (b).

²⁰³ Ibid s 90ML(3). See also REM, above n 1, 24–5.

²⁰⁴ FLA s 90ML(7).

²⁰⁵ Watts, Bourke and Taussig, above n 29, 113.

²⁰⁶ Ibid; FLA s 90K(1)(f).

²⁰⁷ FLA ss 90MK, 90MZF.

²⁰⁸ Ibid ss 90MH(3), 90MHA(3).

²⁰⁹ REM, above n 1, 20.

²¹⁰ FLA s 90MR(1).

²¹¹ Ibid s 90MR(3). See generally Watts, Bourke and Taussig, above n 29, 119.

²¹² FLA s 90MR(2).

of pt VIIIAB financial agreements and s 87(11) relating to the enforceability of maintenance agreements. It has been suggested that the case law in relation to s 87(11) provides guidance in relation to s 90MR(2).²¹³

Splitting and flagging agreements are financial agreements and therefore the provisions for setting aside financial agreements apply.²¹⁴ Of relevance in this context is that if the court is satisfied that the agreement ‘covers’ at least one superannuation interest that is an unsplitable interest²¹⁵ the court can set aside the agreement.²¹⁶ It is common for people to own a number of small interests notwithstanding the fact that they are portable and can be consolidated.²¹⁷ If an agreement purported to split such an interest then the agreement must be at risk.²¹⁸ However, the position is not clear where the agreement provides for the member spouse to retain such an interest.²¹⁹ The rationale for these provisions is unclear and is arguably at odds with s 90MH(1) which permits a financial agreement to ‘deal with’ superannuation not yet in existence. This risk factor makes financial agreements, whether pre nuptial or otherwise, a less attractive means of finalising property settlement disputes for both parties.

Despite the fact that flag lifting and termination agreements are not financial agreements, the court can set them aside on the same grounds as financial agreements²²⁰ with one exception namely that a payment flag can be set aside where there is no likelihood that it will be terminated by a flag lifting agreement.²²¹ As the parties will have had legal advice about the agreement at the time it is entered into, the grounds for setting aside these types of agreements are limited.

An order setting aside a flag lifting agreement also sets aside the related financial agreement.²²² This provision is important because a flag lifting agreement is not a financial agreement. Therefore without this provision an order setting aside the flag lifting agreement would not affect the host financial agreement. The converse position is also provided for. An order setting aside a financial agreement also sets aside the related flag lifting agreement, important for the same reason.²²³

There is an issue about the impact of the transitional provisions where a pt VIIIA financial agreement was entered into prior to the startup time. The parties may have entered a pt VIIIA agreement about a member spouse paying a portion of their superannuation interest to a non-member at the time of payment. This type of agreement is not binding upon the trustee. The parties may wish to access pt VIIIB in order to bind the trustee and also implement an interest split where possible. The transitional provisions state that pt VIIIB does not apply in relation to financial agreements made prior to the startup time.²²⁴ However, it has been suggested that

²¹³ See generally Watts, Bourke and Taussig, above n 29, 120.

²¹⁴ *FLA* ss 90K, 90UM. See generally, Watts, Bourke and Taussig, above n 29, 124–9; Catherine Carew, ‘Setting Aside Financial Agreements’ (2006) 19(2) *Australian Family Lawyer* 35.

²¹⁵ *FL(S)R* reg 11.

²¹⁶ *FLA* ss 90K(1)(g), 90UM(1)(j).

²¹⁷ Above 29.

²¹⁸ Stephen Bourke, *Super Splitting for Family Lawyers* (Certus Law, 2010) 121.

²¹⁹ *Ibid* 121–2, 166–7; Justice Robert Benjamin, ‘The Practical Implications of Financial Agreements: Adopting a Strict Interpretation’ (2008) *Current Family Law* 185, 193–4. See also MacDiarmid, above n 124, for a general discussion about the confusion regarding superannuation as s 4(1) property in relation to financial agreements.

²²⁰ *Ibid* s 90MN(4).

²²¹ *Ibid* ss 90K(1)(f), 90UM(1)(i).

²²² *Ibid* s 90MN(5); REM, above n 1, 26.

²²³ *Ibid* ss 90MN(6), (7).

²²⁴ *FLLA(S)A* s 5(5).

the parties can agree to terminate the pt VIIIA agreement and then enter into a pt VIIIB agreement.²²⁵ It has also been suggested that if the pt VIIIA agreement did not deal with superannuation then the court retains the jurisdiction to deal with it.²²⁶ This would require clear words in the agreement and a narrow interpretation of s 5(5) of the *FLLA(S)R*.

G Corollaries: Part VIIIB Agreements

The new regime thus permits agreements to be made that deal with superannuation interests as if they are property and establishes a process for splitting or flagging superannuation interests in an extension of the policy established by pt VIIIA and continued by pt VIIIB in relation to financial agreements. The comments by Fehlberg and Behrens about pt VIIIA are apt about this change that it 'is part of a wider trend in Australian family law towards private agreement and a more contract-based approach, along with increasing emphasis on the resolution of disputes without court involvement.'²²⁷ There is some risk to the non-member spouse adopting such an approach.

The *2008 Evaluation* findings revealed that post reform:

There remains a small but significant group of women who were unable to access the benefits the Act affords women because neither spouse thought or knew to take superannuation into account when dividing property.²²⁸

This is a concern because financial agreements, including superannuation agreements, are not subject to judicial oversight; and engagement with lawyers and the formal legal system is one of the most important factors predicting men's and women's consideration of superannuation when dividing property post reform.²²⁹

1 Absence of Judicial Oversight

It is significant that financial agreements, and now superannuation agreements, require no judicial approval and need not be fair. They are not subject to the 'just and equitable' requirement of ss 79 and 90SM orders or any similar requirement.²³⁰ Justice Murphy in *Hoult* summarised the position in the following way:

parties who are independently advised and receive appropriate advice should ... be perfectly free to bind themselves to an entirely unjust and inequitable agreement (in s 79 terms) that governs their future rights and operates as a bar to future property (and/or maintenance) proceedings. In short, if the relevant prerequisites are met, and there is absence of vitiating factors, the parties are perfectly free to make a 'bad bargain'.²³¹

This is in contrast to the position in relation to the predecessor of financial agreements, namely s 87 agreements, which required court approval. The court was required to scrutinise s 87 agreements to determine if they were 'proper'. Section 87 agreements were confined in

²²⁵ Watts, Bourke and Taussig, above n 29, 83–4.

²²⁶ Ibid 84.

²²⁷ Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 562. See also REM, above n 1, 5, 20 [59].

²²⁸ Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post Reform Practice and Settlement Outcomes' (2008) 22 *International Journal of Law Policy and the Family* 206, 226 ('2008 Evaluation').

²²⁹ Ibid 221.

²³⁰ Fehlberg and Smyth, 'Binding Prenuptial Agreements in Australia: The First Year', (2002) 16 *International Journal of Law, Policy and the Family* 127, 130.

²³¹ (2011) FLC ¶93-489, 86,065 [63].

their operation to agreements post separation. Agreements entered into before or during marriage and prior to separation were not legally binding.²³² Nevertheless the judicial scrutiny of s 87 agreements afforded protection to vulnerable parties which ceased upon the commencement of pt VIIIA when these agreements were no longer an option.

Judicial oversight has been replaced by statutory requirements for parties to obtain certain legal advice. This change assumes that independent legal advice will provide adequate protection to vulnerable people and it has been noted that in the family context there is evidence that this is not always the case.²³³ It is more likely that, especially in relation to prenuptial agreements, there is unequal bargaining power and therefore agreements are more beneficial to men than women.²³⁴ Pre nuptial agreements are generally sought by an economically superior party to protect assets where there is a disparity in wealth, where a party has been married before, where a party has been previously involved in family law proceedings or where protection is sought for a particular asset.²³⁵

2 *Potential for Reliance upon Defective Ageeements*

The abrogation of responsibility for the oversight of agreements has placed a greater onus upon lawyers to ensure that agreements are enforceable.²³⁶ As discussed, the amendments have imposed additional requirements that must be complied with for a binding agreement in relation to superannuation. Considerable care is required in relation to the drafting of these agreements. Proposed consent orders about superannuation are requisitioned if poorly drafted or if there are other problems evident. Procedural fairness must also be accorded to trustees prior to the making of an order about superannuation providing another source of protection. However there is no court oversight of agreements about superannuation. The risks arising from the lack of court scrutiny are compounded by the fact that there is no requirement that trustees be afforded procedural fairness at the time agreements are entered into. Therefore there is a risk that trustees may be implementing defective agreements and that parties are relying upon defective agreements. Especially in relation to prenuptial agreements, any problems could take a considerable time to surface.²³⁷ Also if an agreement is ultimately rejected by the fund or is otherwise ineffective the parties are left with unavoidable expense. This is so even if the parties are cooperative and can agree to terminate the defective agreement and either enter into a new one or agree to a consent order. Otherwise legal proceedings will be required.

3 *No Requirement for Valuation*

Splitting agreements do not require compliance with the regime of valuation established by the *FL(S)R* unlike splitting orders. Indeed, the REM stated that '[t]he policy intention is that the regulations will provide a default valuation method ...'²³⁸ although it would be prudent to

²³² Belinda Fehlberg and Bruce Smyth, 'Prenuptial Agreements for Australia: Why Not? (2000) 14 *Australian Journal of Family Law* 1, 2–3.

²³³ Ibid 13; Fehlberg and Behrens, above n 227, 426–7, 560–1; Fehlberg and Smyth, 'Binding Prenuptial Agreements in Australia: The First Year', above n 230, 137. See, eg, *Parker & Parker* [2010] FamCA 664 [13].

²³⁴ Fehlberg and Smyth, 'Prenuptial Agreements for Australia: Why Not?', above n 232, 2, 12–14, 21; Fehlberg and Smyth, 'Binding Prenuptial Agreements in Australia: The First Year', above n 230, 129.

²³⁵ Fehlberg and Smyth, *Binding Prenuptial Agreements in Australia: The First Year*, above n 230, 134

²³⁶ Paul Staindl and Lisa Bradley, 'Binding Financial Agreements — How Safe Are They?' (2006) 12 *Current Family Law* 187, 188.

²³⁷ See, eg, *Kostres & Kostres* (2009) FLC ¶93-420. ('*Kostres*').

²³⁸ REM, above n 1, 2.

utilise the regulations to ensure the enforceability of the agreement.²³⁹ This may not be a significant issue if a splitting agreement is entered into in relation to an accumulation interest and the member statement is relied on. Also where the default method of valuation is not appropriate to the circumstances of the member spouse or the particular entitlement then a splitting agreement can properly be based upon a more accurate personal assessment of the value of the superannuation entitlement. On the other hand, if the interest is a valuable defined benefit interest then it may be undervalued when concluding the agreement.

4 *Relevant Risks — Financial Agreements Generally*

There have been considerable problems highlighted in the case law in relation to financial agreements generally. In particular there have been a number of decisions about the effect of a lack of strict compliance with the statutory requirements for binding financial agreements.²⁴⁰ These cases culminated in the decision of the Full Court in *Black & Black*²⁴¹ which endorsed an approach requiring strict compliance with the pt VIIIA statutory provisions because agreements oust the jurisdiction of the court to make s 79 orders.²⁴² Section 90G was subsequently amended²⁴³ to make the requirements for a binding financial agreement less onerous because the strict approach had resulted in additional legal expense that financial agreements were designed to avoid.²⁴⁴ The requirements for the provision of and proof of legal advice were changed and relaxed.²⁴⁵ Also the court may now uphold an agreement notwithstanding a failure to comply with the requirements for a binding financial agreement if it would be unjust and inequitable not to do so (disregarding any changes in circumstances from the time the agreement was made).²⁴⁶ However both the amendments and the interpretation of them have been criticised. The transitional provisions which provide for the amendments to have retrospective effect complicate the position in relation to agreements concluded before the commencement time and may require consideration of both the pre and post amendment forms of s 90G.²⁴⁷ Furthermore a party cannot unequivocally rely upon a copy of a signed statement of legal advice provided by the other party as proof that the other party has actually had the requisite advice.²⁴⁸ Thus through no fault of their own lawyers may find that their clients are at risk and many lawyers consider that this is a sufficient reason to avoid advising upon or drafting financial agreements. The s 90KA powers of the court to determine the validity of agreements do not provide a remedy for non compliance with s 90G.²⁴⁹ The Full Court in *Kostres* has highlighted the fact that notwithstanding the amendments, financial agreements must be drafted with precision to be binding and enforceable.²⁵⁰ Paradoxically after these amendments financial agreements are now a less attractive more uncertain option than previously.²⁵¹

²³⁹ Watts, Bourke and Taussig, above n 29, 106–7.

²⁴⁰ See, eg, *J & J* [2006] FamCA 442; *Millington & Millington* [2007] FamCA 687; *Ruzic & Ruzic* [2007] FamCA 473; *Parker* [2010] FamCA 664.

²⁴¹ (2008) FLC ¶93-357 (*'Black'*).

²⁴² *Ibid* 82,342 [40] [42].

²⁴³ *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth). See also *FLA* s 90UJ.

²⁴⁴ *Kostres* (2009) FLC ¶93-420, 83,809.

²⁴⁵ *FLA* ss 90(1), 90UJ(1).

²⁴⁶ *FLA* ss 90G(1A), 90UJ(1A).

²⁴⁷ See, eg, *Senior & Anderson* (2011) FLC ¶93-470, 85,730–1; *Hoult* (2011) FLC ¶93-489, 86,058–60, 86,069.

²⁴⁸ *Hoult* (2011) FLC ¶93-489, 86,069 [93] [94].

²⁴⁹ *Fevia & Carmel-Fevia* (2009) FLC ¶93-411, 83,633–4. See also *FLA* s 90UN.

²⁵⁰ (2009) FLC ¶93-420, 83,809.

²⁵¹ See generally Paul Doolan, 'Financial Agreements — Everything You Always Wanted to Know But Were Too Afraid to Ask' (Paper presented at the Fourth Annual Family Law Conference, Gold Coast, 22–23 July 2010).

5 *A Level Playing Field?*

The policy considerations cited in support of financial agreements generally are also relevant to agreements about superannuation.²⁵² One of the main policy considerations was that greater participation in the workforce by women ‘meant that marriage is becoming increasingly recognised as an economic partnership as well as a social relationship’ and therefore it was important to keep up with the times and encourage people to resolve their own arrangements.²⁵³ However, this presumes that the parties entering into an agreement are in a position of equal bargaining power. Statistics continue to show that women will be the economically weaker party in the majority of cases in the superannuation context.²⁵⁴ Furthermore it has been observed that the requirement that parties obtain independent legal advice may not provide adequate protection against an unfair agreement resulting from power imbalance.²⁵⁵ Agreements in relation to the flagging and splitting of superannuation are just as likely to be used to advantage by a financially stronger party notwithstanding the legal advice requirements.

Further it is argued in favour of agreements that the parties will have control over the manner in which property is dealt with.²⁵⁶ Thus parties could quarantine pre marital or post separation acquired superannuation or trade off superannuation against other assets. Pre-reform socio legal research by Dewar and others suggested that couples were more likely to consider that superannuation was different in nature to other property and that the non-member spouse should have no entitlement to it.²⁵⁷ It was therefore underrated. This pattern in the data, although moderated, has continued post reform.²⁵⁸

Additional policy considerations advanced for entering into agreements include cost effectiveness, protection of privacy, and freedom from paternalistic scrutiny.²⁵⁹

6 *A Cost Effective Alternative?*

The option of a low cost alternative method of formalising a property settlement dispute including superannuation is an appealing one. However, the legislation about superannuation agreements is complex and requires legal advice in addition to the advice required in respect of financial agreements generally. Also the case law about financial agreements generally indicates that there are significant risks that can result in expensive legal proceedings for the parties.²⁶⁰ Where this occurs this defeats the purposes of providing a low cost option for resolving financial disputes to clients and reducing the demand on court resources by abrogating the responsibility of judicial oversight of agreements. In relation to the proposition that financial agreements provide separating couples with a cost effective option for

²⁵² Fehlberg and Smyth, ‘Prenuptial Agreements for Australia: Why Not?’, above n 232, 9–10.

²⁵³ Further Revised Explanatory Memorandum, Family Law Amendment Bill 2000 (Cth), Regulation Impact Statement.

²⁵⁴ See generally Ross Clare, ‘Developments in the Level and Distribution of Retirement Savings’ (Research Paper, ASFA Research & Resource Centre, September 2011).

²⁵⁵ See above 84–5.

²⁵⁶ Ibid.

²⁵⁷ See, eg, Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986) 199 (‘*Settling Up*’); John Dewar, Grania Sheehan and Jody Hughes, ‘Superannuation and Divorce in Australia’ (Working Paper No 18, Australian Institute of Family Studies, 1999) 19–25 (‘*1999 Working Paper*’).

²⁵⁸ *2008 Evaluation*, above n 228, 219–21

²⁵⁹ See, eg, Staindl and Bradley, above n 236, 188; Fehlberg and Smyth, ‘Pre-Nuptial Agreements for Australia: Why Not?’, above n 232, 10.

²⁶⁰ See, eg, *Hoult* (2011) FLC ¶93-489.

formalising a negotiated agreement, in fact agreements are expensive to prepare properly, especially prenuptial agreements.²⁶¹ It is recommended that lawyers obtain and make full disclosure and also keep a detailed file indefinitely.²⁶² The case law demonstrates the real risks of lengthy and expensive court proceedings in relation to financial agreements. Although courts have the power to determine the validity, enforceability and effectiveness of financial agreements²⁶³ and set them aside²⁶⁴ these are expensive and risky processes which, depending on the outcome, may also then result in property settlement proceedings at even greater cost.

7 Privacy and Freedom from Paternalistic Scrutiny

In relation to the proposition that privacy and freedom from paternalistic scrutiny are legitimate policy considerations courts should not be in the business of promoting unfairness. Generally the aim of a system of post separation property redistribution is the fair division of family wealth.²⁶⁵ These policy considerations are contrary to the goals of full disclosure and just and equitable outcomes that guide financial proceedings.

8 Conclusion

Because of the uncertainty, risk to women and costs associated with financial agreements including superannuation agreements consent orders are likely to be the safer and ultimately less costly alternative. Consent orders may be better placed to achieve certainty and fairness. It is conceivable that financial agreements may in future have a more limited application in relation to pre nuptial agreements.

However, an unsatisfactory possibility is that the complexity and expense of both financial agreements and consent orders as well as the prospect of contested proceedings may increase the pressure upon couples to resolve their financial affairs by way of informal agreements with all the risks that that entails. When men and women negotiate informal agreements without legal advice, and this remains a sizable group,²⁶⁶ they are least likely to consider superannuation when settling their property matters.²⁶⁷ In such circumstances superannuation will continue to be undervalued or overlooked by parties negotiating informal agreements.

Bailey-Harris had concerns that ‘there are real dangers in the over-zealous withdrawal of the State from family regulation. An uncritical adherence to a policy of private ordering may serve to perpetuate and exacerbate inequality between men and women within the family.’²⁶⁸ These comments are no less relevant in the post-reform superannuation context where it is accepted that women generally are still generally in a weaker position.

²⁶¹ Staindl and Bradley, ‘Binding Pre-Nuptial Agreements In Australia: The First Year’, above n 236, 197; Paul Staindl and Lisa Bradley, ‘Financial Agreements: Risks, Responsibilities and Rewards’ (2008) 13 *Current Family Law* 68–9.

²⁶² Staindl and Bradley, ‘Financial Agreements: Risks, Responsibilities and Rewards’, above n 253, 68–9.

²⁶³ *FLA ss90KA, 90UN*.

²⁶⁴ *Ibid ss 90K, 90UM*.

²⁶⁵ See, eg, Marsha Garrison, ‘What’s Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence’ (2011) 72 *Louisiana Law Review* 58.

²⁶⁶ *2008 Evaluation*, above n 228, 219–221, 226.

²⁶⁷ *Ibid* 221.

²⁶⁸ Rebecca Bailey-Harris, ‘Ideals of Equality in Family Law Reform’ (1996) 18(5) *Law Society of South Australia Bulletin* 22, 23.

VII PART VIII B — ORDERS

Part VIII B div 3 sets out the relevant provisions applicable to payment splitting or flagging by court order and is intended to apply in default of parties entering an agreement about superannuation. The seminal provision states:

90MS(1) [Property orders may include superannuation interests] In proceedings under section 79 or 90SM with respect to the property of spouses, the court may, in accordance with this Division, *also* make orders in relation to superannuation interests of the spouses.

Note 1: Although the orders are made in accordance with this Division, they will be made under either section 79 or 90SM. Therefore they will be generally subject to all the same provisions as other orders made under that section.

Note 2: Sections 71A and 90MO limit the scope of section 79.

Note 3: Subsections 44(5) and (6) and sections 90SB, 90SK and 90MO limit the scope of sections 90SM.

90MS(2) [Order must comply with this Part] A court cannot make an order under section 79 or 90SM in relation to a superannuation interest except in accordance with this Part.²⁶⁹

The REM verifies that s 90MS is intended to elucidate the relationship between the operation of s 79 and pt VIII B and explain the limitations upon making superannuation orders because there was uncertainty about this issue expressed during the consultation process.²⁷⁰ Thus an order about a superannuation interest cannot be made where there is a superannuation agreement in force, where a waiver notice has been served upon the trustee or where a payment flag is operating on the interest.²⁷¹ Also pt VIII, and therefore pt VIII B, does not apply where a financial agreement covers financial matters or resources.²⁷²

Section 90MS clarifies that pt VIII B is intertwined with pts VIII and VIII AB rather than a separate regime. Coupled with s 90MC which requires superannuation to be ‘treated as’ property for the purpose of the definition of ‘matrimonial cause’ and ‘de facto financial cause’,²⁷³ the intention appears to be that superannuation is to be dealt with in the same way as other property in property proceedings but subject to the specific requirements of pt VIII B. These provisions facilitate the valuation, flagging and splitting of superannuation. The nature of these provisions and the relationship between s 79 and pt VIII B has, however, been the subject of complex case law. Before examining this case law about the implementation of pt VIII B, an overview of the technical provisions relating to the making of orders about superannuation is required.

A *Forms of Payment Splitting Orders*

The amendments enable splitting orders to be made if the superannuation interest is an interest of the type to which pt VIII B applies, if the payment is not an unsplitable payment and if the interest is not prescribed as an unsplitable interest.²⁷⁴ Orders about superannuation can be made in relation to the majority of superannuation interests. Like agreements about superannuation, orders about superannuation cannot be made at large and although the

²⁶⁹ FLA s 90MS (emphasis added).

²⁷⁰ REM, above n 1, 29.

²⁷¹ FLA s 90M0.

²⁷² Ibid s 71A.

²⁷³ Ibid s 4(1) (definitions of ‘matrimonial cause’(ca), ‘de facto financial cause’(c)).

²⁷⁴ See above 73–4.

permissible forms of splitting order are intended to be similar,²⁷⁵ there are differences. In essence two types of orders can be made in relation to interests that are not percentage-only interests and two for percentage-only interests with some overlap.

1 Type (a) Orders (Non Percentage Only Interests)

The first type of order that can be made about non percentage-only interests is commonly referred to as a type (a) order,²⁷⁶ or a base amount splitting order.²⁷⁷ This type of order envisages that a base amount be allocated to the non-member out of the interest of the member spouse.²⁷⁸ The amount of the base amount must not exceed the value of the interest of the member spouse²⁷⁹ and is payable when the entitlement is paid to the member spouse in due course. If there is a delay before the interest is paid to the member spouse the base amount must be independently adjusted in accordance with pt 6 *FL(S)R*. There is no specific definition of base amount. By inference it is a cash amount.²⁸⁰ However, from time to time type (a) orders have been made on the basis of a percentage although this has not been the subject of considered analysis and would appear to be incorrect.²⁸¹ Section 90MT contains no equivalent provision to s 90MJ(1)(c)(ii) which allows an agreement to specify a method by which the trustee will calculate a base amount.

The type (a) order is not available for percentage-only interests, because, as discussed, the only appropriate approach to these interests is to divide the payments by reference to a percentage.²⁸² The type (a) order is usually appropriate where the superannuation interest is still in the growth phase. The member spouse may wish to continue to contribute to the fund and the type (a) order will fix the entitlement of the non-member spouse, apart from the adjustment of the base amount pursuant to the *FL(S)R*, with the result that the non-member spouse will not continue to benefit from the ongoing contributions of the member spouse. If the interest is in the payment phase and is received by way of pension payments then the type (a) order would be difficult to implement²⁸³ but may be possible.²⁸⁴

2 Type (b) Orders (Non Percentage-Only Interests and Percentage-Only Interests)

The second type of splitting order is a type of percentage splitting order. The type (b) order²⁸⁵ is available for percentage-only interests as well as non percentage-only interests and is an order that would usually be made if the interest is in the payment phase.²⁸⁶ The effect of the order is that the non-member spouse would be entitled to receive a specified percentage from each of the splittable payments paid to the member spouse whether they are lump sum or pension payments or both. The entitlement of the member spouse is reduced by that amount. If the interest is in the payment phase the member spouse has ceased to contribute and no

²⁷⁵ REM, above n 1, 29–30. Cf *FLA* ss 90MJ, 90MT.

²⁷⁶ Watts, Bourke and Taussig, above n 29, 153 coined the terminology type (a), (b) and (c) orders.

²⁷⁷ *FLA* s 90MT (1)(a).

²⁷⁸ *Ibid* s 90MT(4).

²⁷⁹ *Ibid*.

²⁸⁰ *FL(S)R* reg 45(2) provides that if the base amount includes a part of a dollar it should be rounded to the nearest whole dollar.

²⁸¹ See, eg, *Hayton & Bendle* [2010] FamCA 592 [24]–[25] where the form of the order appeared to be required by the fund and was sought by consent.

²⁸² Above 77–8.

²⁸³ Watts, Bourke and Taussig, above n 29, 155 although the authors opine that it would be theoretically possible.

²⁸⁴ *FL(S)R* reg 55(c).

²⁸⁵ *FLA* s 90MT(1)(b).

²⁸⁶ REM, above n 1, 30 [165].

issue arises of the non-member spouse benefiting from any ongoing contributions of the member. The quantum of the percentage will reflect the entitlement of the non-member spouse in the circumstances of each case. If this type of order is used in the growth phase then the non-member spouse will benefit from any ongoing contributions until such time as the order is implemented to the disadvantage of the member spouse. This type of order replicates the similar option in relation to agreements.

3 *Type (c) Orders (Percentage-Only Interests)*

The third type of order is the type (c) order which is a second type of percentage splitting order that is only available for percentage-only interests.²⁸⁷ The effect of this type of order is that only a portion of the accrued entitlement is paid to the non-member spouse.²⁸⁸ This is calculated by ascertaining the accrued benefit multiple as at separation and also as at the time of payment. The accrued benefit multiple as at separation will be fixed so that the non-member spouse will not receive the benefit of any post separation increase in the accrued benefit multiple which would increase the value of the interest. A similar option is available for agreements.²⁸⁹ The REM clarifies that the policy intention of the type (c) order is that the parties be able to split by percentage that portion of the interest built up during the course of the marital relationship.²⁹⁰ This option would generally be used where the interest has not attained full vesting and has therefore not undergone the extreme increase in value characteristic of these types of interests.

4 *Operative Time Requirements — Splitting Orders*

Unlike splitting agreements the operative time for splitting orders is not prescribed but is defined to be the time specified in the order.²⁹¹ It is the time when the trustee must recognise the order and, in appropriate cases, implement it. In the case of a base amount splitting order, the trustee must commence adjusting it until such time as the splittable payment is payable or until interest splitting occurs. The operative time can be retrospective for splitting orders²⁹² but not for splitting by agreement.²⁹³ It would generally be practical to have the date of valuation of the interest as the operative time²⁹⁴ but in *Stevens & Stevens*²⁹⁵ the Full Court found no error in the Federal Magistrate appointing an operative time that was four days after the date of the order in a case where both parties sought an operative time shortly after the date of service of the orders on the trustee.²⁹⁶

5 *Other S 90MT Issues*

In summary, the legislation enables payment splitting orders to be made.²⁹⁷ A splitting order must be either a base amount splitting order or one of two types of percentage splitting order. The type of order that is appropriate depends upon the type of interest and whether the

²⁸⁷ *FLA* s 90MT(1)(c).

²⁸⁸ *Ibid* s 90MT(1)(c), *FL(S)R* reg 26.

²⁸⁹ *FLA* s 90MJ(1)(b)(i).

²⁹⁰ REM, above n 1, 30 [168].

²⁹¹ *FLA* s 90MD (definition of 'operative time').

²⁹² See, eg, *A & A* [2006] FMCAfam 80 [123]–[125], [175]; *Dowdell & Public Trustee (NT)* [2007] FamCA 1276 [134].

²⁹³ *FLA* ss 90MI, 90MK, 90MLA(2)(c).

²⁹⁴ *Wilkinson & Wilkinson* (2005) FLC ¶93-222, 79,682–3 [62] ('*Wilkinson*').

²⁹⁵ (2005) FLC ¶93-246 ('*Stevens*').

²⁹⁶ *Ibid* 80,041 [47].

²⁹⁷ But see *Wilkinson* (2005) FLC ¶93-222, 79,683 [63]–[65] where the Full Court agreed that an order drafted as an interest splitting order could be corrected under the slip rule as a defect of form rather than substance.

entitlement is in the growth phase or the payment phase. In this respect the provisions are broadly similar to the provisions governing agreements about superannuation. The provisions governing orders about superannuation do not permit an order that specifies a method for calculating a base amount, an option which is available in respect of agreements.

Before making a splitting order the court is required to value the interest pursuant to the *FL(S)R* if the regulations provide for a method of valuation,²⁹⁸ or pursuant to an alternative method of valuation approved by the minister²⁹⁹ or by such other method as the court considers is appropriate.³⁰⁰

Finally, the court is given specific power to make such orders as it thinks necessary for the enforcement of splitting orders.³⁰¹ It would appear that enforcement of splitting orders may also be undertaken pursuant to the general power to enforce decrees in addition to the specific power.³⁰²

B Flagging Orders

The amendments also give the courts the power to make flagging orders in relation to superannuation that is not in the payment phase.³⁰³ A flagging order prevents a trustee from making a splittable payment³⁰⁴ in respect of the flagged interest without the leave of the court.³⁰⁵ It therefore provides no clean break.³⁰⁶ The trustee must notify the member spouse and the non-member spouse within the time specified in the order of the next occasion when a splittable payment becomes payable in respect of the interest.³⁰⁷

When considering a flagging order ‘the court may take into account such matters as it considers relevant and, in particular, may take into account the likelihood that a splittable payment will soon become payable’.³⁰⁸ This is not a requirement for flagging agreements. The court may consider it preferable, where superannuation is due to be paid soon, to defer any decision about superannuation by means of a flagging order³⁰⁹ and rather than rely on a valuation pursuant to the *FL(S)R*, await the actual value of entitlements such as defined benefit interests or partially vested accumulation interests.³¹⁰ The basis for flagging interests is not, however, confined by the legislation to these circumstances and has the potential to be of broader application.³¹¹ Also a flagging order must be just and equitable.³¹²

Once the trustee advises the member spouse and the non-member spouse of when the next splittable payment becomes payable the notification should trigger a relisting of the

²⁹⁸ *FLA* ss 90MT(2)(a), (2A).

²⁹⁹ *Ibid* s 90MT(3); *FL(S)R* regs 38, 43A.

³⁰⁰ *FLA* s 90MT(2)(b). See, eg, *Trott* (2006) FLC ¶93-263 for an example of the complexity that can result.

³⁰¹ *Ibid* s 90MT (1)(d). See generally, Bourke, *Super Splitting for Family Lawyers*, above n 218, 265–8.

³⁰² *FLA* s 105; Bourke, *Super Splitting for Family Lawyers*, above n 218, 265–8.

³⁰³ *FLA* s 90MU.

³⁰⁴ But see *FLA* s 90MUA.

³⁰⁵ *Ibid* s 90MU(1)(a).

³⁰⁶ Bourke, *Super Splitting for Family Lawyers*, above n 218, 243–4.

³⁰⁷ *FLA* s 90MU(1)(b).

³⁰⁸ *Ibid* s 90MU(2).

³⁰⁹ REM, above n 1, 31 [180]–[181].

³¹⁰ Watts, Bourke and Taussig, above n 29, 165.

³¹¹ Tom Altobelli, ‘Children’s Accommodation Needs & The Impact of the New Super Splitting Reforms’ (Paper presented at the Mid North Coast Regional Law Society Seminar, 13 September 2003) 4.

³¹² Bourke, *Super Splitting for Family Lawyers*, above n 218, 242.

proceedings by one of the parties. The member spouse will want the flag to be lifted and the non-member spouse will seek a splitting order.

Generally a flagging order is an alternative order to a splitting order. However, in *BAR v JMR*³¹³ a flagging order was made in conjunction with a splitting order. There the only outstanding issue was the superannuation entitlement of the husband which had been adjourned pursuant to s 79(5). A type (b) order was made in favour of the wife. A flagging order was also made to ensure that the leave of the court was required before the trustee could make a splittable payment in respect of the interest. This unusual step was taken to achieve a taxation advantage for the wife by preventing interest splitting occurring before the husband satisfied a condition of release. The intention was to ensure that the wife received her entitlement when the interest entered the payment phase instead of in the growth phase so that her entitlement ultimately received the same taxation treatment as her husband's entitlement. This is a novel if perhaps unintended use of the flagging order. No clean break was achieved and the flag would have to be lifted in due course.

The issue of the nature of a flagging order was considered further in *Mary & William*³¹⁴ a case where the husband advanced the argument that a flagging order is a final order under s 79 and not an interlocutory order made to protect the interest until a splitting order can be made. Benjamin J examined the REM and the terms of s 90MU and concluded that a flagging order 'can only be an interlocutory order'.³¹⁵

Anecdotally it has been suggested that a flagging order could be used as an enforcement tool against non compliance with an order, for example, for the payment of money where there is no other security against default. This view has not gained currency. Indeed flagging orders are infrequently made perhaps because the flag must be dealt with in due course. There is therefore no clean break and no final determination of the financial relationship between the parties. Flagging orders entail further expense for the parties, in particular, if the relationship between the parties is such that a consent order is unlikely to be made. Also there may be issues about circumstances intervening to the detriment of the non-member spouse. This may in part explain the unpopularity of this type of order.

C General and Miscellaneous Provisions

The balance of pt VIII B outlines provisions relating to trustee rights and obligations and miscellaneous matters.

1 Cancellation of Payment Splits / Waiver of Rights

The court has the power to make an order terminating a payment split where the relevant superannuation agreement is no longer in force and the non-member spouse has not served a waiver notice upon the trustee.³¹⁶ The order terminating a payment split only applies to splittable payments made after the order is made and not before.³¹⁷ This type of order would generally be made where the trustee has paid out the entitlement of the non-member spouse. Usually a prescribed waiver notice is signed by the non-member spouse in exchange for payment made in satisfaction of a splitting agreement. The effect of this is that the non-member is no longer entitled to receive any payment from splittable payments payable after

³¹³ (2005) FLC ¶93-231, 79,861.

³¹⁴ (2006) FLC 93-295.

³¹⁵ Ibid 81,010 [46].

³¹⁶ FLA s 90MV.

³¹⁷ Ibid s 90MV(2).

the date of the notice.³¹⁸ To be effective the waiver notice must be accompanied by a statement and certificate, signed by a prescribed financial adviser, to the effect that the non-member spouse has had independent financial advice about the financial effect of the waiver.³¹⁹ However, if the waiver is not signed, then the court has the power to terminate the payment split in relation to ongoing splittable payments. These provisions anticipate that funds may wish to take steps, outside the splitting regime, to terminate their obligation to the non-member spouse by transferring or rolling over funds or paying a lump sum in satisfaction of a payment split, to avoid the ongoing administration of the entitlement that would otherwise ensue.³²⁰

2 Deductions from Splittable Payments

Before calculating a payment split any deductions that the trustee is entitled to make must be deducted from the splittable payment.³²¹ A superannuation surcharge deduction is the type of deduction appropriately made from the splittable payment before calculating the payment split.³²²

3 Multiple Payment Splits

It is possible for one interest to be subject to more than one payment split because the member spouse has married, or been in a de facto relationship, and separated more than once. The trustee is required to implement payment splits in order of operative time, implementing the earliest in time first³²³ and after that applying the next in time to the balance and so on if there are more splits.³²⁴ The member spouse is then left with the balance after the multiple payment splits have been deducted which could ultimately be inadequate to the retirement needs of the member. This provision could operate to the detriment of a party having the benefit of a pre-startup time order about superannuation.

After the de facto reforms an added complication is that the trustee may be required to implement splitting orders in relation to a married non-member spouse and de facto non-member spouse or two de facto non-member spouses at the same time.

4 Fees Payable to Trustees

Trustees may charge reasonable fees in respect of an application for information, splitting, flagging and almost every conceivable action undertaken in relation to the operation of pt VIII B.³²⁵ Generally fees are paid equally by the member spouse and non-member spouse³²⁶ with two exceptions. Firstly, if the non-member spouse is to receive the whole of each splittable payment then the non-member spouse pays the whole fee.³²⁷ Secondly, where an application is made for information the applicant pays the fee.³²⁸ If any fee remains unpaid then the trustee is empowered to deduct it from the share of the superannuation interest of the

³¹⁸ Ibid s 90MZA; *FLSR* reg 60, sch 1, Form 5.

³¹⁹ *FLA* s 90 MZA(2), *FL(S)R* reg 60(2)(a),(b).

³²⁰ Watts, Bourke and Taussig, above n 29, 298.

³²¹ *FLA* s 90MW.

³²² REM, above n 1, 31 [186].

³²³ *FLA* s 90MX(2).

³²⁴ Ibid s 90MX(3).

³²⁵ Ibid s 90MY(1); *FL(S)R* reg 59(1).

³²⁶ *FL(S)R* reg 59(2)(a)

³²⁷ Ibid reg 59(2)(b).

³²⁸ Ibid reg 59(3).

liable person.³²⁹ A broad spectrum of generally modest fees has been levied by superannuation funds.³³⁰ The court has the power to determine the issue of reasonableness of fees but to date the exercise of this power has been negligible. The REM noted that there is generally no regulation of fees for work done in the superannuation industry because large funds may have the benefit of economies of scale and may not wish to levy any charge,³³¹ while small funds need to recover actual costs incurred.³³² The amendments reflect this position.³³³

5 *Superannuation Preservation Requirements*

Consistent with retirement incomes policy, any entitlement of the non-member spouse resulting from a splitting order or agreement is subject to the relevant preservation requirements to ensure that it is retained in the superannuation system.³³⁴ If the entitlement of the non-member spouse derives from a regulated superannuation fund or an approved deposit fund then it will be subject to the preservation requirements of the *SI(S)A*.³³⁵ If the entitlement emanates from a retirement savings account then it will be subject to the preservation requirements of the *RSAR*.³³⁶ If the entitlement originates from a constitutionally protected fund or exempt public sector superannuation scheme, which cannot be regulated by the *SI(S)A* regime, then the entitlement must comply with the applicable preservation provisions,³³⁷ which usually replicate the *SI(S)A* scheme of regulation.³³⁸

6 *Trustees to Provide Information*

The new regime obligates trustees to provide certain information, the detail of which is outlined in the *FL(S)R*, to facilitate the valuation of superannuation. Accurate valuation is one of the principal objects of the new regime and therefore this is a fundamental change. The information can be requested by ‘an eligible person’³³⁹ broadly defined to include a member of the eligible superannuation plan or the spouse³⁴⁰ of a member or a legal personal representative if a member or spouse is deceased. Finally, a person who intends to enter a superannuation agreement with the member is included in the category of eligible person thus enabling parties entering into a pre nuptial agreement or an agreement in contemplation of a de facto relationship, to obtain the information in order to properly negotiate the agreement. It is questionable whether this provision has a sufficient connection to the marriage power in relation to intended pre nuptial agreements, but as yet there has been no challenge to its constitutionality. Arguably, this category of eligible person is broad enough to enable information to be obtained simply by way of fishing expedition. However, knowingly making

³²⁹ *FLA s 90MY(2)*.

³³⁰ See, eg, Public Sector Superannuation Scheme, *Family Law and Splitting Super: How it's Done and What Happens Next*, <http://www.pss.gov.au> (\$150.00 per date for an application for information).

³³¹ See, eg, Unisuper, *Super and Family Law*, <http://unisuper.com.au> (no charge for information provision or for valuation for the purpose of implementing splitting orders or agreements — Chris Lamaris Unisuper (1800331685)).

³³² REM, above n 1, 32 [193]–[194].

³³³ *FLA s 90MY*.

³³⁴ *Ibid s 90MZ*.

³³⁵ *Ibid s 90MZ(1)*.

³³⁶ *Ibid s 90MZ(2)*.

³³⁷ *Ibid s 90MZ(3)*.

³³⁸ REM, above n 1, 33[200]–[202].

³³⁹ *FLA ss 90MZB(1), (8)*.

³⁴⁰ *Ibid s 90MD* (definition of ‘spouse’).

a false declaration is an offence with a significant penalty of up to 12 months imprisonment.³⁴¹

When making an application for information, which is usually by way of a form approved by the Principal Registrar called a Superannuation Information Form, a Form 6 Declaration must accompany the application.³⁴² This Declaration requires the applicant to declare that they are an eligible person and that the information is required either for the negotiation of a superannuation agreement or in connection with the operation of pt VIII B. Once the application has been received then the trustee is mandated to provide the information within a reasonable time.³⁴³ Failure to do so can result in a significant penalty.³⁴⁴

The *FL(S)R* may specify circumstances where a trustee is not required to comply with a request for information.³⁴⁵ To understand the exemption currently permitted by the *FL(S)R* it is necessary to examine the relevant definition of ‘trustee’³⁴⁶ which means, firstly, the trustee of an eligible superannuation plan or, secondly, if there is no trustee then any person identified in the regulations as the trustee³⁴⁷ or, thirdly, the person who manages the plan. Trustees have a number of functions including the management and administration of the plan and the making of payments.³⁴⁸ Some public sector plans divide the functions of the trustee so that the management and administration of the fund is made by one entity and the making of payments is made by another. The definition of ‘trustee’ is extended to include the person who is not the trustee but has the power to make payments to members.³⁴⁹ The latter person is called a secondary trustee. Currently the secondary government trustee is exempt from the requirement to provide information.³⁵⁰ This obligation will rest with the trustee having the management and administrative functions.

There are privacy provisions which apply in relation to the provision of information and there are penalties for any breach. The trustee is prohibited from providing to the non-member spouse information about the address, including postal address, of the member.³⁵¹ This provision takes into account safety issues that might be relevant to the member spouse. The trustee is also prohibited from notifying the member spouse that an application has been made for information with a similar penalty.³⁵²

Once the trustee has been served with a copy of the superannuation agreement, flag lifting agreement or splitting order then further obligations are imposed upon the trustees of certain eligible superannuation plans. The trustee must provide contact details to the non-member spouse; particulars about the nature of the entitlement of the non-member pursuant to the split; information about when the interest will become payable and details of any fees payable.³⁵³

³⁴¹ Ibid s 90MZG.

³⁴² Ibid s 90MZB(2)(a), *FL(S)R* reg 62, sch 1

³⁴³ *FLA* s 90MZB(3), *FL(S)R* reg 68B.

³⁴⁴ *FLA* s 90MZB(3).

³⁴⁵ Ibid s 90MZB(4).

³⁴⁶ Ibid s 90MD (definition of ‘trustee’).

³⁴⁷ *FL(S)R* reg 10 prescribes certain persons as trustees for the purpose of (b) of the definition of ‘trustee’ in s 90MD *FLA* who are not common law trustees. See Explanatory Statement, Family Law (Superannuation) Regulations 2001 (Cth), [regulation 10] (‘Explanatory Statement’).

³⁴⁸ Watts, Bourke and Taussig, above n 29, 268–9.

³⁴⁹ *FLA* s 90MDA.

³⁵⁰ *FL(S)R* reg 69.

³⁵¹ *FLA* s 90MZB(5).

³⁵² Ibid s 90MZB (6).

³⁵³ Ibid s 90MZB(7), *FL(S)R* reg 70.

7 *Effect of the Death of the Non-member spouse*

Where the death of the non-member spouse occurs after the operative time for the payment split, the payment split continues to operate in favour of and bind the legal personal representative of the deceased spouse, who has the same rights as the deceased spouse.³⁵⁴

8 *Procedural Fairness/Orders Binding on Trustees*

It is pivotal to the operation of the new regime that a pt VIIB order will be binding upon the trustee.³⁵⁵ However, the order cannot be made unless the trustee has been accorded procedural fairness.³⁵⁶ Additionally, the court may require that procedural fairness be accorded to the secondary government trustee.³⁵⁷ An order which is binding upon the trustee at the time it takes effect will also bind successor trustees.³⁵⁸ This addresses the possibility that the trustee may change between the date the order takes effect and the date when it is implemented. Thus, once the obligation to accord the trustee procedural fairness has been complied with, the order will bind current and future trustees and any secondary government trustee if the court so orders.

Procedural fairness is not defined by the legislation and the case law about the rules of natural justice must be considered.³⁵⁹ The rules of natural justice are flexible rules for the purpose of ensuring fairness in proceedings and will depend upon the circumstances of the case.³⁶⁰ In the superannuation context the trustee must be notified that an order about superannuation is sought and be given the opportunity to be heard in relation to the making of the order. This is because the making of the order imposes obligations upon the trustee in respect of which they should be forewarned.

An accommodating approach to compliance with the requirement of procedural fairness was taken in two early decisions.³⁶¹ However, these decisions were handed down soon after the commencement of the new regime at a time of transition and the obliging approach is no longer considered appropriate.³⁶² Currently an application for a splitting order is likely to fail in the absence of appropriate procedural fairness being accorded to the trustee.³⁶³ It has been observed that where an order is made about superannuation in the absence of compliance with the requirement of procedural fairness then this would constitute an error of law justifying an appeal. Such an order would be binding until set aside rather than void ab initio.³⁶⁴

Accordingly procedural fairness is the fundamental cornerstone upon which the regime of superannuation orders is based and the legislation clearly provides that the court cannot make

³⁵⁴ *FLA s 90MZC.*

³⁵⁵ *Ibid s 90MZD(1).*

³⁵⁶ *Ibid s 90MZD(1)(a).*

³⁵⁷ *Ibid s 90MZD(1)(b).*

³⁵⁸ *Ibid s 90MZD(2).*

³⁵⁹ See, eg, *Kioa v West* (1985) 159 CLR 550; *K and S & V* (2001) FLC ¶93-070.

³⁶⁰ See generally, Watts, Bourke and Taussig, above n 29, 189–92.

³⁶¹ *Anderson & Anderson* [2003] FamCA 635 (a telephone call by the lawyer to the trustee about an oral application for a flagging order within an hour before the hearing although earlier procedural fairness had been accorded in relation to other superannuation orders); *Kelly & Kelly* [2003] FMCAfam 180 (procedural fairness was overlooked, the trial had commenced and judgment reserved to the following day to enable compliance).

³⁶² *Fatt & Fatt* [2004] FMCAfam 254 [20] (*'Fatt'*).

³⁶³ *O'Connor & O'Connor* [2004] FamCA 392 [176]; *Woollams & Woollams* (2004) FLC ¶93-195, 79,252 [121] (*'Woollams'*).

³⁶⁴ *Fatt* [2004] FMCAfam 254 [8]–[12].

a binding order in relation to a superannuation interest unless procedural fairness has been accorded to the trustee first. The importance of this obligation is underlined by the fact that anecdotally, particularly when consent orders about superannuation are sought, trustees frequently require issues, usually of a mechanical nature, to be addressed prior to the making of an order.

9 *Service of Documents*

Any document to be served upon the trustee for the purposes of pt VIII B can be served in any of the ways permitted by the *FLR* in addition to any other method of service permitted by law.³⁶⁵ If the court makes an order binding the trustee then the party that sought the order must serve a copy of the order on the trustee³⁶⁶ except where such an order is sought by way of an Application for Consent Orders in which case pt 10.4 of the *FLR* makes no provision about the obligation to serve the order. Serious consequences can flow from a failure to serve or from a delay in serving the order³⁶⁷ and amendment is required to clarify this issue. However, if the person obliged to serve the order is self represented there could still be problems in the event of any failure to understand their obligations.

10 *Protection for Trustees*

Section 90MZE implements the policy that trustees should not be penalised for acting in good faith.³⁶⁸ Trustees are not liable for loss or damage sustained in reliance upon pt VIII B documents or court orders relied upon and acted upon in good faith. For example, if the trustee acts upon a forged superannuation agreement, the trustee will not be liable for any resulting loss or damage.³⁶⁹ As noted it is an offence to make a false declaration³⁷⁰ and this should provide some deterrent in relation to making false declarations.

11 *Prohibition against Terminating Employment Due to Superannuation Flagging or Splitting*

Section 90MZH contains a prohibition against discriminating against an employee because of a flagging or splitting order or agreement in relation to their superannuation. The termination of employment on these grounds is an offence and subject to penalty.

12 *Review: Pt VIII B — Orders*

Accordingly the court can now make binding orders in relation to superannuation if the parties are unable to negotiate their own agreement. Furthermore any orders about superannuation must be just and equitable which is not a requirement of superannuation agreements and is relevant to ability of the reforms to achieve fairness.

The capacity to make a variety of orders splitting superannuation is consistent with retirement incomes policy because when a splitting order is made the entitlement of the non-member spouse is also subject to the preservation requirements. The court is empowered to make splitting orders which broadly parallel the form of splitting agreements. The court can also

³⁶⁵ *FLA* s 90MZF.

³⁶⁶ *FLR* r 14.06(3) in relation to contested proceedings; *Federal Magistrates Court Rules 2001* (Cth) r 24.07(3).

³⁶⁷ Stephen Bourke, 'How to Avoid a Negligence Claim when Splitting Superannuation under the *Family Law Act 1975* (The Physiology of a Splitting Order)' (Paper presented at the 2011 Family Law Intensive, Adelaide, 13 August 2011) 13–18

³⁶⁸ REM, above n 1, 36 [235]–[236].

³⁶⁹ *Ibid.*

³⁷⁰ See above 80.

make orders flagging superannuation interests in the same way that agreements can flag superannuation interests. However, a precondition to the court being able to make binding orders about superannuation is that the trustee be afforded procedural fairness by being notified of the orders sought and being given a fair chance to object to them before they are made. There is no requirement that the trustee be accorded procedural fairness in relation to an agreement about superannuation.

Trustees are mandated to provide certain information about entitlements to enable valuations to be undertaken. The obligation to provide prescribed information facilitates the valuation of superannuation which is a requirement of making a splitting order unlike the position in relation to superannuation agreements. This reform assists women negotiating settlements to evaluate superannuation on the basis of its real value and achieve fair outcomes.³⁷¹ The obligation of trustees to provide information is subject to privacy restrictions and there are significant penalties for any breach. Protection is provided to trustees acting in good faith in the administration of the new regime.

These major changes are in marked contrast to the previous lack of regulation of superannuation in family law. On the face of the legislation superannuation is to be treated as if it were property for the purpose of property proceedings, a change designed to introduce much needed certainty and promote greater fairness.

VIII OVERVIEW OF THE *FAMILY LAW (SUPERANNUATION) REGULATIONS 2001 (CTH)*

The purpose of the *FL(S)R* is to create a system for the implementation of the provisions of pt VIII B. The provisions are comprehensive and complicated. In summary, the *FL(S)R* prescribe the obligations of trustees to provide certain information; prescribe the valuation of certain superannuation interests; specify the circumstances where trustees have finalised any obligation pursuant to a superannuation agreement or order; provide for the adjustment of an interest of the non-member spouse in certain circumstances pending the conclusion of the obligations of the trustee; and finally, prescribe methods of calculating payments to the non-member spouse in certain circumstances.

The following examination of the *FL(S)R* is intended to provide no more than a broad outline of the operation of the Regulations. It was noted by the creator of the new regime, '[t]he Regulations are extremely detailed and complex and deserve a comprehensive commentary of their own'.³⁷² Such a critique of the valuation of superannuation and the calculation of payments to the non-member spouse is beyond the scope of this thesis.³⁷³ Instead, the present examination is limited to exploring whether this system of uniform valuation methods for different types of superannuation results in consistent and realistic values for superannuation compared to the pre-reform law. The valuation methods for the more complex entitlements might be incomprehensible to men and women and require costly expert advice.³⁷⁴

³⁷¹ See generally above 95–6; below 107–9 about the possible costs involved in obtaining information and a valuation.

³⁷² Stephen Bourke, 'Family Law (Superannuation) Regulations 2001' (2001) 15 *Australian Journal of Family Law* 184, 184.

³⁷³ But see below 281 in relation to recommended future monitoring and review.

³⁷⁴ See generally above 94–5, below 108–9.

The overview abides by the outline of the *FL(S)R*.

A *Preliminary Provisions (Part 1)*

Although the *FL(S)R* are complex the route through the regulations is carefully charted. The preliminary part sets out the definitions that clarify the meaning of the concepts underpinning the operation of the amendments.³⁷⁵ It expands upon and is intended to be consistent with the definitions in pt VIII B.³⁷⁶ It defines the different types of superannuation covered by the regime. It also defines unflaggable and unsplitable interests³⁷⁷ as well as other concepts important to the operation of the scheme namely growth phase,³⁷⁸ payment phase,³⁷⁹ adjusted base amount³⁸⁰ and trustee³⁸¹ to name a few.

B *Payments that are Not Splittable Payments (Part 2)*

Splitting orders and agreements do not apply to all superannuation payments. As discussed, payments of a particular type made for special reasons of a compassionate nature or for incapacity or hardship cannot be split, although the underlying interest can still be the subject of a payment splitting order.³⁸² The risk of these types of payments being made and the possible impact upon the underlying interest are relevant to an assessment of whether a splitting order should be made especially if interest splitting is unavailable. Also certain payments to or on behalf of a child in the event of the death of the member spouse may not be splittable and may prevail over a splitting order or agreement in certain circumstances.³⁸³ Thus splitting orders or agreements are characterised by a degree of uncertainty for non-member spouses who are most frequently women. These risks must be considered and assessed when considering the option of splitting superannuation payments.

Also the circumstances when payments that would otherwise be splittable are not splittable are prescribed.³⁸⁴ These are payments made after the prior fulfilment of the obligation of the member spouse to the non-member spouse in respect of a splitting order or agreement. Either the trustee or the member spouse may take steps to pay the non-member spouse their entitlement prior to the member spouse satisfying a condition of release. Any splittable payment made to the member spouse after that time is 'spent' in respect of the non-member spouse. The Explanatory Statement confirms:

The purpose of the prescription of these payments is to bring to an end a payment split of an interest in favour of a particular separated or divorced non-member spouse where he or she has received the effect of the payment split in some other way at an earlier time than the member spouse's receipt of superannuation benefits.³⁸⁵

Thus the regime envisages that there be the flexibility for a splitting order or agreement to be implemented in advance of the time when a splittable payment becomes payable and provides protection to the member spouse in this situation. Any payment made in advance of a

³⁷⁵ *FL(S)R* pt 1.

³⁷⁶ *Ibid* reg 4.

³⁷⁷ See above 73–4.

³⁷⁸ *FL(S)R* regs 3 (definition of 'growth phase'), 6, 7.

³⁷⁹ *Ibid* regs 3 (definition of 'payment phase'), 8.

³⁸⁰ *Ibid* reg 3 (definition of 'adjusted base amount').

³⁸¹ *Ibid* reg 3 (definition of 'trustee'), *FLA* s 90MD (definition of 'trustee').

³⁸² See above 73–4.

³⁸³ See above 75.

³⁸⁴ *FL(S)R* reg 14.

³⁸⁵ Explanatory Statement, above n 347, [regulation 14].

condition of release must be of the properly calculated amount and, in relation to defined benefit interests, must not reduce the entitlement of other members of the plan or scheme.³⁸⁶

From this point on the *FL(S)R* prescribe the provision of information, the valuation of certain entitlements, the adjustment of base amount orders and agreements and the calculation of payments. They become progressively more detailed and difficult.

C *Implementation of Certain Splitting Agreements (Part 3)*

The valuation of an interest pursuant to the provisions of the *FL(S)R* is not mandated for splitting agreements. Therefore there is no need to obtain information about the interest using the relevant provisions of the *FL(S)R* applicable to court orders. It might be considered prudent, but it is not mandatory. This impedes the bargaining power of the non-member spouse and compromises his or her ability to negotiate a fair agreement given the historical reluctance of both men and women to properly take superannuation into account where they have not been legally advised to do so.³⁸⁷ The conclusion of a fair agreement for women must be a more difficult process notwithstanding the requirement for legal advice.

In any event because valuation is not mandatory for agreements the pathway through the *FL(S)R* can be shorter than for orders about superannuation. Nevertheless, the *FL(S)R* do regulate the treatment of the interest of the non-member spouse once the operative time commences for a payment split, unless the agreement specifies a percentage that is to apply to all splittable payments, in which case when a splittable payment becomes payable the payments are split in accordance with the agreed percentage.

Otherwise pt 3 prescribes the pathway. For base amount agreements the route depends upon whether the interest is in the growth phase at the date of service of the agreement³⁸⁸ or the payment phase.³⁸⁹ If the interest is in the growth phase the base amount must be appropriately adjusted from the operative time to the time when the splittable payment becomes payable.³⁹⁰

After adjusting the base amount the manner of payment must be calculated. This is significant if the initial splittable payment is insufficient to meet the quantum of the adjusted base amount. If it is insufficient then various complex methods are prescribed for the payment of any outstanding amount out of subsequent payments.³⁹¹ If the interest is in the payment phase then the calculation of the payment is prescribed and the methods are similarly complex.³⁹²

Where the interest is a percentage-only interest other than a superannuation annuity and the agreement specifies a percentage which does not apply to all splittable payments³⁹³ then pt 3 prescribes the formula for calculating the entitlement of the non-member spouse.³⁹⁴ The effect of the formula is that the agreed percentage applies to a portion only of the superannuation payment in effect segregating any post separation accumulation. This would not appear to be fair to the non-member spouse who may have made indirect contributions to the post

³⁸⁶ *FL(S)R* regs 14G(7), (7A), 14N(6A).

³⁸⁷ See, eg, *2008 Evaluation*, above n 228, 219–221, 226.

³⁸⁸ *Ibid* reg 16.

³⁸⁹ *Ibid* reg 17.

³⁹⁰ *Ibid* pt 6 div 6.1A.

³⁹¹ *Ibid* pt 6 div 6.2.

³⁹² *Ibid* pt 6 div 6.3.

³⁹³ *FLA* s 90MJ(1)(b)(i).

³⁹⁴ *FL(S)R* reg 19.

separation increase in value of the entitlement and appears to revert to a type of mathematical approach.

For percentage-only interests in the nature of a superannuation annuity the splittable payment is multiplied by the percentage specified in the agreement.³⁹⁵

Thus the *FL(S)R* ensure that base amount splits by agreement are adjusted if there is a delay before implementation, a protection that is inbuilt for percentage splits. As well if the first splittable payment is insufficient to meet the adjusted base amount then the non-member spouse is protected by provisions which ensure that subsequent splittable payments can be used to meet any outstanding adjusted base amount. However, because a prescribed valuation of the interest is not required the impact of these benefits may be reduced.

D Payment Splitting by Court Order (Part 4)

The *FL(S)R* provide for a more complicated pathway for splitting orders, from the provision of information, through to the valuation of the interest, then the adjustment of the interest and finally the calculation of the manner of payment. Separate provisions apply in respect of splitting orders although the pt 6 provisions in respect of the adjustment of base amounts followed by the calculation of the manner of payment apply to both orders and agreements.

Part 4 is specific to splitting orders and maps the pathway through these provisions. Separate provision is made for non percentage-only interests and percentage-only interests. For certain non percentage-only interests the relevant pt 5 valuation pathway is prescribed which depends upon whether the interest is in the growth phase³⁹⁶ or payment phase.³⁹⁷ Then the relevant pt 6 pathway is prescribed for the adjustment of a base amount and the calculation of the payment to the non-member spouse for non percentage-only interests in the growth phase³⁹⁸ and in the payment phase.³⁹⁹

In respect of percentage-only interests, the same formula is prescribed for the calculation of the entitlement of the non-member spouse in respect of a type (c) order as for agreements⁴⁰⁰ and is therefore subject to the same criticism. Also similar provision is made for orders about superannuation annuities as for agreements.⁴⁰¹ The result is that both valuation and adjustment processes are encompassed in one calculation.

In effect pt 4 has a similar charting function in relation to court orders as pt 3 in relation to agreements although additional charting is provided to the relevant information and valuation provisions.

E Valuation Determination (Part 5)

One of the main objectives of the amendments was to achieve fair and consistent valuations of superannuation especially the more complex entitlements such as defined benefit interests that have both vested and unvested components.⁴⁰² Prior to the amendments valuation of

³⁹⁵ Ibid reg 19A.

³⁹⁶ Ibid reg 22(1)(a).

³⁹⁷ Ibid reg 22(1)(b).

³⁹⁸ Ibid reg 23(2)(a).

³⁹⁹ Ibid reg 23(2)(b).

⁴⁰⁰ Ibid reg 26.

⁴⁰¹ Ibid reg 26A.

⁴⁰² REM, above n 1, 6.

superannuation was ad hoc and the consideration, if at all, of the value of superannuation, particularly any unvested component, was unclear. A standardised regime of valuation of these interests which takes account the value of any unvested component should result in values that are higher than the withdrawal or resignation values. This is generally, but not always, the case and can be affected by proximity to retirement. It is an issue that has resulted in debate. Nevertheless, proper valuation of these valuable interests should result in consistency and more realistic valuations both of which should normally benefit the homemaker unless otherwise eroded by the case law.⁴⁰³

Valuation of superannuation is now a mandatory step in the process of obtaining a splitting order and pt 5 provides direction through the relevant provisions of the *FL(S)R*. Before making a splitting order the court must determine the value of the interest.⁴⁰⁴ The approach taken depends upon whether there is a prescribed valuation for the interest or not. If not then the court ‘must determine the value of the interest by such method as the court considers appropriate’.⁴⁰⁵ This may require appropriate expert evidence.⁴⁰⁶ Part 5 does not apply to a small superannuation accounts interest⁴⁰⁷ the value of which is the account balance.⁴⁰⁸ Nor does pt 5 apply to a percentage-only interest.⁴⁰⁹ Similarly an interest in a self managed superannuation fund is excluded⁴¹⁰ and generally valuation of this type of interest requires valuation of the underlying assets.⁴¹¹ Also an interest in a regulated fund to be reconstructed or terminated need not be valued as presumably an accurate determination of value would be required by either process.⁴¹²

Otherwise a ‘determination of an amount’⁴¹³ must be undertaken and the amount determined in this way ‘is taken to be the value of the interest’.⁴¹⁴ Part 5 proceeds by separately regulating growth phase and payment phase interests.

1 *Growth Phase Interests*

A three step process for valuing superannuation interests in the growth phase, other than percentage-only interests, is prescribed.⁴¹⁵ The first step is to determine the gross value of the interest at the relevant date.⁴¹⁶ The second step is to deduct the amount of any earlier payment split and the last step is to deduct the amount of any surcharge debt in the most recent member information statement. Although the surcharge was abolished in relation to superannuation contributions made on or after 1 July 2005 surcharge debts will continue to be relevant for some considerable time into the future.

⁴⁰³ Chief Justice Diana Bryant, ‘Finding the Balance: Women’s Access to Superannuation after Marriage Breakdown’ (Paper presented at the Australian Women’s Lawyers Conference, Sydney, 29 September, 2006) 19.

⁴⁰⁴ *FLA* s 90MT(2).

⁴⁰⁵ *Ibid* s 90MT(2)(b).

⁴⁰⁶ See, eg, *Hayton & Bendle* [2010] FamCA 592.

⁴⁰⁷ *FL(S)R* reg 22(2)(a).

⁴⁰⁸ *Ibid* reg 24.

⁴⁰⁹ *Ibid* regs 27, 39.

⁴¹⁰ *Ibid* reg 22(2)(b).

⁴¹¹ See generally Stephen Bourke, ‘Splitting Self Managed Superannuation’ (Paper presented at the 13th National Family Law Conference, Adelaide, 6–11 April 2008) 339.

⁴¹² *FL(S)R* reg 22(2)(c).

⁴¹³ *FLA* s 90MT(2)(a).

⁴¹⁴ *Ibid* s 90MT(2A).

⁴¹⁵ *FL(S)R* reg 28.

⁴¹⁶ *Ibid* reg 3 (definition of ‘relevant date’).

The type of superannuation interest determines the relevant provisions for determining the gross value of the interest and pt 5 provides direction to the appropriate valuation method in the schedules⁴¹⁷ except for accumulation interests. The value of these interests is more simply determined and the member information statement or trustee statement of voluntary resignation value will suffice.⁴¹⁸ However, if both statements are before the court and the values differ the latter statement prevails.⁴¹⁹ The information in these statements is unlikely to provide an accurate basis for valuing a defined benefit interest.⁴²⁰

The valuation of combined superannuation interests is also prescribed.⁴²¹ For example, if a superannuation interest comprises a combination of a defined benefit interest and an accumulation interest then the value of the interest is calculated by valuing the defined benefit component and the accumulation component and adding them together.⁴²² Finally, the valuation of an interest that requires a comparative valuation of multiple types of superannuation or the deduction of an amount to be calculated from a valuation amount is prescribed.⁴²³

The valuation methods in schs 1A–6 were formulated by the Australian Government Actuary.⁴²⁴ They are based on a standard set of factors which may or may not reflect the circumstances in an individual case. In recognition of the fact that the prescribed valuations may result in injustice in certain circumstances the Minister can approve alternative valuation methods and factors⁴²⁵ which provide a more accurate valuation and which prevail over the standard valuation. Nonetheless, if no alternative valuation has been approved for determining the gross value of a particular interest then the use of the appropriate methodology prescribed by the regulations is mandatory where a splitting order is to be made.

Once any deductions for prior payment splits and surcharge are made, then this is the value of the interest. Any type (a) base amount order must not exceed this amount.⁴²⁶

2 *Payment Phase Interests*

A two step process is prescribed for valuing payment phase interests rather than a three step process⁴²⁷ because any surcharge is paid when the interest enters the payment phase. The first step is to determine the gross value of the interest and the second step is to deduct any earlier payment split.

Where the whole or remaining part of the benefit is payable as one or more lump sums then the value of the benefit is the withdrawal benefit.⁴²⁸ However, where the benefit is being paid

⁴¹⁷ Ibid see, eg, regs 29 (defined benefit interest), 32 (partially vested accumulation interest).

⁴¹⁸ Ibid reg 31. Regs 31(3)–(5) prescribe a method of calculating the value of an accumulation interest at a date other than the date of the member information statement or trustee statement of voluntary resignation value.

⁴¹⁹ Ibid reg 31(2B).

⁴²⁰ *Kapoor & Kapoor* [2010] FamCAFC 113 [82]–[95].

⁴²¹ *FL(S)R* regs 33 (combined defined benefit interest and accumulation interest), 34 (combined defined benefit interest and partially vested accumulation interest).

⁴²² Ibid reg 33.

⁴²³ Ibid regs 35–37.

⁴²⁴ Australian Government Actuary, *Superannuation and Family Law — Calculation of Superannuation Valuation Factors*, 25 February 2002.

⁴²⁵ *FLA* s 90MT(3); *FL(S)R* reg 38.

⁴²⁶ *FLA* s 90MT(4).

⁴²⁷ *FL(S)R* reg 40.

⁴²⁸ Ibid reg 41.

as a pension then the valuation method depends upon the type of pension.⁴²⁹ A valuation method is also prescribed where the benefit is payable partly as a pension and partly as a lump sum.⁴³⁰ As with growth phase interests the Minister may approve alternative valuation methods and factors but only for life pensions.⁴³¹

Valuation of an interest in the payment phase, even if it is not commutable, requires that a lump sum value be given to the interest. However, there is a conflict between acknowledging the significant value of these types of interests and recognising that they may never be capable of being paid as a lump sum. If a splitting order is to be made then a valuation is required even if the split is an equal one.

One commentator noted that:

The complexity of the new FL(S)R is primarily due to the desire to have legislation that provides universal coverage and will cater for all forms of superannuation. The complexity of the current legislation arises mainly because of the difficulties involved in valuing the defined benefit and hybrid superannuation interests.⁴³²

The valuation of certain interests, namely accumulation interests, allocated pensions and market linked pensions, is relatively uncomplicated. Conversely, the valuation methodology for defined benefit interests, partially vested accumulation interests, life pensions and fixed term pensions or hybrid interests containing one or more of these components is particularly complicated. A perusal of the relevant schedules discloses a complex array of actuarial formulae and tables.

The regime of valuation will have the greatest impact upon interests, other than the more straightforward accumulation interests, such as the defined benefit interests. It removes the element of judgment that was previously exercised by actuaries by providing ‘a standard methodology and standard factors (incorporating economic and demographic assumptions) for the valuation of the superannuation interest.’⁴³³ The regime of valuation captures the unvested component of these types of interests which previously had been an issue and was generally overlooked. It also enables a value to be ascribed to interests having a reversionary entitlement. These changes should benefit women by ensuring that these valuable types of interests are ascribed a proper value.

However, whether a prescribed valuation of superannuation is required in property proceedings where no splitting order is sought, and indeed whether it is to be treated as property at all in those circumstances, has been a contentious issue for the courts. If not then the efficacy of the amendments is compromised and a return to the previous position is possible for the significant number of former married and defacto couples who settle by agreement.

The regime of valuation is complex. There is a tension between achieving the objective of fairness in relation to the valuation of complicated superannuation interests and the

⁴²⁹ Ibid reg 42(2), sch 4 (life pension); reg 42(3), sch 5 (fixed term pension); reg 42(4) (allocated pension); reg 42(5) (market linked pension).

⁴³⁰ Ibid reg 43.

⁴³¹ Ibid reg 43A.

⁴³² Corinna Lueg, ‘Valuing the Superannuation Interest under the Family Law (Superannuation) Regulations – Practical Actuarial Perspective’ (Paper presented at the 10th National Family Law Conference, Melbourne, March 2002) 314 [5.2].

⁴³³ Ibid 310–11 [2.7]–[2.9].

complexity of the regime required to do so.⁴³⁴ Nevertheless, Chief Justice Diana Bryant recognised the importance of the regime of valuation because ‘it enabled not only consistency in valuation of particular funds but ensured that a realistic value is attributed to superannuation.’⁴³⁵

F Base Amount Adjustment and Payment (Part 6)

To reiterate pt 6 applies to both base amount splitting orders and agreements and has a dual function once the splitting order or agreement is concluded. Part 6 prescribes the ongoing adjustment of the base amount and also regulates the calculation of the payment to the non-member spouse when the splittable payment is payable.

1 Base Amount Adjustment

Where there is a delay between the operative time and the time when the splittable payment becomes payable, various methods of adjusting the base amount during that time are prescribed.⁴³⁶ The method depends upon the type of interest and whether it is in the growth phase or the payment phase. If interest splitting is unavailable the base amount will be adjusted until the splittable payment becomes payable. Even if interest splitting is available, if there is a delay between the operative time and the time of the interest split, then the base amount will be adjusted for that period. This adjustment is important for interests such as defined benefit interests where interest splitting may be unavailable. It is less significant for accumulation interests where interest splitting is available. It provides for growth of the entitlement of the non-member spouse in appropriate circumstances until such time as it is paid from the splittable payment. This is a significant protection for a non-member spouse who is required to wait for payment and also perhaps provides some incentive to the trustee or member spouse to pay out the entitlement in advance.

As previously discussed⁴³⁷ there is no detailed definition of ‘base amount’ which is described as the amount specified as the base amount in the order or agreement pursuant to pt VIIB.⁴³⁸ It can be inferred from the drafting of the legislation that it is a cash amount.⁴³⁹ For the purpose of adjustment different interest rates are prescribed for different types of superannuation interests.⁴⁴⁰ Also there are different adjustment periods.⁴⁴¹ The adjustment period is the financial year, the income year or allotment period of the fund.⁴⁴² The adjustment may be a positive, negative or zero depending upon the prevailing economic conditions.⁴⁴³ The trustee is obliged to make the adjustment for each adjustment period until such time as payment is made or the splitting order or agreement is otherwise concluded.

⁴³⁴ Danny Sandor, ‘To Have and To Hold Till The Super Do We Part – Women and Marital Separation: Superannuation Implications’ (Paper presented at the Economic Policy Summit on Women & Retirement Savings, University of New South Wales, 7 September 2001) 12.

⁴³⁵ Chief Justice Diana Bryant, above n 403, 19.

⁴³⁶ *FL(S)R* pt 6 div 6.1A.

⁴³⁷ See above 78, 90.

⁴³⁸ *Ibid* reg 45.

⁴³⁹ *Ibid* reg 45(2).

⁴⁴⁰ *Ibid* regs 45A(2), 45D.

⁴⁴¹ See generally Watts, Bourke and Taussig, above n 29, 275–7 ¶9-220.

⁴⁴² *FL(S)R* regs 45B, 45C.

⁴⁴³ *Ibid* reg 45A(2) *Note*.

2 *Payment of the Adjusted Base Amount*

Secondly, pt 6 prescribes the calculation of the payment of an adjusted base amount to the non-member spouse in particular where the initial splittable payment is insufficient to pay the adjusted base amount. The provisions are complex and depend upon whether the interest is in the growth phase⁴⁴⁴ or the payment phase.⁴⁴⁵

Where the amount of the first splittable payment is a lump sum which is equal to or greater than the adjusted base amount, then the non-member spouse is entitled to be paid the whole of the adjusted base amount from this amount.⁴⁴⁶ This extinguishes the entitlement of the non-member spouse who is not entitled to be paid any amount from any other splittable payment in respect of that interest.⁴⁴⁷

However, where there is no lump sum or there is an insufficient lump sum from which the entitlement of the non-member can be met the provisions are complicated. In summary, for growth phase interests the non-member spouse can elect to take all or any outstanding amount of the adjusted base amount by way of lump sum paid by commutation provided the commutation does not prevent the member from taking any remaining entitlement by way of pension. If only a portion of the adjusted base amount is paid, then the non-member spouse is entitled to be paid a proportion of the remaining splittable payments. The apportionment reflects the amount of the outstanding adjusted base amount in relation to the value of the interest after deducting the amount already paid to the non-member spouse.⁴⁴⁸ Thus the provisions for growth phase and payment phase interests are similar.

G *Information Provision Requirements /Miscellaneous Provisions (Part 7)*

Finally, pt 7 regulates general matters including the fees payable to the trustee⁴⁴⁹ and the waiver of rights under a payment split.⁴⁵⁰

Part 7 also specifies the information that must be provided by the trustee in response to an appropriate request for information. Access to information is another major change that has significantly benefited women by enabling proper valuations to be undertaken and facilitating informed decision making. Women can now contact the fund directly to access information on their spouse's or de facto's entitlements. The type of information that must be provided is dependent upon the type of superannuation interest and whether it is an interest in the growth phase or the payment phase. This information is used to calculate the value of the interest using the relevant method in the Schedules to the regulations. The complex information provision requirements reflect the actuarial assumptions and methodology underlying the various valuation methods.

The trustee is required to provide the particulars mandated by the regulations to the person making the request within a reasonable time.⁴⁵¹ The document providing the information is

⁴⁴⁴ Ibid pt 6 div 6.2.

⁴⁴⁵ Ibid pt 6 div 6.3.

⁴⁴⁶ Ibid regs 49, 56.

⁴⁴⁷ Ibid regs 49(3), 56(3).

⁴⁴⁸ See generally Explanatory Statement, above n 347.

⁴⁴⁹ *FL(S)R* reg 59.

⁴⁵⁰ Ibid reg 60.

⁴⁵¹ Ibid reg 68B(1).

evidence of the information stated in it and that it was provided to the person to whom it is addressed.⁴⁵²

Part 7 applies to specific interests, namely, accumulation interests including partially vested accumulation interests, defined benefit interests, percentage-only interests, self managed superannuation interests and small superannuation interests. Some of the information provision requirements are common to the different interests. Information common to all interests, with the exception of small superannuation interests, includes whether or not the interest is unsplittable;⁴⁵³ whether the interest is subject to a payment split or flag;⁴⁵⁴ the date of commencement of the member's service period;⁴⁵⁵ the date when the member first became a member of the plan;⁴⁵⁶ whether the interest is in the growth phase or payment phase;⁴⁵⁷ withdrawal benefit details if specifically requested;⁴⁵⁸ and details of any fees to be charged.⁴⁵⁹ Funds may charge reasonable fees for almost every conceivable action undertaken in relation to pt VIII B.⁴⁶⁰

Part 7 then prescribes information which is individual to the different categories of interests. These provisions are extensive. For example, for defined benefit interests in the growth phase information must be provided about the member's retirement age, accrued benefit multiple and salary, *inter alia*.⁴⁶¹

Part 7 also prescribes when the trustee is not required to provide certain information.⁴⁶² Where withdrawal benefit information is requested then no other information about the interest specified in the relevant regulation need be provided.⁴⁶³ Also if certain information is not in the possession, power or control of the trustee then the trustee is not required to provide it.⁴⁶⁴

While the regulations enable an applicant for information to specifically request that a trustee provide a gross valuation of the interest, this is at the discretion of the trustee. Otherwise, the calculation should be undertaken by a specialist legal practitioner, actuary or financial expert using the information provided by the trustee. These valuations will involve an additional cost for the parties. Usually a formal valuation is not required of an accumulation interest as the value stated in the member information statement will generally provide sufficient evidence of the gross value of the interest.⁴⁶⁵ This is unlike the position in relation to the cost of valuing a defined benefit interest and the cost of a forensic valuation of an interest in a self managed superannuation fund with a complex portfolio of assets which can be even higher. As with the valuation of any other asset an expert valuation of these types of interests will be at the expense of the parties. Also if these experts are required to be witnesses in contested

⁴⁵² Ibid reg 68B(2).

⁴⁵³ Ibid regs 63(2)(aa), 64(2)(aa), 66(2)(aa), 67(2)(aa).

⁴⁵⁴ Ibid regs 63(2)(a), 64(2)(a), 66(2)(a), 67(2)(a).

⁴⁵⁵ Ibid regs 63(2)(b), 64(2)(b), 66(2)(b), 67(2)(b).

⁴⁵⁶ Ibid regs 63(2)(c), 64(2)(c), 66(2)(c), 67(2)(c).

⁴⁵⁷ Ibid regs 63(2)(d), (e), 64(2)(d), (e), 66(2)(d), (da), (e), (eaa), 67(2)(d), (e).

⁴⁵⁸ Ibid regs 63(2)(ea), 64(2)(ea), 66(2)(ea), 67(2)(ea).

⁴⁵⁹ Ibid regs 63(2)(f), 64(2)(f), 66(2)(f), 67(2)(g).

⁴⁶⁰ See generally above 95. There may be no charge at all or a range of charges.

⁴⁶¹ Ibid reg 64(4).

⁴⁶² Ibid regs 63(6), 64(6), 66(6), 67(5).

⁴⁶³ Ibid regs 63(6)(a), 64(6)(a), 66(6)(a), 67(5)(a).

⁴⁶⁴ Ibid regs 63(6)(b), (c), (d), 64(6)(b), (d), 66(6)(b), 67(5)(b).

⁴⁶⁵ Ibid reg 31.

proceedings then additional costs will be incurred. Nevertheless these charges will generally be modest relative to the value of the interest being assessed.⁴⁶⁶

The information to be provided in relation to some types of interests highlights the exceptional level of detail required for the operation of the new regime. Once the information has been received then the appropriate valuation can be undertaken. The information will identify the nature of the interest and whether it is in the growth phase or payment phase. The relevant method of valuation can then be identified and applied.

H Valuation Methods — the Schedules

Valuation methods are prescribed for percentage-only interests in the payment phase,⁴⁶⁷ defined benefit interests in the growth phase⁴⁶⁸ and partially vested accumulation interests in the growth phase.⁴⁶⁹ Valuation methods are also prescribed for other interests in the payment phase namely life pensions;⁴⁷⁰ lifetime annuities;⁴⁷¹ fixed-term pensions;⁴⁷² fixed term annuities;⁴⁷³ and interests payable as a pension and future lump sum.⁴⁷⁴ The methods determine the gross value of the interest for the purpose of determining ‘the amount’,⁴⁷⁵ being the value of the interest for a splitting order.⁴⁷⁶ As noted the schedules provide no method of valuation for accumulation interests, small superannuation accounts and self managed superannuation funds.⁴⁷⁷ Also the prescribed valuation methods do not apply to all types of superannuation interests which can cause additional complexity, uncertainty and cost as is evident in *Trott*.⁴⁷⁸

A perusal of the prescribed valuation methods discloses the complexity of the task of valuing all forms of superannuation interest, and all components of the superannuation interest in question, to ensure that the full value of superannuation is considered in property proceedings. As discussed this is a significant development provided that the impact of the valuation regime is not otherwise eroded. While there are fees payable to valuers for undertaking valuations and can also be payable to trustees for obtaining the information necessary to undertake valuations and for implementing any splitting orders, these are usually modest when compared to the value of the superannuation under consideration.⁴⁷⁹ The complexity of the provisions was necessary in order to achieve consistent valuations.

⁴⁶⁶ See, eg, <http://www.supersplitting.com.au/services/advice//> for an example of a range of charges for services by a superannuation expert.

⁴⁶⁷ Ibid sch 1A.

⁴⁶⁸ Ibid sch 2.

⁴⁶⁹ Ibid sch 3.

⁴⁷⁰ Ibid sch 4.

⁴⁷¹ Ibid sch 4A.

⁴⁷² Ibid sch 5.

⁴⁷³ Ibid sch 5A.

⁴⁷⁴ Ibid sch 6 as modified by sch 7.

⁴⁷⁵ Ibid regs 28, 40.

⁴⁷⁶ *FLA* s 90MT (2), (2A).

⁴⁷⁷ See above 103.

⁴⁷⁸ (2006) FLC ¶93-263[97]–[102].

⁴⁷⁹ Ross Clare, ‘Equity and Superannuation — The Real Issues’ (Research Paper, ASFA Research & Resource Centre, September 2012) 10–11 for improvements in retirement savings from 2006–10. See above 95, 108–9.

1 *Defined Benefit Interests*

Prior to the amendments, the valuation of defined benefit interests required the assistance of an actuary or superannuation specialist to ensure that this type of interest was dealt with fairly. It was not common to obtain this type of advice.

Nevertheless, it has been noted that while standardised valuation methods and factors are now fixed by the new regime, specialist assistance is still required in relation to the application of the regulations which themselves are complex.⁴⁸⁰ This has now developed into common practice.

Schedule 2 sets out the method for determining the value of a defined benefit interest in the growth phase and is divided into seven parts. There is a preliminary part, three parts applicable where the interest is held as a result of employment in which the member spouse is still engaged⁴⁸¹ and three parts applicable where the interest is held as a result of employment in which the member spouse is no longer engaged.⁴⁸² A valuation of a defined benefit interest relies on both the prescribed information provided by the trustee and also the relevant tables. These are located in sch 2 which is long and complicated. Defined benefit interests are valuable interests and the methods of valuation ensure that the unvested portion of the interest is appropriately taken into account.

2 *Percentage-Only Interests*

A method of valuing a percentage-only interest in the payment phase in limited circumstances is prescribed.⁴⁸³ This method of valuation is only appropriate when a new interest is being created or an amount transferred or rolled over or paid or a separate entitlement arises for the non-member spouse. There are two options depending upon whether the benefit is payable only as a pension⁴⁸⁴ or whether the benefit is payable by way of pension and some other benefit.⁴⁸⁵

3 *Partially Vested Accumulation Interests*

Schedule 3 prescribes the method for valuing a partially vested accumulation interest in the growth phase. The valuation method takes account of the fact that this type of interest will increase in value over time when specified vesting points are reached. The full value of the interest is discounted to an extent which depends upon how far through the vesting period the interest is. The closer to full vesting the member spouse gets, the smaller is the discount applied to the fully vested value. Since the startup time additional standard vesting periods have been added which increases the likelihood that the valuation will be accurate. The vesting periods are now two, three, four, five, six, seven, eight, nine, 10, 15 and 20 years.⁴⁸⁶

⁴⁸⁰ Lueg, 'Valuing the Superannuation Interest ...', above n 432, 311 [3.3].

⁴⁸¹ *FL(S)R* sch 2 pt 2 (payable only as a lump sum), pt 3 (payable only as a pension), pt 4 (payable as a combination of lump sum and pension).

⁴⁸² *Ibid* sch 2 pt 5 (payable only as a lump sum), pt 6 (payable only as a pension), pt 7 (payable as a combination of lump sum and pension).

⁴⁸³ *Ibid* sch 1A.

⁴⁸⁴ *Ibid* sch 1A, sub-cl 3(1), 4(1).

⁴⁸⁵ *Ibid* sch 1A, sub-cl 3(2), 4(2).

⁴⁸⁶ *Ibid* sch 3, cl 4.

4 *Pensions and Annuities*

As noted valuation methods are prescribed for various pensions and annuities in the payment phase.⁴⁸⁷ A good example of the complexity of the methods is demonstrated by the method of valuing a life pension.⁴⁸⁸ It is relevant to the value of a life pension whether or not there is a reversionary interest which provides a benefit to another person upon the death of the member which increases the value of the interest. Also relevant is whether or not the pension is indexed and different valuation factors apply depending upon the type of indexation and whether or not the member is male or female. As well the age of the member spouse is relevant.

Similarly complex formulae provide for the valuation of lifetime annuities, fixed term annuities, fixed-term pensions and interests payable as both a pension and future lump sum.⁴⁸⁹

IX POST PAYMENT SPLITTING ISSUES

A *Obligations to Provide Information*

The non-member spouse in relation to a superannuation interest that is subject to a payment split or payment flag must provide to the trustee personal and contact details by way of a written, signed and dated reg 72 notice as soon as practicable and has an ongoing obligation to update these details.⁴⁹⁰

The trustee also has initial and ongoing obligations to provide information to the parties about the interest until such time as the payment split is implemented.⁴⁹¹ This is in marked contrast to the position before the amendments. If the non-member spouse had the benefit of an order adjourning the issue of superannuation until vesting or for an order for a payment to them upon the payment of the entitlement, they had no right to obtain information from the fund about when the entitlement was payable and were left to rely solely on the cooperation of the member spouse. Anecdotally this was not always forthcoming to the detriment of the non-member spouse. Now the provision of this information by the trustee enables the non-member spouse to monitor any interest which is a great advance.

B *Interest Splitting*

After service of the order or agreement upon the trustee the interest of the non-member spouse may remain in the family law system until a splittable payment becomes payable to the member spouse. For constitutional reasons the reforms are limited to facilitating payment splitting orders and agreements and do not extend to the splitting of interests.⁴⁹² Thus there may be no clean break. Nevertheless, there are a number of reasons why it is important to pursue the option of interest splitting if it is available which would enable a clean break to be achieved.

Interest splitting, which enables the interest of the non-member spouse to be severed from the entitlement of the member spouse, may be available in many cases but not pursuant to pt

⁴⁸⁷ Above 104–6. See generally Watts, Bourke and Taussig, above n 329, 225–35.

⁴⁸⁸ *FL(S)R* sch 4.

⁴⁸⁹ *Ibid* schs 4A, 5, 5A, 6.

⁴⁹⁰ *Ibid* reg 72.

⁴⁹¹ *Ibid* regs 70, 71; *SI(S)R* regs 2.36C, 2.36D.

⁴⁹² Above 63–4.

VIIIB or the *FL(S)R*. Interest splitting is implemented outside the family law system. For accumulation interests interest splitting will be available pursuant to the *SI(S)R*.⁴⁹³ Numerically, accumulation interests form a very high proportion of superannuation interests.⁴⁹⁴ This means that from a practical perspective a large proportion of splitting orders and agreements will be able to be implemented with little or no delay. Thereby a clean break will be achieved and any risks of delay will be ameliorated. This may be a significant factor in determining whether a splitting order or agreement should be made.

However, for interests other than accumulation interests, the interest of the non-member spouse must remain in the family system unless the relevant trust deed, governing rules or legislation have been amended to facilitate interest splitting which is not uncommon. Interest splitting should usually be undertaken as a matter of prudence where available.⁴⁹⁵ However, where it is not possible to achieve an immediate interest split then the non-member spouse must wait until a splittable payment becomes payable to the member spouse which introduces a degree of uncertainty and will impact mainly upon women.

Some of the reasons that highlight the importance of interest splitting and a clean break are outlined. The governing rules of the plan may permit the member to make a binding death benefit nomination nominating who should receive any death benefit.⁴⁹⁶ A splitting order pursuant to pt VIIIB would prevail if the nomination is in favour of an adult.⁴⁹⁷ However, payments after the death of a member spouse to or for the benefit of a child under the age of 18 years are not splittable payments.⁴⁹⁸ Therefore if the member spouse dies leaving a binding death benefit nomination in favour of a child and the non-member spouse fails to pursue the interest splitting option then the splitting order may be defeated.⁴⁹⁹

Where the non-member spouse is older than the member spouse, leaving the payment split in the family law system means that they must wait for the member spouse to satisfy a condition of release although they may have already reached that stage themselves. If an interest split is implemented and the non-member spouse has satisfied a condition of release then they can access their interest at the earlier time.

Finally, there may be a risk that the member spouse may reduce the entitlement, for instance by accessing it on hardship grounds, which may impact upon the entitlement of the non-member spouse.

C Preservation and Conditions of Release

Generally superannuation is required to be maintained for the purpose of retirement although it can be accessed earlier in certain circumstances.⁵⁰⁰ The preservation rules are designed to ensure the retention of the entitlement until a condition of release is met which is usually attaining the preservation age of 65 years.⁵⁰¹ Other prescribed conditions of release include

⁴⁹³ *SI(S)R* regs 7A.03A(1), (2), 7A.04(1). See also *RSAR* pt 4A which similarly provides for the splitting of retirement savings account interests that are the subject of a splitting order or agreement.

⁴⁹⁴ Bourke, *Super Splitting for Family Lawyers*, above n 218, 19 citing *APRA Annual Superannuation Bulletin*, 10 February 2010.

⁴⁹⁵ But see *BAR & JMR* (2005) FLC 93-231, 79,858, 79,861 [305].

⁴⁹⁶ *SI(S)A* s 59(1A).

⁴⁹⁷ *FLA* s 90MB.

⁴⁹⁸ *FL(S)R* reg 13.

⁴⁹⁹ See generally, Watts, Bourke and Taussig, above n 29, 54–5, 196–9, 303.

⁵⁰⁰ *SI(S)R* sch 1.

⁵⁰¹ *Ibid*.

retirement, death, suffering a terminal medical condition, severe financial hardship, compassionate grounds and permanent incapacity inter alia.⁵⁰²

When a condition of release has been satisfied then the benefit is paid as a lump sum or sums, pension or combination of both depending upon the design of the fund. These rules apply to most superannuation entities.⁵⁰³ The conditions of release prescribed by the *SI(S)R* are minimum restrictions. It is possible that some funds may impose additional requirements further restricting accessibility to the benefit.

The interest of the non-member spouse is subject to the preservation requirements unless a condition of release enables the payment of a lump sum at the time of the interest split pursuant to the *SI(S)R*. There is an exception to the rule that the interest of the non-member spouse is subject to the preservation requirements, where the superannuation interest which is the subject of the splitting order or agreement is being paid as a pension.⁵⁰⁴ Reasons of fairness militate against the member spouse being paid the entire pension after the operative time on account of the non-member spouse not having satisfied a condition of release.

Once a new interest has been created or a transfer or rollover effected in favour of the non-member spouse then this interest abides the circumstances of the non-member spouse and is paid when the non-member satisfies a condition of release.⁵⁰⁵ The interest of the member spouse is reduced by the amount of the value of the benefit to the non-member and by the fees payable by the non-member in respect of the payment split.⁵⁰⁶ The remaining amount of the interest of the member spouse is no longer splittable vis-à-vis the non-member spouse. The payment split is spent.

In brief the amendments ensure that as far as possible the non-member spouse retains the benefit of a splitting order or agreement for retirement purposes in the same way as superannuation generally. This is consistent with retirement incomes policy. If superannuation were to be routinely subject to splitting orders or agreements, then this could have a significant impact upon the homemaker spouse who might have immediate pressing needs after separation. The preservation requirements ensure that superannuation can be accessed early in very limited circumstances.⁵⁰⁷ Even where severe financial hardship can be established a very limited amount can be accessed each year which may be subject to taxation.

Thus even this brief examination of the *FL(S)R* reinforces the comments of Bourke in relation to the *FL(S)R* that '[c]omplexity breeds complexity. The new superannuation scheme will operate in a complex superannuation industry and the design of the scheme has attempted to capture all eventualities, making it complex as well.'⁵⁰⁸ The reforms have attempted to capture all eventualities in an effort to ensure consistency of treatment of superannuation in family law.

⁵⁰² Ibid.

⁵⁰³ James Leow, Shirley Murphy and Giles Hooper, *Australian Master Superannuation Guide* (CCH, 6th ed, 2002), 49 ¶3-010.

⁵⁰⁴ *SI(S)R* reg 7A.17.

⁵⁰⁵ Ibid reg 7A.16.

⁵⁰⁶ Ibid regs 7A.11(5), 7A.12(2), 7A.13(5). See also *FLA* s 90MY: *FL(S)R* reg 59.

⁵⁰⁷ Ibid sch 1 item 105.

⁵⁰⁸ Bourke, 'Family Law (Superannuation) Regulations 2001' above n 372, 190.

X THE FAMILY LAW SUPERANNUATION REGIME IN CONTEXT

The amendments provide a comprehensive response to a long history of well documented problems about the treatment of superannuation in family law proceedings. Prior to the commencement of the new regime a variety of approaches had been developed by the courts.⁵⁰⁹ However, the lack of consistency which resulted from matters being dealt with on a case by case basis was a common criticism. The preponderance of opinion was to the effect that superannuation was frequently overlooked or underestimated. Information about superannuation was not freely available to the non-member spouse. It was difficult to value and parties rarely obtained actuarial valuations.

Superannuation could be treated as a resource. Alternatively it was possible to make an order that the member spouse pay a portion of the superannuation to the non-member spouse upon receipt of the payment by the member spouse. An order of this type was not binding upon the trustee and the outcome of these orders was consequently uncertain. It relied on the member spouse to comply and in the event of non compliance the non-member spouse had expensive and possibly ineffectual remedies.

There were few legislative tools for dealing with superannuation.⁵¹⁰ From 1983 it became possible to adjourn proceedings if it could be shown that a significant change in financial circumstances of the parties would soon occur and that it was reasonable to adjourn because an order made then would be more likely to do justice between the parties. Change because of an impending superannuation entitlement is specified as a possible reason. Nevertheless, cooperation by the member spouse was integral.

The current regime introduced radical change. The regime enables the non-member spouse to obtain detailed information about the superannuation entitlement of the member spouse. The trustee is obliged to provide specific information mandated by the regulations upon receipt of an appropriate request. Failure to comply can result in a serious penalty being imposed upon the trustee.⁵¹¹ The non-member spouse can now obtain a valuation of most types of superannuation pursuant to the *FL(S)R*. Although parties to a superannuation agreement are not required to use the valuation provisions of the *FL(S)R* as a matter of caution they may choose to do so. A superannuation agreement provides an option for parties if the standardised valuation does not suit their personal circumstances. Furthermore, if the standardised valuation is not appropriate to the characteristics of a particular fund the Minister may approve alternative valuation methods and factors. Trustees may choose to provide a valuation pursuant to the *FL(S)R* in response to a request for information. If they do so then the information used to calculate the valuation must also be provided so that the calculation can be checked.

The new regime provides for splitting orders and agreements to bind trustees. The trustee then has various ongoing obligations to provide information, to adjust certain entitlements and to calculate payments in due course to name a few.

The capacity to split superannuation payments supports retirement incomes policy especially if routinely exercised in practice. However, in the event of equal, actual rather than notional, division of superannuation in every case retirement incomes policy would prevail, but the

⁵⁰⁹ See above 45–52.

⁵¹⁰ *FLA* ss 79(1)(e), (5), (6), (7), 75(1)(b), (f), (o).

⁵¹¹ *FLA* s 90MZB(3).

opportunity to achieve substantive equality for women could be missed.⁵¹² Such an approach may fall short of recognising the full opportunity costs of relationships and child rearing for women and could further produce unfairness in circumstances where the pool of assets is modest and the result is that the home must be retained by the member spouse or be sold rather than retained by a homemaker with a low income earning capacity. Where parties are wealthy and there are substantial s 4(1) assets and superannuation the legislative mechanisms described in this Chapter have the potential to fulfil both public and private sphere goals.

As will be demonstrated in the proceeding Chapters the position is not straightforward. The significant decisions disclose that the courts retain a flexible discretion and while splitting orders are not uncommon nor are they made as a strict general rule. Offsetting is still an option, and one that a majority of separated couples, with both equity in the family home and superannuation at the time of separation, choose to adopt.⁵¹³ The reasons why the option of offsetting continues to be favoured include the fact that it offers the flexibility to provide capital for housing for the homemaker party and it can be a cheaper, simpler option which does not involve satisfying the requirements of trustees.

Ultimately the increased powers of the courts to deal with superannuation, the standardised approach of the legislation to valuation which extends to most types of superannuation, the improved access to information about superannuation for family law purposes and the ability to achieve a clean break in many cases all constitute considerable improvements that are advantageous to women negotiating or disputing property settlements with a member spouse or de facto partner.

The final form of the amendments, as integrated in the chain of legal reasoning under pt VIII, will now be considered to assess whether the legislation delivers substantive equality in the outcomes generated. Further, whether the implementation of the reforms resulted in consistency, certainty and fairness in the redistribution of family wealth including superannuation, will also be examined in the proceeding Chapters. Having regard to the acknowledged parameters it was hypothesised that these would be the outcomes of the reforms.

⁵¹² See above Chapter 2, 34–8, for discussion on this issue.

⁵¹³ *2008 Evaluation*, above n 228, 222, Table 1; note that this figure of 71 per cent is based on the sub-sample totals indicated in the columns for those separated and divorced couples who considered superannuation when dividing property.

CHAPTER 5 PART VIII B IN OPERATION

I INTRODUCTION

The next step is to consider whether the application of this complicated new regime achieves the intended goals of consistency, certainty, clarity and fairness in the treatment of superannuation in property proceedings. While the superannuation reforms facilitate payment splitting the reforms provide no guidance about the circumstances in which payment splitting should be undertaken or about appropriate apportionment. Nor do the reforms provide explicit guidance about the impact of pt VIII B on the treatment of superannuation if no splitting orders are to be made. The broad discretion to alter interests in property remains and is exercised by considering a list of factors accorded no particular priority.¹ The implementation of the reforms and their assimilation into the discretionary process by the case law will therefore be assessed in Chapters 5 to 9. The impact of the amendments upon mitigating the disadvantage sustained by women pre-reform will be considered. While the number of disputes that proceed to trial is relatively small² these decisions are of considerable importance in providing guidance both for contested hearings and for negotiations carried out in the shadow of the law.³ Although the *2008 Evaluation* found that 65 per cent of respondents settled their property disputes without a court order⁴ it also found that engagement with the legal system was a significant factor affecting whether superannuation was taken into account.⁵

II SUPERANNUATION AS S 4(1) PROPERTY: THE RELATIONSHIP BETWEEN S 79 AND PART VIII B

The main objective of this Chapter is to examine the treatment of superannuation as property post reform. The expectation after the reforms was that superannuation would be treated as property in the same way as other forms of family wealth.⁶ The consequences of this categorisation upon the four step approach will be considered in subsequent Chapters. The approach of the courts to the treatment of superannuation as property is fundamental to the relationship between pt VIII B and s 79 and central to the success of the reforms.⁷ It was predicted that the treatment of superannuation as property after the reforms would introduce consistency in the way in which superannuation is treated in property settlement proceedings compared to other forms of family wealth. Prior to the reforms superannuation was not generally treated as part of the family wealth available for redistribution and also different types of superannuation were treated differently. Therefore there was no consistency about

¹ See *FLA* ss 79(2), (4), 75(2). *FLA* ss 90SM(3),(4), 90SF(3) are the equivalent provisions for de facto relationships.

² See, eg, Family Court of Australia, Annual Report 2009–10, 40 (10 per cent); 2011–12, 49 (12.9 per cent).

³ See, eg, *McLay & McLay* (1996) FLC ¶92-667, 82,901–2 (*McLay*).

⁴ Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post Reform Practice and Settlement Outcomes' (2008) 22 *International Journal of Law Policy and the Family* 206, 219 ('*2008 Evaluation*').

⁵ *Ibid* 221.

⁶ *Ibid* 215 (the data analysis for the *2008 Evaluation* included the value of superannuation in a single pool of property available for redistribution).

⁷ See generally Chapter 1.

the treatment of superannuation compared to other assets and it was anticipated that the reforms would result in change.

A *Jurisdiction Revisited*

Jurisdiction is conferred upon courts with respect to matrimonial causes and de facto financial causes⁸ which are defined to include proceedings between the parties to a marriage or de facto relationship with respect to the property of the parties or either of them.⁹ Property is defined to mean property to which the parties to a marriage or de facto relationship, or either of them, are entitled whether in possession or reversion.¹⁰ Courts exercising family law jurisdiction have the power to alter the property interests of parties to a marriage or de facto relationship.¹¹ The problem with considering superannuation in property proceedings prior to the commencement of pt VIII B was that generally it was not considered to be property until it was actually received by the member spouse¹² despite a broad interpretation of the s 4(1) definition.¹³ The various methods and approaches of the courts to the problem of how to take superannuation into account before the commencement of pt VIII B have been previously examined.¹⁴

Although Fogarty J in *Crapp*¹⁵ noted that it would be possible to amend the definition of ‘property’ in s 4(1) to include contingent interests thus encompassing superannuation that was not immediately realisable, nevertheless the definition remained unchanged after the amendments. Likewise, the definition of ‘matrimonial cause’ for the purpose of property proceedings remained unchanged. Nor was s 79 amended to clarify whether superannuation is now ‘property’ or ‘treated as property’ whether or not a pt VIII B order is to be made. As well the objects clause provides no indication of whether superannuation is ‘property’ after pt VIII B.

Rather the link between the power to alter the interests of parties in their property and pt VIII B is provided by s 90MC which provides that superannuation is now to be treated as property for the purpose of the definitions of matrimonial cause and de facto financial cause. Superannuation is now ‘to be treated as property’ for the purposes of the definitions of ‘matrimonial cause’ and ‘de facto financial cause’ and s 90MC contains no qualification.¹⁶ This has been of considerable significance in the leading decisions. Thus the amendments have the effect of expanding the jurisdiction of the courts to deal with superannuation rather than deeming superannuation to be property.

In this way courts with jurisdiction in relation to matrimonial causes and de facto financial causes can deal with superannuation in accordance with pt VIII B. Any court orders about superannuation must be made under ss 79 or 90SM but in accordance with pt VIII B div 3 which enables courts to make different types of splitting orders as well as flagging orders

⁸ *FLA* ss 31, 39, 39B.

⁹ *FLA* s 4(1) (definitions of ‘de facto financial cause’ para (c), ‘matrimonial cause’ para (ca)). See generally *Graf & Graf* [2005] FamCA 240 (‘*Graf*’), [45]–[51], *Coghlan & Coghlan* (2005) FLC ¶93-220, 79,654–5 (‘*Coghlan*’).

¹⁰ *FLA* s 4(1) (definition of ‘property’).

¹¹ *FLA* ss 79, 90SM. See *Harris v Caladine* (1991) FLC ¶92-217, 78,493 for a discussion of the distinction between ‘jurisdiction’ and ‘power’.

¹² *Crapp & Crapp* (1979) FLC ¶90-615 (‘*Crapp*’); Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2000 (Cth) 4 (‘REM’).

¹³ Above 43–5.

¹⁴ Above 45–52.

¹⁵ (1979) FLC ¶90-615, 78,181–2.

¹⁶ *FLA* s 90MC.

inter alia.¹⁷ Superannuation is therefore subject to the ss 79 and 90SM discretionary process¹⁸ and an appraisal of the treatment of superannuation in the exercise of this discretion will be undertaken.

In summary the power to alter the entitlement of a member spouse to a superannuation payment emanates from ss 79 and 90SM but is exercised in accordance with div 3 and the jurisdiction to do so is extended by s 90MC.¹⁹

B The Significance of the Four Step Approach Reiterated

The relationship between pt VIII B and s 79 as interpreted by the case law is also relevant to the success of the reforms in achieving the goals of certainty, clarity and fairness in the treatment of superannuation in property settlement proceedings. It was expected that the consistent treatment of superannuation of different types and varying values as property at step one would potentially expand the family wealth available for distribution to include superannuation to which women had made a contribution.²⁰ The case law about the treatment of superannuation as property, and its implications for the respective evaluative parameters, will be considered in this Chapter. The impact upon the four step approach is evaluated in subsequent Chapters. A brief overview of the four step approach is presented below.

As noted,²¹ in the broader context the discretion to make appropriate orders altering property interests is extensive but circumscribed both by the legislation²² and by the case law that has developed to rationalise the process. Although the exercise of discretion in property proceedings previously proceeded as a three step exercise²³ it is now acknowledged to be a four step process.²⁴ However, Watts J in *Trott* said:

[t]here is no reference to “steps” in Section 79 Family Law Act. Steps are a gloss created by case law in order to give some logical and predictable order to the consideration of matters under Section 79 Family Law Act.²⁵

Nonetheless, the four step approach is acknowledged to be the ‘preferred approach to the determination of an application brought pursuant to the provisions of s 79’²⁶ although there may be circumstances justifying a departure from this approach. The Full Court in *Krassas & Krassas* said:

We do of course accept that there does remain open to a trial Judge the opportunity under the Act, not to adopt the step process in the generally accepted manner. While an alternate process has dangers and normally is avoided it exists subject to there being reasons provided for such departure.²⁷

¹⁷ *FLA* s 90MS.

¹⁸ Stephen Bourke, ‘Super Splitting — Two Years On: Case Law Review’ (Paper presented at the 14th Annual Family Law Masterclass, Sydney, 10–11 May 2005) 1.

¹⁹ Stephen Bourke and Peter Murphy, ‘The Place of Part VIII B in the s 79 Process After *Coghlan*’ (2006) 12 *Current Family Law* 62, 63; George Brzostowski, ‘Superannuation after *Coghlan*: One Pool or Two? The Distinction with a Difference’ (2006) 19 *Australian Family Lawyer* 18, 18.

²⁰ Above 12–13.

²¹ Above 7.

²² *FLA* ss 79(2), (4), 75(2), 90SM(3), (4), 90SF(3).

²³ *Ferraro & Ferraro* (1993) FLC ¶92-335, 79,560 (*‘Ferraro’*); *Clauson & Clauson* (1995) FLC ¶92-595, 81,907 (*‘Clauson’*); *McLay* (1996) FLC ¶92-667, 82,896.

²⁴ *Russell v Russell* (1999) FLC ¶92-877, 86,439 (*‘Russell’*) affd *JEL & DDF* (2001) FLC ¶93-075, 88,332 [140–2]; *Hickey & Hickey & A-G (Cth)* (2003) FLC ¶93-143, 78,386 [39] (*‘Hickey’*).

²⁵ (2006) FLC ¶93-263, 80,469–70 [175].

²⁶ *Hickey* (2003) FLC ¶93-143, 78,386 [39].

²⁷ [2005] FamCA 803 [66].

It has also been noted that the four steps ‘are seen as “inter-related” and not necessarily rigidly compartmentalised’.²⁸ Nevertheless, it is not disputed that s 79 requires certain matters to be considered and currently the four step approach has been endorsed for the consideration of these matters.

The first step involves identifying and valuing the assets, liabilities and financial resources of the parties at the date of the hearing.²⁹ This defines the subject matter of the discretion.

The second step requires an assessment of the contributions of the parties.³⁰ The provisions have a mainly retrospective focus. The direct and indirect financial and non-financial contributions to the acquisition, conservation or improvement of the property of the parties must be assessed.³¹ As well, any contributions by a party to the welfare of the family, including any contribution made in the capacity of homemaker or parent, must be evaluated.³² The second step also requires a decision to be made about whether to undertake the global approach or asset by asset approach to the assessment of the contributions of the parties. Any appropriate adjustment at this stage is generally expressed in percentage terms. The process is not a mathematically precise exercise. Nevertheless, it will be contended that some degree of precision is justified to clarify the reasoning behind any conclusions about superannuation.

The third step entails considering additional factors which are generally future focussed factors of an economic nature.³³ These factors can result in a further adjustment following step two. The effect of any proposed order upon the earning capacity of either party to the marriage must be considered.³⁴ Any relevant spousal maintenance factors must be considered including financial resources.³⁵ Any other family law order affecting a party to a marriage or a child of the marriage must be considered³⁶ and, lastly, any child support paid or payable is relevant.³⁷

Finally, the fourth step requires consideration of whether the order, not just the overall division arising from a consideration of the first three steps, is just and equitable in all the circumstances.³⁸

The discretion to alter interests in property is broad but nevertheless constrained by these prescribed factors as well as the case law relating to them. The exercise of the discretion is also dependent upon all of the circumstances of each individual case. There is no presumption of a starting point of equality of division of assets even in long marriages³⁹ and no compensation for the economic loss occasioned by the marriage is mandated.⁴⁰ To sum up,

²⁸ Bourke and Murphy, above n 19, 62 (citation omitted).

²⁹ See below Chapter 6.

³⁰ See below Chapter 7.

³¹ *FLA* ss 79(4)(a), (b), 90SM(4)(a), (b).

³² *Ibid* ss 79(4)(c), 90SM(4)(c).

³³ See below Chapter 8.

³⁴ *Ibid* ss 79(4)(d), 90SM(4)(d).

³⁵ *Ibid* ss 79(4)(e), 90SM(4)(e). See generally, *Coghlan* (2005) FLC 93-220, 79,655 [145].

³⁶ *FLA* ss 79(4)(f), 90SM(4)(f).

³⁷ *Ibid* ss 79(4)(g), 90SM(4)(g).

³⁸ *Ibid* ss 79(2), 90SM(3); *Russell* (1999) FLC ¶92-877, 86,439 [80]. See below Chapter 9.

³⁹ *Mallet & Mallet* (1984) FLC ¶91-507 (*‘Mallet’*). But see *McLay* (1996) FLC ¶92-667, 82,901–2 which arguably attempted to create a prima facie guideline of equal shares at step two.

⁴⁰ Chief Justice Diana Bryant, ‘Finding the Balance: Women’s Access to Superannuation after Marriage Breakdown’ (Paper presented at the Australian Women’s Lawyers Conference, Sydney, 29 September 2006) 41–45. But see *Douglas & Douglas* [2006] FamCA 245 [41]–[59] (*‘Douglas’*).

‘the approach taken by courts exercising jurisdiction under the Family Law Act is highly discretionary and individualised.’⁴¹

III APPROACH

Since the startup time, significant decisions have been made about the operation of pt VIII B in s 79 proceedings which will be considered and which are relevant also to s 90 SM proceedings in relation to de facto relationships. The related issue of the effect of pt VIII B on the four step approach to property proceedings will also be considered. The present doctrinal analysis presented in Chapters 5 to 9 concentrates on litigated outcomes from the startup time in 2002 until 2011 with a view to identifying the law and describing the principles and guidelines that underpin how superannuation is taken into account post reform in contested proceedings.⁴² This is in contrast with the *2008 Evaluation* — a socio-legal and empirical analysis — which broadly sampled settlements reached with varying degrees of involvement with the legal system between 2002 and 2006, and focussed on men’s and women’s self reports of the process of settling their property matters and the outcomes of that process.

The cases have been selected on the basis of relevance to the evaluation of the four step approach when applied to superannuation,⁴³ and on the basis of the significance of the decisions. Initially after the amendments there was little significant case law. Nevertheless the early case law provides the background context for the emergence of subsequent principles and guidelines that have stabilised. In particular, the treatment of superannuation as property rapidly became a prominent issue. This early case law has been précised. Subsequently, as would be expected given the increasing prevalence of superannuation, there has been a proliferation of decisions.

The analytical approach adopted is to consider the two seminal reported Full Court decisions of *Hickey*⁴⁴ and *Coghlan*⁴⁵ at length because of the significant influence that these decisions have had upon the subsequent development of the case law. The balance of the case law has also been considered because it provides guidance about the implementation of pt VIII B in the light of these key decisions. This includes particular cases that have achieved prominence in the case law or the scholarly literature. The principles and guidelines have been distilled from the entire analysis of the case law.

A range of judicial decisions are examined including both first instance and appellate decisions. The case law includes the reported decisions of the Full Court of the Family Court during this period as well as significant reported and unreported single instance decisions of the Family Court and Federal Magistrates Court.⁴⁶ Where necessary for completeness, single instance decisions that precede Full Court decisions have been considered.

⁴¹ Chief Justice Diana Bryant, above n 40, 11. See generally Marsha Garrison, ‘What’s Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence’ (2011) 72 *Louisiana Law Review* 57 for a discussion about individualised and rule based distributional models of property distribution after separation.

⁴² Above 2.

⁴³ See Chapters 1 and 2 for the parameters, policy goals and equality standard against which the post-reform law is evaluated.

⁴⁴ (2003) FLC ¶93-143.

⁴⁵ (2005) FLC ¶93-220.

⁴⁶ The Federal Magistrates Court was renamed the Federal Circuit Court of Australia from 12 April 2013 (*Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth)).

Supplemental appendices present information in tabular form relevant to:

- (1) the assessment of contributions and the results of that assessment pre and post the *Coghlan* decision;⁴⁷
- (2) the step three adjustment and the results of that adjustment pre and post the *Coghlan* decision;⁴⁸ and
- (3) step four orders and the impact of such orders on overall adjustments and retention of the family home pre and post the *Coghlan* decision.⁴⁹

This information is condensed from the case law in transparent table form for ease of consideration in preference to extensive footnoting.

The tabulated results of the assessment of contributions pre and post *Coghlan* are considered in the Chapter 7,⁵⁰ and the tabulated results of the evaluation of step three pre and post *Coghlan* are considered in Chapter 8.⁵¹ The results of the impact of step four pre and post *Coghlan* are considered in Chapter 9.⁵²

The appendices also include information about the percentage adjustments resulting from the evaluation of steps two three and four in the cases considered. However, it is acknowledged that there are limitations in relation to what can be extrapolated from the percentage figures because of factual variations and the multiplicity of factors that come in to play in arriving at percentage outcomes. Furthermore the approach is neither a quantitative analysis nor a mathematical approach although the results may signpost further future research of this nature. Nonetheless the legal principles that have been identified have the potential to generate unfair outcomes for women.

The diversity of circumstances present in each case means that the outcomes of the cases sampled cannot be directly compared. Nevertheless particular cases or groups of cases do qualitatively reveal trends in outcomes relevant to the framework of this evaluation. By analogy with the qualitative research approach, this analysis embodies the same constraints in generalising findings beyond a single case or group of cases under consideration.

In reference to the present doctrinal research method, generalisability is best thought of as a 'fit' between the cases studied and others to which the concepts and conclusions of the present analysis might be applied.⁵³ A detailed description of select cases is necessary in order to facilitate an informed judgement about the issue of fit.⁵⁴ A detailed presentation of select cases is included in Chapters 5, 6, 7, 8 and 9 to demonstrate the impact of the reforms after *Coghlan* upon the four step approach. These cases also illustrate in depth how the apparent trends in outcomes are derived through the discretionary process, given the specific circumstances of the parties.

⁴⁷ See Appendices 1, 2, 3, 4, 5.

⁴⁸ See Appendices 6, 7, 8, 9, 10.

⁴⁹ See Appendices 11, 12.

⁵⁰ Below 182–3.

⁵¹ Below 202, 205–7.

⁵² Below 224, 228, 230.

⁵³ See generally Janet Ward Schofield, 'Increasing the Generalizability of Qualitative Research' in A Michael Huberman and Matthew B Miles (eds) *The Qualitative Researcher's Companion* (Sage Publications, 2002) 198–9.

⁵⁴ *Ibid.*

It is thereby recognised that a study of case law, particularly in the exercise of a broad discretion, will have limitations.⁵⁵ It is also acknowledged that the sample of decided cases may be small per se. Nevertheless the sample constitutes a significant if imprecise proportion of superannuation cases decided during the relevant period. The cases are influential because they shape the conduct of contested proceedings and provide guidance to the judiciary and the legal profession.⁵⁶ They also inform negotiations in cases that do not proceed to trial although the extent of that influence is unclear. There is a lack of access to information on non-litigated outcomes because former couples who reach agreement outside of the court system are a relatively under-researched group. Therefore it is not within the scope of this thesis to examine how the settled state of the reforms are interpreted and applied ‘at the periphery of regulatory influence’⁵⁷ although the *2008 Evaluation* concluded that engagement with the law and the legal system was an important factor affecting the treatment of superannuation after separation.

IV EMERGING THEMES — EARLY CASE LAW

A review of the early first instance case law reveals that important issues about the treatment of superannuation in the exercise of the s 79 discretion started to emerge almost immediately after the startup time. The cases demonstrate both areas of consistency and divergence.

Prior to the first seminal Full Court decision the early decisions were consistent in one respect, namely, that due to the drafting of s 90MS splitting orders are not obligatory in every case. Parties are not required to seek orders about superannuation and the court retains the discretion whether to make such orders or not. However, the relevant provisions of pt VIII B and the *FL(S)R* must be complied with when splitting orders are made and therefore valuation is mandatory. The drafting of the legislation is unambiguous and there has been no subsequent dissent about this in the Full Court decisions that followed.

Less clear was the impact, if any, of pt VIII B on the treatment of superannuation if no order about superannuation was sought or made. This is a very significant issue and posed a considerable obstacle in the way of the effectiveness of the amendments. Early views varied.

At one extreme, the decision of *Crown & Yarnold*⁵⁸ considered pt VIII B to be a complete code for the treatment of superannuation in family law whether or not an order about superannuation is sought or made. May J concluded that superannuation must now be treated as an asset and not as a resource after the amendments.⁵⁹ Her Honour agreed with Stephen Bourke, the architect of the amendments, that an order that superannuation be retained by the member is still an order about superannuation requiring compliance with the valuation regime.⁶⁰ This is because a proper value must be ascribed to superannuation, even where it is to be retained, to enable an appropriate offset of the interest against other assets. Bourke pointed out that if parties have several superannuation interests and only one is to be the subject of a splitting order, it is not logical to value this interest pursuant to the legislation and

⁵⁵ See above 16–17 for constraints.

⁵⁶ Marsha Garrison, ‘How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making’ (1996) 74 North Carolina Law Review 401, 432.

⁵⁷ *2008 Evaluation*, above n 4, 213.

⁵⁸ [2003] FamCA 152 (May J exercising the jurisdiction of the Full Court pursuant to s 94AAA *FLA*).

⁵⁹ *Ibid* [92].

⁶⁰ *Ibid* [96]–[98].

not the others.⁶¹ On this view the regime of valuation would apply in every case involving superannuation and the application of the previous law would be restricted. It would ensure that the prescribed value of superannuation is considered in every case. There is a strong argument for this view given the unfairness that precipitated the reforms and the desire to ensure consistency in the treatment of superannuation.

At the other extreme is the view that, if no pt VIII B order is sought or made, then the amendments have no application at all. Superannuation is not ‘treated as property’. On this view the previous law may have ongoing relevance and there may be scope for injustice to persist. This view could lead to the incongruous result that separate bodies of law apply to superannuation depending upon whether an order about superannuation is to be made or not. In *Hickson & Hickson*⁶² superannuation was treated as a resource at step three as had been common before the amendments. Stevenson J commented:

it seems to me that the requirement contained in section 90MC that a superannuation benefit be treated as property “for the purposes of paragraph (ca) of the definition of matrimonial cause in section 4” means only that such a benefit is to be treated as property only when it is sought to invoke the provisions of Part VIII B and not otherwise. In the present case, it would seem illogical that I am required to treat as “property” a superannuation benefit which will not vest in the husband for many years ...⁶³

Her Honour did not specifically comment upon whether the old approaches could still be used although the approach ultimately taken would tend to support this view.

In *Cahill & Cahill*⁶⁴ the *Hickson* approach was taken to a pension in the payment phase which was treated as a resource.⁶⁵ Coleman J stated:

It is one thing to “treat” superannuation as “property” to enliven the jurisdiction of the Court to make an order in respect of superannuation, another altogether to suggest that superannuation must thereby be treated the same way as existing or tangible assets when entitlements of parties are determined pursuant to s 79 of the Act.⁶⁶

However, his Honour did not take this approach to the other growth phase interests although likewise no splitting orders were sought in respect of these interests. They were included in the list of assets at the *FL(S)R* value. Prior to the amendments they would not have been treated as property in this way. Conversely, the pension in the payment phase, arguably s 4(1) property, was treated as a resource as previously. The decision highlights an issue that subsequently became prominent in the case law and the subject of polarised views, namely, the appropriate treatment of pensions in the payment phase. The decision suggests that the courts have a discretion about whether or not to treat superannuation as property where no splitting order is sought or to be made.

A middle view appears to have been taken in *Jovanovic & Jovanovic*,⁶⁷ *Spagnardi & Spagnardi*⁶⁸ and *H & H*⁶⁹ namely that superannuation is now ‘treated as property’ whether or

⁶¹ Stephen Bourke, ‘Orders Under the New Super Splitting Laws’ (Paper presented at the Family Court Judges’ Conference, Melbourne, 16–17 July 2002) 36–7.

⁶² [2003] FamCA 1091 (*Hickson*).

⁶³ Ibid [86] (emphasis in original).

⁶⁴ (2006) FLC ¶93-253 (*Cahill*) a 2003 decision published in 2006.

⁶⁵ Ibid 80,303–4.

⁶⁶ Ibid 80,303 [75] (emphasis in original).

⁶⁷ [2003] FamCA 34 (*Jovanovic*).

⁶⁸ [2003] FamCA 162 (*Spagnardi*).

⁶⁹ (2003) FLC ¶93-168.

not a superannuation order is sought or made but that compliance with the valuation regime is only mandatory for a splitting order. The effect of this approach is that superannuation can be included in the list of assets at step one with other non superannuation property. There would thus be limited scope for the application of the pre startup time case law.

In *Jovanovic* Chisholm J said about the amendments:

These provisions together create a situation in which the court can make orders relating to superannuation interests in the way it can with other property: the ordinary principles apply ... The court goes through the established steps of identifying and valuing the property (a step that now includes the superannuation interests); assessing the contributions; assessing the relevant matters under s 75(2); and ensuring that the orders it makes are just and equitable ... The court in s 79 proceedings has a discretion about what orders to make. It might leave assets where they are, or transfer an asset from one party to the other, or order the sale of an asset and the division of the proceeds of sale. All this applies equally to superannuation interests. The court may make an order changing the superannuation interests (a “splitting order”). Or it may not: it may, for example, make orders about other assets, or for the payment of money, and leave each party’s superannuation interests unaffected.⁷⁰

This suggests that the new regime applies and superannuation is ‘treated as property’ whether or not a splitting order is sought and the four step approach applies. However, his Honour found, that in the circumstances where a consent order is sought about property and no splitting order is sought, the regime of valuation need not be complied with.⁷¹

Likewise, if the parties in defended proceedings choose not to seek a splitting order or the court chooses not to make such an order, then the court is not obliged to rely on the valuation regime. In *Spagnardi* Chisholm J noted that it is neither mandatory for parties to seek a splitting order, nor for the court to make a splitting order.⁷² In those circumstances his Honour said it is not necessary to value superannuation under the new regime.⁷³ Nevertheless, his Honour said ‘[b]ecause I must apply the new laws, I will treat the superannuation interests as an asset with the values indicated.’⁷⁴ Thus the superannuation was ‘treated as property’.

In *H & H* Ryan FM stated:

Does s 90MA “The object of this part is to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between the parties to a marriage, either by agreement or court order” mean that a superannuation interest is to be treated only as property when it is sought to invoke the provisions of Part VIII B and not otherwise? In my view it does not. The intent of s 90MA when read in conjunction with s 90MC is to extend the definition of matrimonial cause so that the categorisation of an eligible superannuation interest is changed to make it an asset for the purpose of the application of s 79.⁷⁵

This quotation clearly enunciates the pivotal issue about the operation of the new superannuation legislation.

The treatment of superannuation as property for the purpose of pt VIII B developed in an unexpected direction in *Levick & Levick*,⁷⁶ a decision where a splitting order was sought and made. Although the superannuation was therefore ‘treated as property’, the superannuation was considered separately from the non-superannuation assets and also separately from the

⁷⁰ [2003] FamCA 34 [4]–[5].

⁷¹ Ibid [6]–[9].

⁷² [2003] FamCA 162 [8].

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ (2003) FLC ¶93-168, 78,704 [51].

⁷⁶ (2006) FLC ¶93-254 (*Levick*). a 2003 decision published in 2006.

list of resources.⁷⁷ This suggests that superannuation might be ‘treated as property’ for the purpose of a splitting order but that it is in fact something different to s 4(1) property. The result was that the ultimate adjustments in respect of the s 4(1) list and the superannuation list were different after the application of the four steps to each list. This approach was then also taken in other cases.⁷⁸

These first instance decisions were made in less than four months after the commencement of pt VIII B and reveal divergent views about the application of the new regime. The one consistent theme to be extrapolated from these early decisions is that splitting orders are not mandatory and that valuation is not compulsory if no splitting order is sought or made. These early cases provided immediate and important pointers to significant issues that were to be agitated in greater depth in later decisions of the Full Court. On the one hand if superannuation was to be treated as property only where a pt VIII B order was sought then the previous law would still be relevant and the previous unfairness would continue where no splitting order was sought. On the other hand if the effect of pt VIII B was that superannuation was to be treated as property even if no superannuation order was sought then the scope for the application of previous law was reduced. At this stage, it was not immediately apparent that the goals of consistency, certainty, clarity and fairness were being achieved.

V SUPERANNUATION AS S 4(1) PROPERTY: THE FIRST FULL COURT DECISION

Some five months after the startup time the Full Court considered the new regime for the first time in the significant decision of *Hickey*.⁷⁹ The case arose for consideration in circumstances where the husband and wife had resolved disputes about children and property after the conciliation phase of the proceedings. Both parties were legally represented and sought to have final orders made by consent to formalise their agreement and conclude the proceedings. A Deputy Registrar declined to make the orders⁸⁰ and an Application for Review was filed on 5 March 2003 which was heard by Chisholm J on that day. His Honour made parenting orders and a partial property order. His Honour then referred the matter by way of case stated pursuant to s 94A of the *FLA* to the Full Court of the Family Court for an opinion on a question of law. The case stated took the form of 21 questions for the consideration of the Full Court. They related to the fact that the parties sought to include a ‘catch all’ declaration, which included superannuation, in the final orders in the following terms:

5. That, except as otherwise provided in these orders, the husband and the wife each be declared the sole legal and beneficial owners of all items of property or resource including money, motor vehicles, insurances, equities, superannuation entitlements and personal effects currently in the possession or control of each of them respectively.⁸¹

Inter alia, the wife was to retain her accumulation interest in the growth phase of approximately \$25,000 and the husband was to retain his accumulation interest in the growth phase of approximately \$10,600. Neither party sought a splitting order. Neither party provided a valuation of their superannuation. The facts of the case and the questions framed

⁷⁷ Ibid 80,314–17 [38].

⁷⁸ See, eg, *Gardner & Gardner* [2003] FamCA 249 (‘*Gardner*’).

⁷⁹ (2003) FLC ¶93-143 (Nicholson CJ, Ellis and O’Ryan JJ).

⁸⁰ Ibid 78,380 [5].

⁸¹ Ibid 78,379.

for the consideration of the Full Court unequivocally address the issue of the operation of pt VIII B in s 79 property proceedings.

The husband made an application on 28 March 2003 for Professor Parkinson to appear and address the court as *amicus curiae*. This application was dismissed on the basis that the intervention ‘was not necessary to do justice effectively and efficiently or to determine the law’ and was not otherwise appropriate.⁸² The Commonwealth Attorney-General filed a Notice of Intervention on 3 April 2003.

The questions are as follows:

Section 78

1. Does section 78 grant the Court power to make the declaration in relation to *property*?
2. If section 78 does grant the Court power to make the declaration in relation to property, should the Court make it?
3. Does section 78 and/or section 90MS grant the Court power to make the declaration in relation to *superannuation*?
4. If section 78 and/or section 90MS does grant the Court power to make the declaration in relation to superannuation, should the Court make it?
5. Does section 78 grant the Court power to make the declaration in relation to *resources*?
6. If section 78 does grant the Court power to make the declaration in relation to resources, should the Court make it?

Section 79

7. Does section 79 grant the Court power to make the declaration in relation to *property*?
8. If section 79 does grant the Court power to make the declaration in relation to property, should the Court make it?
9. Does section 79 and /or section 90MS grant the Court power to make the declaration in relation to *superannuation*?
10. If section 79 and/or section 90MS does grant the Court power to make the declaration in relation to superannuation, should the Court make it?
11. Does section 79 grant the Court power to make the declaration in relation to *resources*?
12. If section 79 does grant the Court power to make the declaration in relation to resources, should the Court make it?

Determinations under s 90MT(2), and procedural fairness requirements

13. If the Court should otherwise make the declaration under s 78 and/or s 90MS in relation to superannuation, must the Court make a determination under section 90MT(2) before making the declaration?
14. If the Court should otherwise make the declaration under s 79 and/or s 90MS in relation to superannuation, must the Court make a determination under section 90MT(2) before making the declaration?
15. If the Court should otherwise make the declaration under s 78 and/or s 90MS in relation to superannuation, must the Court be satisfied that the trustee of any relevant superannuation interest has been accorded procedural fairness before making the declaration?
16. If the Court should otherwise make the declaration under s 79 and/or section 90MS in relation to superannuation, must the Court be satisfied that the trustee of any relevant superannuation interest has been accorded procedural fairness before making the declaration?
17. If the Court can and should make the declaration under a s 79 in relation to property, but cannot or should not make the declaration under s 79 and/or s 90MS in relation to superannuation, then must the Court make a determination under section 90MT(2) before making the declaration in relation to property?
18. If the Court could not or should not make the declaration under s 79 in relation to property, should the Court have made the orders and notations on 5 March 2003 without making a determination as the value of the parties’ respective interests in superannuation under section 90MT(2)?

Jurisdiction of registrars

19. If section 78 does grant the Court power to make the declaration in relation to property, can the jurisdiction be exercised by a Registrar, relying upon Order 36A rule 2(m) of the Family Law Rules?

⁸² Ibid 78,382 [10].

20. If section 79 does grant the Court power to make the declaration in relation to property, can the jurisdiction be exercised by a Registrar relying upon Order 36A rule 2(m) of the Family Law Rules?

Principles

21. If the Court is able to grant the declaration in relation to property and/or the declaration in relation to superannuation and/or the declaration in relation to resources, what other principles should it apply in considering whether to do so?⁸³

The first six questions put to the Full Court asked whether the Court had power pursuant to s 78 to make a declaration in relation to property, resources, or superannuation and, if so, whether that power should be exercised. Section 78 enables the court to declare the title or rights that a party has in respect of property in the course of property proceedings.

The Full Court noted that because the hearing proceeded on the basis that the parties sought the ‘catch all’ order pursuant to s 79 rather than s 78 it was unnecessary to deal with these questions.⁸⁴ As well, the husband submitted that answers to questions five and six were not required because ‘by definition one does not have a legal or equitable entitlement to a financial resource’.⁸⁵ The wife agreed.⁸⁶ The Full Court added ‘that an order cannot be made under s 79 in relation to a financial resource although by reason of s 75(2) such a resource can be taken into account when considering what order, if any, to make under s 79’.⁸⁷ Therefore no answers were required to questions five, six, 11 and 12. The parties agreed that the words ‘or resource’ should be deleted from the ‘catch all’ declaration sought.⁸⁸

The Full Court contrasted s 78, which ‘empowers the courts to declare existing interests in property according to the general principles of law and equity and to make consequential orders to give effect to the declaration’ with s 79.⁸⁹ The Court noted that s 79 ‘requires the Court to consider the whole of the property of the parties, however and whenever acquired, notwithstanding that the parties may only seek an alteration of interest in some of that property.’⁹⁰ After observing that the court has a duty to end financial relations pursuant to s 81 the court went on to recite the case law in relation to the ‘once and for all’ proposition, namely, that the court can only make one order pursuant to s 79.⁹¹ Once made, that order can be challenged on appeal or varied pursuant to s 79A where appropriate.

The Full Court stated that two consequences flow from the proposition that only one s 79 order can be made. The first consequence is that ‘catch all’ clauses, to the extent that they do not effect an alteration of property interests, are ineffective as a matter of substance although useful as a matter of form.⁹² The parties can be reassured that everything has been dealt with where such a clause appears. The second consequence of the ‘once and for all’ proposition is that a s 79 order is a single order which might comprise a number of clauses or paragraphs but does not comprise a series of s 79 orders.⁹³ The Full Court noted that there may be interim or

⁸³ Ibid 78,379–80.

⁸⁴ Ibid 78,388 [49].

⁸⁵ Ibid 78,382 [12].

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid 78,386 [38].

⁹⁰ Ibid [40].

⁹¹ Ibid 78,386–7.

⁹² Ibid [47].

⁹³ Ibid.

partial orders pursuant to s 79(6).⁹⁴ This observation may contemplate that components of the single s 79 order may be made at different times.⁹⁵

The Court stated:

ultimately there is only one exercise of power under s 79 in respect of the property of the parties, even though that single exercise of power may be reflected in a complex order of many paragraphs or clauses, each dealing with a different item of property and some dealing with questions of implementation. It may be that some items of property are not dealt with in paragraphs or clauses of the order as it is not proposed that there be an alteration of interest in such property. However, the single exercise of power prevents a further application in relation to both specified and non specified items of property except pursuant to the provisions of s 79A.⁹⁶

Because the hearing proceeded on the footing that the parties sought a s 79 order not an order pursuant to s 78, the Full Court held that answers to questions one to six, and questions 13, 15 and 19 were not required or appropriate as they all related to s 78.⁹⁷

The Full Court then considered the nature and effect of the ‘catch all’ clause and concluded that although such a provision is not in personam, nevertheless it can be effective to alter an interest in property in certain circumstances. It can effect a change from joint ownership to sole ownership of personalty in the respective possessions of the parties where no other formalities must be complied with.⁹⁸

The Full Court then considered whether the Court has the power to include such a provision where it does not effect an alteration of an interest in property⁹⁹ and concluded that such a provision could nevertheless form part of a single s 79 order effecting an alteration of the interests of the parties overall in relation to their property.¹⁰⁰ This conclusion was drawn in the context of observing that the Court can exercise the powers in s 80, in particular s 80(1)(k), to make orders necessary to do justice in the exercise of pt VIII powers.¹⁰¹ The Full Court stated that the use of the word ‘declaration’ in such a provision is misleading and to avoid ambiguity ‘catch all’ provisions should not be drafted in this way.¹⁰²

The Full Court did not consider that it was strictly necessary to include such a provision where it did not, in fact, effect an alteration of a property interest of the parties. However, the Court recognised the value of providing reassurance to the parties in this manner that the entirety of their property has been encompassed by the s 79 order.¹⁰³

Next the Full Court turned its attention to whether the s 79 ‘catch all’ clause can include a superannuation interest where it is to be retained by the member spouse without adjustment and, if so, whether pt VIIIB applies.¹⁰⁴ Senior Counsel for the husband and the Solicitor General submitted that it could include superannuation and that this was the case even before the commencement of pt VIIIB because superannuation has always been property for the

⁹⁴ Ibid [48].

⁹⁵ Garry Watts, ‘Superannuation Valuations and Property Orders: The Full Court Gives Practical Guidance’ (2003) 16(4) *Australian Family Lawyer* 15, 15.

⁹⁶ *Hickey* (2003) FLC ¶93-143, 78,387 [48].

⁹⁷ Ibid 78,388 [49].

⁹⁸ Ibid 78,389 [54]–[55].

⁹⁹ Ibid [56].

¹⁰⁰ Ibid 78,390 [62].

¹⁰¹ Ibid 78,389 [57]–[59].

¹⁰² Ibid 78,390 [63].

¹⁰³ Ibid 78,391 [66].

¹⁰⁴ Ibid [67].

purpose of the s 4(1) definition. They submitted that, due to a misconception about the way in which superannuation should be treated, it was treated as a financial resource.¹⁰⁵ The reason for this was due to the nature of superannuation itself. It could not be valued and dealt with in the same way as other property. It was further submitted that the rights of a member of a superannuation fund are in the nature of a chose in action which is property and case law was cited in support of this proposition.¹⁰⁶ The husband reiterated that the rights of a beneficiary under a trust deed or superannuation legislation are a chose in action and are and always have been property, enabling the appropriate inclusion of such interests in a s 79 ‘catch all’ clause.¹⁰⁷ This submission was not addressed directly by the Full Court. The husband submitted that the advent of pt VIII B gave the courts added flexibility to deal with superannuation and did not reduce the pre-existing powers. The Full Court agreed¹⁰⁸ but did not address the significant issue of whether superannuation is property irrespective of whether a pt VIII B order is sought or made. The husband submitted that the new regime does not require the Court to make a splitting order (including a zero splitting order) in every case involving superannuation and that it can still be dealt with in the ‘traditional way’ under s 75(2).¹⁰⁹ The Full Court stated:

Although, for obvious reasons, the definition of property in s 4 was not amended to include a superannuation interest or deem such an interest to be property, the effect of s 90MC is that in proceedings in relation to property under s 79 a superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made. As was submitted on behalf of the husband, the expression “treated as property” should be understood as meaning “treated as if it were property even though it is not” and that it should be so treated for the purposes of s 79. It was further submitted that the intention of the Parliament is clear from Note 1 to s 90MS. Because a superannuation interest is to be treated as property in s 79 proceedings it follows that it will be included in the list of property and valued at what is step one of the preferred four step approach to the determination of an application pursuant to s 79. At step three the superannuation interest may be taken into account, as are other items of property and financial resources, pursuant to the provisions of s 75(2) if the interest is relevant. The superannuation legislation introduced reforms which are directed to how a court will deal with a superannuation interest at steps one and four of the preferred four step approach in the determination of an application under s 79. The legislation did not amend s 79 or s 75 ... For this reason, in our view, it is not necessary for us to resolve the issue raised by the submissions that a superannuation interest is property as defined in s 4(1) apart from the provisions of Part VIII B. In our view, a provision such as paragraph 5 of the Terms of Settlement in an order made pursuant to s 79 may now include a superannuation interest.¹¹⁰

The Full Court did not elaborate on the ‘obvious reasons’ why the s 4(1) definition of property was not changed to include superannuation or to deem superannuation to be property. There was no disagreement expressed with the detailed examination of this issue by Senior Counsel for the husband and the Solicitor General. It might therefore be inferred that an amendment to s 4(1) was not necessary because superannuation has always been property. Equally it might be inferred that the Full Court did not consider superannuation to be property apart from pt VIII B notwithstanding the fact that developments in the public sphere have resulted in superannuation being very much in the nature of property. The Full Court may have considered it unnecessary to decide the issue because of its interpretation of the legislation.

The Full Court stated:

¹⁰⁵ Ibid [68].

¹⁰⁶ Ibid [69].

¹⁰⁷ Ibid [70].

¹⁰⁸ Ibid 78,392 [71].

¹⁰⁹ Ibid [72].

¹¹⁰ Ibid 78,392–3 [75]–[76].

We also agree with the submission that Parliament did not intend to make the consideration of superannuation entitlements optional after 28 December 2002; it made splitting and flagging orders by the Court optional in property settlement proceedings in its consideration of the appropriate order. The effect of Part VIII B is to enable the Court to make a splitting or flagging order in appropriate circumstances, not to compel the Court to make such an order ...

We are further of the view that an order whereby an adjustment is made to other property having regard to the value of the superannuation interest is not an order “in relation to a superannuation interest.” The contrary view is that such an order is an order in relation to superannuation interests because those interests are being used as a ‘measuring stick’ for other rights.¹¹¹

The Full Court expressed disagreement with the measuring stick argument approved by May J in *Crown & Yarnold* and having its genesis in an article by Stephen Bourke.¹¹² The Full Court rejected the argument that an order that does not adjust superannuation is still an order about superannuation because to find otherwise would achieve no practical result. On the contrary it would impose the burden of valuation and procedural fairness obligations upon parties and impose unnecessary formalities upon trustees.¹¹³ The Full Court noted that the argument relied upon the fact that ss 90MT(1)(a) and (c) each envisaged the possibility of a zero payment to the non-member spouse because of the use of the words ‘(if any)’. However, this wording is absent from the drafting of s 90MT(1)(b) and the Full Court agreed that if the argument meant that there could be a zero splitting order for the type (a) and (c) orders but not for the type (b) orders this was not a rational result. The Full Court noted alternative explanations for the use of the words ‘(if any)’ for instance where due to the deduction of costs or market losses, the non-member spouse might receive no payment.¹¹⁴ The Full Court rejected the argument that a zero splitting order can be made.¹¹⁵ The Full Court agreed with the *Jovanovic* view that where the value of superannuation is agreed by the parties there is no need to obtain a valuation in accordance with the *FL(S)R* where superannuation is to be retained by the member spouse and no splitting order is to be made.¹¹⁶

In summary, the Full Court said:

If the superannuation interest is not to be altered in accordance with s 90MT(1), although the superannuation interest is to be treated as property for the purposes of s 79, the provisions of Part VIII B (procedural fairness to the trustee and valuation in accordance with the Regulations) do not have to be complied with. In our view, there is no splitting order if the Court simply leaves the superannuation interest where it is and awards the other party at step three of the preferred approach a greater share of the other property on account of the superannuation interest remaining where it is. It follows that a provision such as paragraph 5 of the Terms of Settlement dealing with a superannuation interest(s) in circumstances where it is intended that there be no alteration of the superannuation interest(s) may be included in a s 79 order and the mandatory obligations under Part VIII B in relation to procedural fairness to the trustee and the determination of the amount (valuation) in accordance with the Regulations do not apply.¹¹⁷

It was not necessary for the Full Court to consider whether Registrars have the power to make s 79 ‘catch all’ orders by consent because the parties and the Solicitor General agreed that the answer was affirmative.¹¹⁸

¹¹¹ Ibid 78,393 [80]–[81].

¹¹² Ibid 78,393–5 [81]–[83] quoting *Crown & Yarnold* [2003] FamCA 152 and Stephen Bourke, ‘Orders under the New Super Splitting Laws’, above n 61.

¹¹³ Ibid 78,394–5 [86].

¹¹⁴ Ibid 78,395 [88].

¹¹⁵ Ibid.

¹¹⁶ Ibid [89] citing *Jovanovic* [2003] FamCA 34.

¹¹⁷ Ibid 78,396 [91].

¹¹⁸ Ibid [92].

The Full Court was invited to comment on whether valuations should be mandatory in certain circumstance, such as where parties may be unrepresented or where the interest is a defined benefit interest, even where a splitting order was not sought. The Full Court declined on the basis that *Harris v Caladine* provides adequate guidance in these circumstances.¹¹⁹ This decision stated that generally where parties have had appropriate legal advice, have considered the relevant statutory provisions and are at arms length, then the fact of the consent should suffice. However, the judicial officer may require further information depending upon all the circumstances. Accordingly the uncertainty about the necessity for a valuation where a consent order is sought that each party retain their respective superannuation interests is not entirely removed. The approach is sensible where the parties are both legally represented and the interests are of the straightforward accumulation type, because the member information statement generally provides adequate evidence of value and no process of formal valuation need be undertaken.¹²⁰ However, if the interest is of the defined benefit or other atypical variety and if a party is self represented, then the judicial officer may require proof of value. Consequently it is possible for a consent order to be made about property which fails to take into account the full value of superannuation.

In the final result the Full Court found that it was not appropriate or necessary to answer questions one to six, 11, 12, 13, 15, 17, 18 and 19 for the reasons already outlined but provided answers to the remaining questions.¹²¹

Thus *Hickey* clarified some of the issues which emerged from the early single instance decisions. The *Crown & Yarnold* approach, which requires compliance with the valuation and procedural fairness provisions in every case involving superannuation, whether or not a splitting order is sought or made, was rejected. This protects the superannuation industry from unnecessary involvement in family law proceedings. Nor did the *Hickson* approach receive endorsement. The practical effect of the *Hickson* approach was that the superannuation regime only applied if a pt VIII B order was sought or made and thus appeared to have the significant disadvantage of maintaining the previous position, with all the shortcomings that the new regime was designed to address, where no such order is sought or made.

The *Hickey* approach is consistent with and expands upon the *Jovanovic*, *Spagnardi* and *H & H* approaches. It did not lend support to the *Levick* approach that although superannuation is to be treated as property for the purpose of obtaining pt VIII B orders, it is nevertheless different to s 4(1) property for the purpose of evaluating the four steps.

Notably the Full Court examined the nature of an order made pursuant to s 79 and concluded that a s 79 order involves a single exercise of power although the order may comprise a number of parts made at different times including partial or s 79(6) interim orders. A s 79 order may also incorporate a 'catch all' clause including superannuation. A 'catch all' clause is justified because it may effect an alteration of a property interest. Even if it does not, it serves an important role in reassuring the parties that all property has been dealt with. The decision continues to be a prominent decision about the nature of s 79 orders generally.

The *Hickey* interpretation of the application of the new regime was sensible and utilitarian in outcome.¹²² It was what is described as 'a purposeful interpretation of the legislation.'¹²³ It

¹¹⁹ Ibid [94] citing *Harris v Caladine* (1991) FLC ¶92-217.

¹²⁰ See above 108.

¹²¹ *Hickey* (2003) FLC ¶93-143, 78,396-8 [97].

had the advantage of relative simplicity and clarity. To treat superannuation as property in all cases for the purpose of the four step approach was a great advance on the position prior to the amendments. It limits the scope for any continued application of the previous law and therefore the scope for perpetuating unfairness to women. It also promotes consistency and certainty in the treatment of superannuation in property settlement proceedings. The limitation however, is that a valuation of superannuation is not required in every case whether or not an order about superannuation is sought or made. Perhaps because a valuation of other types of property is not required in every case there is some consistency in this approach. On the other hand, in contrast to other property there is a statutory regime for valuing superannuation. There is therefore a possibility that, especially when consent orders are made,¹²⁴ superannuation is undervalued and therefore underrated. An alternative view is that not requiring a valuation in all cases enables a balancing of costs against other interests, for instance, where the interest is an accumulation interest or where the entitlement is comparatively modest. However, the valuation of accumulation interests is generally straightforward, accessible to parties and at minimal cost. There are disadvantages and risks associated with not requiring a valuation in every case for the economically weaker party, particularly in the case of valuable forms of superannuation such as defined benefit interests.

After this decision, two further decisions highlighted an area of continuing difficulty, namely the treatment of pensions in the payment phase. The outcome of these decisions suggested that there was still room for the application of the pre-existing approaches notwithstanding the *Hickey* approach. An approach based on *Perrett & Perrett*,¹²⁵ which had been rejected in *Crown & Yarnold*,¹²⁶ was taken in *Ennis & Ennis*¹²⁷ where an amount equivalent to a fortnight's pension, a miniscule fraction of its lump sum value, was included at step one¹²⁸ and otherwise the entitlement was taken into account at step three.¹²⁹ In effect it was not treated as property at step one. O'Reilly J found that, having regard to the *Hickey* approach, if no splitting order was to be made then a valuation pursuant to the *FL(S)R* was unnecessary.¹³⁰ In *Radhakrishnan & Radhakrishnan* Coleman J took a pension into account as a s 75(2) factor at step three stating that the *Hickey* approach did not exclude this course.¹³¹ Neither case treated the superannuation as property at its lump sum value because no splitting order was made and therefore no valuation was required. Thus, adopting a circular approach, the step four decision not to make a splitting order was made first and this justified the decision not to consider the pension at step one. This is despite the fact that not only might pensions in the payment phase be 'treated as property' after *Hickey* but also that such entitlements should indeed be considered s 4(1) property. Instead the previously favoured approach of considering the entitlement at step three was undertaken. Rather than deal with the unique characteristics of pensions in the payment phase within the parameters of the four step approach applied sequentially, these cases first decided whether a splitting order should be made. If a decision

¹²² See generally, Lachlan Cottom, 'Superannuation, "Catch All" Declarations and Property Settlement Orders: Dispelling the Confusion: Re *Hickey* (Fam Ct of Aust FC)' (2003) 12 *Australian Legal Monthly Digest Advance* 1; Victoria Bennett, 'Superannuation: The Jurisprudence of Whether and How to Split' (2003) 9 *Current Family Law* 280, 284–7.

¹²³ Timothy North, 'Certain Outcomes in Uncertain Times' (Paper presented at the 14th National Family Law Conference, Canberra, 18–22 October 2010) 5.

¹²⁴ Family Court of Australia, Annual Report 2011–12, above n 2, 49 (59 per cent of filings are Applications for Consent Orders for orders about property and/or children).

¹²⁵ (1990) FLC ¶92-101 ('*Perrett*').

¹²⁶ [2003] FamCA 152.

¹²⁷ [2003] FamCA 1565 ('*Ennis*').

¹²⁸ *Ibid* [121].

¹²⁹ *Ibid* [105]–[110].

¹³⁰ *Ibid* [78]–[88].

¹³¹ [2003] FamCA 1360 [139] ('*Radhakrishnan*').

was made not to make a splitting order then the lump sum value was disregarded and it was dealt with as a resource at step three. In effect the *Hickson* approach and the *Cahill* approach to a pension in the payment phase was taken. The decisions evince a reluctance to treat pensions in the payment phase as property with a lump sum value despite the considerable value that these entitlements can have. This resistance permitted fragmentation¹³² of the post-reform law and was the source of inconsistency in the treatment of superannuation.

The decisions are unfair to the non-member spouse. The fact that there is a strong case for arguing that this type of interest is s 4(1) property and therefore should be considered at step one was not directly addressed. If such an entitlement is not commutable and therefore it is not considered reasonable to assign to it a lump sum value, this might be a persuasive factor in favour of a splitting order. However, the decisions opted for the less transparent previous approach of taking the interests into account at step three, an approach subject to all the criticisms leading to the amendments. The approach detracts from the fact that pensions are by their nature valuable as is evidenced by the prescribed valuation methods. The decisions demonstrate that pensions in the payment phase remained a troublesome issue accentuated by the application of the valuation regime. Neither decision clarifies the relationship between superannuation of this type as s 4(1) property and the application of the new regime. Both adhere to the old approach to superannuation. The effect of these decisions was that inadequate weight was given to these valuable income streams, an approach certain to be detrimental to the homemaker parent. It is difficult to envisage why a regime of valuing these types of interests exists if this approach is correct.

In the subsequent Full Court decisions of *Harling & Lever*¹³³ and *Wrona & Wrona*,¹³⁴ neither of which involved a pension in the payment phase, the courts declined to consider superannuation only at step three, but treated it as property applying the *Hickey* approach.

It will be recalled that Coleman J in *Cahill*¹³⁵ considered a number of superannuation entitlements including a pension in the payment phase. Coleman J has since become a prominent engineer of the case law that has developed in relation to this problematic area. In *Mackey & Mackey*¹³⁶ Coleman J considered a pension in the payment phase. While his Honour acknowledged that after *Hickey* the pension was in fact property and apparently applied *Hickey*, the result did not appear to differ from the pre *Hickey* decision in *Cahill* or indeed the old case law. Coleman J used what was described as an asset by asset approach¹³⁷ which appeared to be a type of two lists or two pools approach rather than an approach to the evaluation of contributions at step two. However, his Honour made no mention of the *Levick* approach of applying the four steps to superannuation in a separate list. Step two was not undertaken in relation to the entitlement¹³⁸ and his Honour then appeared to consider it at step three.¹³⁹ Purportedly treating the pension as property did not advance transparent and fair consideration of the entitlement.

¹³² See generally Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford Press, 2008) 2–8, 18, 455 for a discussion about the different aspects of fragmentation in family law.

¹³³ [2004] FamCA 361 [43]–[45].

¹³⁴ (2004) FLC ¶93-207, 79,368 [18]–[21] (*‘Wrona’*).

¹³⁵ (2006) FLC ¶93-253.

¹³⁶ [2005] FamCA 276 (*‘Mackey’*).

¹³⁷ *Ibid* [44], [65].

¹³⁸ *Ibid* [83].

¹³⁹ *Ibid* [84].

Thus even after the clear guidance provided by the *Hickey* approach, pensions in the payment phase continued to be problematical. This was further demonstrated by the decision of Dawe J in *Graf* about a pension in the payment phase.¹⁴⁰ Her Honour noted that *Hickey*:

did not require an interpretation of the interaction between the superannuation amendments and Section 79 other than in the context of a consent order where no splitting order was sought ... the comments ... about the inclusion of a superannuation interest in the property pool of assets in the first step of the four step decision process were not essential to dispose of the issues ...¹⁴¹

Her Honour referred with approval to the approaches of Coleman J in *Cahill* and *Radhakrishnan*. Once again the relationship between s 79 and pt VIII B was subject to question. Her Honour stated:

The inclusion of a superannuation interest as property in the definition of “matrimonial cause” may give the Court jurisdiction to deal with superannuation interests but does not amend Section 79 to require the Court to treat superannuation as if it were property for the purposes of Section 79 ... Section 90MS says the Court may also make orders in relation to superannuation interests in proceedings under Section 79. It does not require that superannuation interests are to be treated as property in Section 79 proceedings ... I conclude that I am not required to deal with the superannuation interest by including it in the asset pool and treating it as property for all purposes.¹⁴²

Her Honour concluded that the options for a superannuation interest are to treat it as property; treat it as a s 75(2) factor without a splitting order; or treat it as a s 75(2) factor and make a splitting order. These options suggest that the previous approach of treating superannuation as a resource, thereby disregarding steps one and two, had not been displaced by the amendments but remained an option. Her Honour considered that treating superannuation as property in accordance with the *Hickey* approach was also optional. The issue of whether a pension in the payment phase is s 4(1) property was not directly addressed but is probably explained by the comment that ‘[w]hilst the capital value of the husband’s pension is substantial the capitalisation is artificial. It does not represent an existing asset. It is a guaranteed income but is not capable of being converted to lump sum.’¹⁴³

The decision pinpoints the difficulties that remained unresolved as a result of the parameters of the case stated in *Hickey* about the relationship between s 79 and pt VIII B. However, Young J in *BAR & JMR*, admittedly dealing with a defined benefit interest in the growth phase, expressed some disagreement with the *Graf* approach and emphasised the importance of including superannuation at step one and then fully considering steps two and three before making an order.¹⁴⁴

Thus the treatment of pensions in the payment phase, which can have very large lump sum values notwithstanding that they might not be commutable, was the subject of disagreement in the early cases. In the public sphere, taking superannuation as a pension rather than a lump sum is now preferred and encouraged. Therefore it is not difficult to envisage that the treatment of pensions in the payment phase will become increasingly important with the passage of time. The treatment of these valuable interests will be significant in optimising the impact of the amendments and redressing the disadvantage to women.

¹⁴⁰ [2005] FamCA 240.

¹⁴¹ *Ibid* [74].

¹⁴² *Ibid* [76]–[78].

¹⁴³ *Ibid* [120].

¹⁴⁴ (2005) FLC ¶93-231, 79,843 [197]–[202].

VI SUPERANNUATION ‘TREATED AS PROPERTY’ — THE COGHLAN APPROACHES

The early decisions did not clarify the relationship between s 79 and pt VIII B in a consistent way, especially in relation to pensions in the payment phase, notwithstanding the guidance provided by the *Hickey* approach. However, two years later, a specially constituted Full Court of five members,¹⁴⁵ including Coleman J who decided *Cahill*, *Radhakrishnan* and *Mackey* and O’Ryan J who was a member of the *Hickey* Full Court, handed down four decisions about superannuation on the same day. One of those decisions, *Coghlan*,¹⁴⁶ remains the foremost Full Court decision to date about the operation and effect of pt VIII B in s 79 proceedings involving superannuation.

By way of background information,¹⁴⁷ the husband and wife had been married for 11 years after cohabiting for six months. They separated in late 2002. They were both 48 years of age and there were no children of the marriage. The husband was unemployed but in receipt of a PSS pension of \$432 per fortnight with his income likely to be supplemented both by cabinet making work and work of an unskilled nature. The wife was employed at the ABC where the husband had also previously been employed. The pool of assets, without including the superannuation, totalled \$590 208. The superannuation had a total value of \$364 342. It comprised the defined benefit interest and accumulation interests of the wife with a combined value pursuant to the *FL(S)R* of \$65 482, the husband’s lump sum superannuation received in late 2001 of \$66 954.59 and the husband’s pension in the payment phase valued pursuant to the *FL(S)R* at \$231 906. Thus the value of the husband’s pension was significant overall.

The trial Judge, Rose J, apportioned the non-superannuation assets 60 per cent in favour of the wife on the basis of the parties’ contributions and no further adjustment was made on account of s 75(2) factors.¹⁴⁸ No splitting order was sought or made. The trial Judge commented that to conduct a valuation of the husband’s pension pursuant to the *FL(S)R* had an air of artificiality about it for the reason that it would never be available to the husband as a lump sum.¹⁴⁹ His Honour was guided by the comments of Coleman J in *Cahill*.¹⁵⁰ It was therefore excluded from the pool of assets. The wife’s superannuation was also excluded for the reason that it would not be available for many years.¹⁵¹ The husband’s lump sum received prior to separation was not included as it was no longer available.¹⁵²

The wife appealed on the basis that there had been a failure to give proper weight to the superannuation of the parties.¹⁵³ The wife argued that the trial Judge failed to act in accordance with the legislative mandate in pt VIII B that requires the value of superannuation interests to be taken into account in s 79 proceedings. The majority of the Full Court¹⁵⁴ stated that this proposition appeared to have originated in the Full Court decision in *Hickey*.¹⁵⁵ The majority referred to the observation in *Hickey* that the effect of s 90MC is that in s 79

¹⁴⁵ Bryant CJ, Finn, Coleman, Warnick and O’Ryan JJ.

¹⁴⁶ (2005) FLC ¶93-220.

¹⁴⁷ *Ibid* 79,636–8 citing and quoting *Coghlan & Coghlan* [2004] FamCA 709 (‘*Coghlan*’).

¹⁴⁸ *Coghlan* [2004] FamCA 706 [69].

¹⁴⁹ *Ibid* [75].

¹⁵⁰ *Ibid* citing *Cahill* (2006) FLC ¶93-253.

¹⁵¹ *Ibid* [76].

¹⁵² *Ibid* [73].

¹⁵³ *Coghlan* (2005) FLC ¶93-220, 79,638 [17].

¹⁵⁴ *Ibid* 79,636 (Bryant CJ, Finn and Coleman JJ).

¹⁵⁵ *Ibid* 79,638 [18] citing *Hickey* (2003) FLC ¶93-143.

proceedings, superannuation is to be treated as property whether or not a superannuation order is sought and the four step approach applied.¹⁵⁶ Before addressing this conclusion the majority decided, as did the Full Court in *Hickey*, that it was not necessary to decide if superannuation is ‘property’ for s 4(1) apart from pt VIII B.¹⁵⁷ Later in the judgment, comprehensive reasons were provided by way of explanation. However, these reasons did not absolve the court from ever having to decide in an individual case whether superannuation is s 4(1) property leaving open the possible relevance of the previous law. The majority did not decisively pronounce on this issue.

The majority diverged from the Full Court in *Hickey* on the critical point about whether it is obligatory to treat superannuation as property in every case and to include the value of superannuation interests in the list of assets for division. The majority said that the sole purpose of pt VIII B is to allow orders and agreements to be made about superannuation and that the definition of ‘matrimonial cause’ is used to confer this jurisdiction.¹⁵⁸ The majority stated that support for this view is to be found in the object section, s 90MA and said:

it needs to be said that the section makes it clear that the sole purpose or object of Part VIII B is to permit agreements or Court orders to be made which would provide for certain payments in respect of superannuation interests to be allocated between spouses. There is no other purpose or object stated.¹⁵⁹

Thus far the decision endorses the restrictive view in *Hickson*¹⁶⁰ that the superannuation regime has no application at all unless a superannuation order is sought or made. In turn this suggests that the old law might have ongoing relevance where no splitting order is sought or made.

However, a strong argument can be made in support of the contrary view. The drafting of s 90MA does not mandate the splitting of superannuation payments but is cast in a permissive way ‘to *allow* certain payments ... to be allocated’ (emphasis added). It does not state that the sole purpose of pt VIII B is to enable the splitting of superannuation payments; rather that this is the ultimate aim. If this was the sole purpose of pt VIII B then the appropriate addition of the word ‘only’ or some other drafting device could have unambiguously stated the same.

There are other indicators to be found both in the REM and in the design of the regime that contraindicate the sole purpose view. The REM states that the amendments ‘will provide that a superannuation interest is to be treated as property for the purposes of a *property* order.’¹⁶¹ It does not state that superannuation is to be treated as property solely for the purpose of a splitting order or agreement. As well, the objectives set out in the REM are not confined to providing the court with the power to make splitting orders or agreements.¹⁶² Other objectives include enabling the parties to access information to accurately value superannuation and to facilitate informed and appropriate negotiation and decision making. The reforms would not achieve the goals of consistent fair treatment of superannuation if the application of the reforms was limited to superannuation to be the subject of a splitting order.

Certain legislative provisions suggest that pt VIII B and the *FL(S)R* may apply whether or not a splitting order or agreement will be made. Section 90MZB, which outlines the obligation of

¹⁵⁶ Ibid 79,638–9 [19]–[22].

¹⁵⁷ Ibid 79,640 [26].

¹⁵⁸ Ibid 79,640–2.

¹⁵⁹ Ibid 79,640 [29].

¹⁶⁰ See above n 62 and accompanying text.

¹⁶¹ REM, above n 12, 3 (emphasis added).

¹⁶² Ibid 6.

the trustee to provide information to appropriate parties, states that the information must be required to assist in the proper negotiation of a superannuation agreement or ‘to assist the applicant in connection with the operation of the Part’. The drafting does not suggest that the information can only be obtained for the purpose of a splitting order or agreement. Indeed it was possible at that time, prior to the de facto amendments, for a person who was not yet married to the member spouse to obtain this information¹⁶³ to assist in the negotiation of a pre nuptial agreement. In fact a superannuation agreement can be entered into in relation to superannuation that is not yet in existence.¹⁶⁴ It is difficult to envisage a superannuation agreement providing for any type of s 90MJ split in these circumstances. Such a superannuation agreement is more likely to provide in a general way for each party to keep their own superannuation. This is therefore another provision of pt VIIIB which provides endorsement for the view that access to the superannuation regime is not limited to the circumstance where a splitting order or agreement is to be made.

Furthermore, the amendments enable parties to enter into a flagging agreement or to obtain a flagging order¹⁶⁵ which may be terminated or lifted with or without a payment split.

These provisions support the view that the flagging of superannuation, the provision of information about superannuation and the valuation of superannuation are further objectives of pt VIIIB. These processes may be undertaken without a splitting order or agreement being the final outcome. These procedures ‘allow’ payment splitting as provided by s 90MA but do not require it to be the end result.

Having stated the sole purpose view of pt VIIIB the majority disagreed in strong terms with the *Hickey* interpretation of s 90MC that superannuation is now to be treated as property whether or not a superannuation order is sought or made.¹⁶⁶ However, the majority also remarked at the lack of guidance provided in the legislation in relation to cases where no pt VIIIB order is sought.¹⁶⁷ The majority said that s 90MC only extends the definition of ‘matrimonial cause’ to enable superannuation orders to be made and found support for this in s 90MS and the use of the word ‘also’ therein. The majority said:

In our opinion, s 90MC does no more than operate to extend the definition of “matrimonial cause” by extending the jurisdiction, which the various courts which exercise the jurisdiction under the Act, have in proceedings between parties to a marriage with respect to their property, to include a jurisdiction to make orders with respect to the superannuation interests of the parties to property settlement proceedings.¹⁶⁸

This is despite the fact that s 90MC is unqualified and does not expressly limit the extended meaning of matrimonial cause and de facto financial cause to making pt VIIIB splitting and flagging orders and agreements.

Having regard to the wording of s 90MS(1) the majority stated:

We acknowledge that were it not for s 90MS(1), it might perhaps be possible to take the view that because of the provisions of s 90MC, superannuation interests should be regarded as synonymous with property for the purposes of proceedings under s 79. However we are of the view that the use of the word “also” prevents such an interpretation. We interpret the use of the word “also” in s 90MS(1) to mean that superannuation interests are another species of asset which is different from property as defined in s 4(1),

¹⁶³ *FLA* s 90MZB(8)(c).

¹⁶⁴ *FLA* s 90MH(1).

¹⁶⁵ *FLA* ss 90ML, 90MU.

¹⁶⁶ *Coghlan* (2005) FLC ¶93-220, 79,641 [36]–[38].

¹⁶⁷ *Ibid* [37].

¹⁶⁸ *Ibid* [38].

and in relation to which orders can also be made in proceedings for property settlement under s 79. There is nothing in our view in s 90MS(1) which indicates that superannuation interests are to be treated as property in proceedings under s 79 (irrespective of whether or not an order under Part VIIIIB is sought in those proceedings). Indeed, the only stated purpose anywhere in Part VIIIIB for superannuation interests being “treated as property” is for the purposes of the definition of “matrimonial cause” which, as earlier explained, is the jurisdiction conferring provision.¹⁶⁹

However, if the legislature intended that the only function of pt VIIIIB was to enliven the jurisdiction to make orders about superannuation and had no application otherwise, this could have been clearly stated. Section 90MS could also be interpreted to mean that in s 79 proceedings, the court may, but is not required to, make orders about superannuation. When such orders are made they must comply with pt VIIIIB as to the type of order, the valuation of the entitlement and procedural fairness. The orders cannot be made at large. These requirements are mandatory not optional.

In any event the majority observed that superannuation is ‘another species of asset’¹⁷⁰ different to property as defined in s 4(1) and in respect of which s 79 orders can also be made in accordance with pt VIIIIB. The majority disagreed with the Full Court in *Hickey* that Note 1 to s 90MS(1) which then provided ‘[a]lthough the orders are made in accordance with this Division, they will be made under section 79’ lent support to their view and said:

[w]e read s 90MS(1) as providing that:

- in proceedings under s 79
- with respect to the property of spouses (the definition of which does not include superannuation interests)
- the court may in accordance with Division 3 of Part VIIIIB
- also make orders in relation to superannuation interests of the spouses ...

If we are wrong as to the second dot point and the section intended the property of spouses to include superannuation interests, then the words in the fourth dot point would not be required and the section would perhaps be drafted in a different way ...¹⁷¹

The majority stated that generally in s 79 proceedings superannuation will not be property, but s 90MS allows the court to also make orders with respect to superannuation and must comply with pt VIIIIB to do so.¹⁷² An order about superannuation must be made in accordance with pt VIIIIB and under s 79, which requires consideration of the s 79 factors.¹⁷³

The majority gained support for the view that superannuation is another species of asset from the *Cahill* approach and the REM.¹⁷⁴ The majority considered s 15AB of the *Acts Interpretation Act 1901* (Cth), about the use of extraneous material in the interpretation of legislation and examined the REM which said about s 90MC that superannuation ‘will not be able to be treated as property generally for the purposes of pt VIII.’¹⁷⁵ The REM said about s 90MS that s 79 orders may include orders in relation to superannuation and that Note 1 would clarify that orders made in accordance with pt VIIIIB div 3 would be made under s 79.¹⁷⁶ The

¹⁶⁹ Ibid 79,642 [40].

¹⁷⁰ Ibid [40] [43]. But see, Peter Skinner, ‘The Role of Super in the Property Pool’ (2005) 43(11) Law Society Journal 60, 63 said the interpretation of superannuation as a separate species of asset ‘is, in my view, tied with ‘a gossamer thread’.

¹⁷¹ *Coghlan* (2005) FLC ¶93-220, 79,642 [41]–[42].

¹⁷² Ibid 79,642–3 [44]–[48].

¹⁷³ Ibid.

¹⁷⁴ Ibid 79,643–4 [49]–[51].

¹⁷⁵ Ibid [50] quoting the REM, above n 12, [38].

¹⁷⁶ Ibid [51].

majority concluded that the REM did not indicate that superannuation is “to be treated as property”.¹⁷⁷ The majority concluded that since superannuation is a different species of asset to s 4(1) property, the Court need not determine whether superannuation is s 4(1) property or simply a financial resource.¹⁷⁸

The majority gained added support for this view of superannuation as a separate species of asset from the treatment of superannuation in s 75(2)(f) separately from s 75(2)(b) noting that ‘the treatment by the legislation of a superannuation benefit or entitlement as a concept separate from property and financial resources is not new’.¹⁷⁹ The *Levick* approach, which appears to provide the genesis of the separate treatment of superannuation, was not mentioned. It is equally arguable that the REM clarified that pt VIII B provides a code for dealing with superannuation in s 79 proceedings and enables but does not mandate splitting orders.

Thus far, both the *Hickey* and the *Coghlan* approaches are cogent for different reasons. The *Hickey* approach provides facilitative interpretation of the inadequate drafting of s 90MS that superannuation as a form of family wealth must now to be treated as an asset whether or not a splitting order is made and be evaluated together with other forms of family wealth. On the other hand the *Coghlan* approach acknowledges the poor drafting of s 90MS but gives it a strict interpretation that pt VIII B only applies when a splitting order is sought. As will be demonstrated this endorsement of the treatment of superannuation as a different species of asset sanctions an approach which undervalues superannuation as a form of family wealth. Also the ramifications of the *Coghlan* approach if no order about superannuation is sought or made are considerable while the *Hickey* approach adopts a purposeful interpretation of the legislation. But the decision did not end here and the reasons of the majority then became more complicated under the heading ‘[t]he position where no order is sought under Part VIII B’.¹⁸⁰ The majority said that the provisions of s 79 only arise under s 90MS if a superannuation order is sought, and that the legislation provided no guidance about the correct approach where no such order is sought, a significant oversight.¹⁸¹ Since the *Hickson* approach appeared to have been endorsed by the Full Court, the previous law would still be relevant if no order about superannuation is sought or made. This is despite the fact that nowhere in the discussions, reports, debates and the REM was this envisaged. After all, the amendments were intended to comprehensively address the previous problems, not add an additional layer of complexity to the earlier unsatisfactory position.

The majority specifically considered that perhaps the intention of the legislation was that superannuation should be treated as it was under the previous law where no order about superannuation is sought.¹⁸² In subsequent cases about this interstitial issue, this comment has been argued to leave the way open for the application of the previous law. However, the majority said about this:

The difficulty, however, with that argument is that the Court has an obligation in property settlement proceedings to make an order which is just and equitable. In the circumstances now prevailing since the introduction of Part VIII B, in which a valuation which provides an indication of the true worth of a

¹⁷⁷ Ibid.

¹⁷⁸ Ibid [53].

¹⁷⁹ Ibid.

¹⁸⁰ Ibid [54].

¹⁸¹ Ibid. But see Stephen Bourke, ‘Recent Decisions of the Full Court of the Family Court’ (2005) 18(3) *Australian Family Lawyer* 32, 36 where the comment was made that no legislative guidance is provided where the s 79 power to alter property interests is not exercised in respect of any non superannuation assets either.

¹⁸² *Coghlan* (2005) FLC ¶93-220, 79,644–5 [56].

superannuation interest can be made available and in which the Court has the capacity to make a splitting order in relation to payments made in respect of a superannuation interest, a Court may well only be able to satisfy itself that any order it makes will be just and equitable, if it applies to its consideration of the superannuation interests, the criteria for determining a just and equitable order – those criteria being in effect the matters contained in s 79(4) of the Act.¹⁸³

This reasoning is challenging and does not decisively exclude the application of the previous law. It also suggests that the four step approach is not sequential in application.

The majority then stated that arguably where no order about superannuation is sought then ss 79(4)(a) and (b) do not apply and there is no requirement for the court to consider the parties' contributions to superannuation as it is not s 4(1) property.¹⁸⁴ However, such contributions would still be relevant under s 75(2)(j), namely 'the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party', a factor made relevant by s 79(4)(e).¹⁸⁵

The majority drew the following difficult conclusion:

Thus we consider that because of the obligation under s 79(2) to make a just and equitable order, then in order to ensure such a result the Court should wherever there is a superannuation interest apply the provisions of s 79(4)(a) to (g) (which will include the matters contained in s 75(2)) to that superannuation interest whether or not a splitting order is sought.¹⁸⁶

The majority considered that by assessing s 79(4) in relation to superannuation interests where no splitting order is sought, if the Court considered that justice and equity nevertheless required a splitting order to be made, then the requirements of valuation and procedural fairness could be complied with.¹⁸⁷ The reasoning is circuitous and not easy to follow.

The majority agreed with *Hickey* that no valuation need be obtained if no superannuation order is sought.¹⁸⁸ However, the majority considered that if it became apparent that the Court should make a superannuation order for reasons of justice and equity then the valuation could be required at that point,¹⁸⁹ a costly exercise that would necessitate an adjournment of proceedings.

The effect of this reasoning is that the four step approach does not proceed in a strictly sequential way and step four, the just and equitable step, is the new step one in proceedings involving superannuation.

The majority then examined the practical consequences of these conclusions and described the circumstances where superannuation 'could be' added to the s 4(1) list of property at step one whether or not a splitting order is sought namely:

- if the parties agree;
- where the Court is satisfied that the superannuation is s 4(1) property;
- if the interest is of relatively small value; or

¹⁸³ Ibid.

¹⁸⁴ Ibid [57].

¹⁸⁵ Ibid.

¹⁸⁶ Ibid [58] (emphasis in original).

¹⁸⁷ Ibid [59].

¹⁸⁸ Ibid [60].

¹⁸⁹ Ibid.

- there are features about the interest that make it appropriate.¹⁹⁰

However, inclusion of superannuation in the s 4(1) list in these circumstances is not mandated but is optional. The second factor requires a determination to be made about whether superannuation is in fact s 4(1) property which has been a difficult exercise in the past. The third factor may require that the entitlement produce no distortive effect when added to the s 4(1) list. The fourth factor may envisage an interest such as an interest in a self managed superannuation fund which owns assets in the nature of s 4(1) property.

Then steps two three and four must be applied in a sequential way to the s 4(1) list including the superannuation.¹⁹¹ Contributions on a global or asset by asset approach must be evaluated. The s 75(2) future economic factors must be assessed and finally the justice and equity of any proposed order must be considered.

However, the majority then formulated the ‘preferred approach’ as follows:

- prepare a separate list of superannuation interests;
- if a superannuation order is sought value the superannuation via the *FL(S)R*;
- if no superannuation order is sought value the superannuation either via the *FL(S)R* or otherwise;
- assess the parties’ contributions in respect of the s 4(1) list and any superannuation list either on an asset by asset basis or globally;
- consider the s 79(4)(d),(e),(f) and (g) factors and s 75(2) factors including the division of s 4(1) property and superannuation as well as the parties’ future superannuation prospects; and
- evaluate the overall justice and equity of proposed orders.¹⁹²

The majority subsequently stated ‘[i]n summary, then, the trial Judge has a discretion as to how superannuation interests will be treated in a particular case’,¹⁹³ a comment that has not gone unnoticed by courts and commentators. The majority continued that, if the superannuation is not included in the list of s 4(1) property but is considered in a separate list, then it is necessary if a splitting order is sought or ‘extremely prudent where no such splitting order is sought (in order to ensure that justice and equity is achieved)’ to apply the four step process.¹⁹⁴ This introduced a qualification not referred to in the previous paragraph which had outlined the obligatory application of the four steps in a sequential way to superannuation in a separate list even where no splitting order is sought. The qualification that it is ‘extremely prudent’ to apply the four step approach to superannuation in a separate list where no splitting order is sought suggests that there is a discretion about this. It is linked to the just and equitable requirement in the fourth step. This use of the fourth step indicates a non sequential application of the four steps which could result in a different approach to superannuation where no splitting order is sought. Alternatively the fourth step may have been treated as a consideration that overarches all steps. In any event, the majority then proceeded to describe the application of the four step approach sequentially to superannuation, even if it is dealt with in a separate list, and even where no splitting order is sought.¹⁹⁵

¹⁹⁰ Ibid [61].

¹⁹¹ Ibid [62].

¹⁹² Ibid 79,646 [63]–[64].

¹⁹³ Ibid [65].

¹⁹⁴ Ibid.

¹⁹⁵ Ibid [64]–[65].

The majority commented that when superannuation is considered in a separate list then steps two and three require consideration of the following factors:

- the years of fund membership in relation to years of cohabitation;
- the actual contributions made by the fund member at the start of cohabitation, at separation and at the date of hearing;
- the preserved and non preserved entitlements of the member at those times; and
- any factors peculiar to the fund or the entitlement.¹⁹⁶

The majority concluded that this approach would enable ‘proper recognition’ to be given to the parties’ contributions and would enable the ‘real nature’ of the interest to be considered.¹⁹⁷ Examples of relevant interests given by the majority were an interest in the nature of an uncommutable pension that might have a significant lump sum value or a lump sum interest ‘the value of which at the date of receipt is unknown.’¹⁹⁸ These factors suggest that there is room for a formulaic approach of the *West & Green* variety and also suggest that evidence in addition to valuation evidence may be relevant.

Ultimately the majority decided that there was no error in the trial Judge not including the superannuation in the same list as the other assets but that the parties’ contributions to superannuation and their present and future entitlements to superannuation were not sufficiently taken into account.¹⁹⁹ Therefore the matter was referred for rehearing.

The majority concluded by saying that, in the event of any conflict with the ratio decidendi in *Hickey*, then the High Court²⁰⁰ had sanctioned the correction of error about the interpretation and operation of s 90MC, although the ‘the unfortunate lack of clarity’ in the legislation was acknowledged.²⁰¹ Costs certificates were awarded to the parties in respect of the appeal and new trial.²⁰² No relevant legislative change has resulted to date.

Warnick and O’Ryan JJ dissented in relation to reasons but not in relation to the orders made. Warnick J, contrary to the view of the majority, considered that the trial Judge was obliged to treat the superannuation interests of the parties as property.²⁰³ The pension entitlement interest of the husband was in the payment phase. His Honour noted that ‘it was at least arguable that that entitlement was property as defined in the Act.’²⁰⁴ As this proposition was not argued either before the trial Judge or the Full Court, it was not finally determined.

His Honour disagreed with the reasons of the majority in a number of respects. Warnick J considered that pt VIII B, and s 90MC in particular, make it clear that for the purpose of s 79 proceedings, property includes superannuation interests ‘treated as’ property.²⁰⁵ His Honour disagreed with the approach of the majority that superannuation is not property generally for s 79 and is not to be treated as property, other than when orders about superannuation are sought. His Honour agreed that the amendments did not change the definition of ‘property’

¹⁹⁶ Ibid [66].

¹⁹⁷ Ibid [67].

¹⁹⁸ Ibid [68].

¹⁹⁹ Ibid [69].

²⁰⁰ Ibid 79,647 [72] citing *Nguyen v Nguyen* (1990) 169 CLR 245 (‘*Nguyen*’).

²⁰¹ Ibid [73].

²⁰² Ibid [74].

²⁰³ Ibid [75]–[77].

²⁰⁴ Ibid [76], 79,652 [119].

²⁰⁵ Ibid 79,648 [82].

and that therefore the term has a ‘duality’ in this context.²⁰⁶ However, his Honour said that the legislature could have referred to ‘property and/or superannuation interests’ wherever a reference was made to ‘property’ in s 79 if the majority interpretation is correct.²⁰⁷ It is difficult to argue with this conclusion. His Honour observed that the terms of the REM relied on by the majority in support of their interpretation were:

at least as supportive of the proposition that superannuation is to be treated as property in s 79 proceedings (albeit the orders made in respect of superannuation will be made pursuant to Part VIIIIB), as they are supportive of the view that, though not property or treated as property, superannuation is to be divided according to the provisions of s 79 relating to property.²⁰⁸

This is also a rational argument having regard to the history of superannuation in family law proceedings and the issues that the superannuation amendments were designed to address. His Honour considered that the use of the word ‘also’ in s 90MC must be viewed in the context of pt VIIIIB which enables the court to do what could not be done before, namely make orders flagging superannuation and dividing superannuation payments which orders are binding on third parties.²⁰⁹ Again this provides a logical explanation.

His Honour examined the difficulties with the approach of the majority that ‘where an order under pt VIIIIB is sought, superannuation is to be dealt with under s 79 in the same way as property, notwithstanding that their Honours concluded that it is neither property, nor to be treated as property.’²¹⁰ His Honour concluded that the note in s 90MS is insufficient to reinforce the view of the majority and noted that if superannuation is ‘another species of asset’ which is different from property there is no jurisprudence supporting the application of s 79.²¹¹ His Honour said that the views of the majority ‘at least in cases where no order pursuant to pt VIIIIB is sought, can only amount to guidelines for a preferred approach’ and that this is not satisfactory.²¹² In conclusion his Honour did not agree that it was proper to depart from the *Hickey* approach, noting the authority of *Nguyen* that a court of appeal should rarely depart from an earlier court of appeal decision unless obligated to conclude that the decision is wrong.²¹³ His Honour acknowledged that the case was a difficult case but concluded that the decision of the majority had produced a less desirable result than *Hickey*.²¹⁴

O’Ryan J also dissented and considered that the superannuation interests of the parties should have been treated as property, the contributions assessed and the other factors, including s 75(2) factors evaluated.²¹⁵ His Honour endorsed the *Hickey* approach and disagreed that there was any error of construction justifying departure from this precedent.²¹⁶ His Honour commented that the approach of the majority could cause uncertainty and confusion.²¹⁷

²⁰⁶ Ibid 79,649 [92]–[93].

²⁰⁷ Ibid [88].

²⁰⁸ Ibid [89].

²⁰⁹ Ibid [94].

²¹⁰ Ibid 79,650 [102].

²¹¹ Ibid 79,651 [104]–[105].

²¹² Ibid [114].

²¹³ Ibid 79,651–2 [116]–[118].

²¹⁴ Ibid 79,652 [117].

²¹⁵ Ibid [120].

²¹⁶ Ibid [123].

²¹⁷ Ibid [124].

His Honour agreed that generally superannuation had previously been underestimated but disagreed that there is artificiality about valuing a pension in the payment phase,²¹⁸ thus flagging an issue of ongoing controversy. His Honour noted that if there are factors that should be considered in relation to giving a pension a lump sum valuation then this is a matter for evidence.²¹⁹

His Honour agreed with Warnick J about the effect of s 90MC²²⁰ and stated:

in all proceedings under s 79 where there is a superannuation interest which is not property as defined in s 4(1) it is to be treated as property for the purposes of s 79 irrespective of whether a splitting order is sought or proposed to be made. Division 3 does no more than set out the type of order that may be made.²²¹

His Honour summarised the approach of the majority as follows:

a superannuation interest should be treated as “another species of asset” even if it is property as defined in s 4(1). Next, irrespective of whether an order is sought or proposed to be made under Div 3 of Pt VIII B the interest may be included in a list of the other assets which are property as defined in s 4(1) or in a separate list. Next, in whatever list the interest may be put the preferred approach must apply if an order is sought under Div 3 of Pt VIII B or “extremely prudent” if no such order is sought ...²²²

His Honour stated that this reasoning is not easy to follow and could have unexpected effects in s 79 proceedings.²²³ His Honour noted that if no splitting order is sought and if a superannuation interest is not s 4(1) property, on the view of the majority, the previous law should theoretically apply although his Honour noted the reasoning of the majority about why this was erroneous.²²⁴ His Honour found it difficult to rationalise this reasoning.²²⁵

In summary, his Honour stated:

My concern is that the decision of the majority may promote uncertainty and not provide a clear guide as to how superannuation interests are to be treated in determining applications for an order under s 79.²²⁶

The dissenting judgments are persuasive and endorse a simpler view of the relationship between pt VIII B and s 79 while still enabling controversial issues to be addressed within the parameters of the four step approach. They promote consistency in the treatment of different forms of superannuation and certainty of approach rather than the uncertainty and a lack of clarity predicted by O’Ryan J.

²¹⁸ Ibid 79,653 [131].

²¹⁹ Ibid 79,654 [134].

²²⁰ Ibid 79,657 [153].

²²¹ Ibid [157].

²²² Ibid 79,659 [167].

²²³ Ibid [167]–[168].

²²⁴ Ibid 79,658 [160].

²²⁵ Ibid [161].

²²⁶ Ibid 79,660 [172].

VII THE IMPACT OF COGHLAN — EVALUATION AND COMMENTARY

A A Separate Species of Asset — Consequences

The reasons of Warnick and O’Ryan JJ endorse the approach taken in *Jovanovic*, *Spagnardi*, *H & H* and *Hickey* that in s 79 proceedings, even if superannuation is not s 4(1) property, it must nevertheless now be ‘treated as property’ whether or not an order about superannuation is sought or made. The dissenting judgments have been described as compelling²²⁷ and highlight the need for further guidance about the treatment of and characteristics of superannuation being ‘another species of asset’.²²⁸ The exact implications of superannuation being a separate species of asset were not delineated by the majority. Moreover, O’Ryan J did not understand what was meant by the phraseology ‘interest ... of relatively small value’ and ‘features about the interest’ and no further guidance was provided by the majority decision.²²⁹ Also O’Ryan J considered that it was unnecessary to evaluate superannuation in a separate list in order to establish ‘the real nature of the interest’ as this has always been a requirement in relation to all property considered in a single list in property proceedings.²³⁰

Prior to *Coghlan* Bourke considered the case law and concluded that where superannuation had a ‘distortive effect’ if included in the list with the other assets, that is, ‘the superannuation occupies a disproportionately large part of the property pool’, then a type of asset by asset approach to superannuation might be appropriate.²³¹ This was in essence another precursor to superannuation being treated as another species of asset. Bourke suggested that where no splitting order was proposed in relation to superannuation in a separate list then assessing it only at step three in the previous way to avoid double counting remained an option.²³² Ultimately the *Coghlan* approach stopped short of endorsing the continued treatment of superannuation as a resource if no splitting order is sought or made. However, whether the ‘distortive effect’ of superannuation is a relevant factor in determining whether superannuation should be considered in a separate list is a matter for the case law. Such guidance as was provided by the Full Court did not necessarily support such an approach.

Commentators immediately foresaw other issues arising from the *Coghlan* preferred approach including the treatment of pensions in the payment phase; the effect of s 75(2); the practical valuation issues; the treatment of pre cohabitation and post separation contributions to and related growth of superannuation to name a few.²³³

Justice Ian Coleman, a member of the *Coghlan* majority, promptly responded and confirmed ‘that the construction of Part VIII B is not without uncertainty’ and submitted that regardless of the differing views of the majority and the dissentients in *Coghlan* the practical effects of the differences when implemented are inconsequential.²³⁴ Following the majority approach, the superannuation may be included in the list with other property and then the four step

²²⁷ Jacqueline Campbell, ‘Key Judgments in Superannuation’ (Speech delivered at the Law Institute of Victoria Annual Family Law Conference, Melbourne, 21 October 2005) 8.

²²⁸ *Coghlan* (2005) FLC ¶93-220, 79,651[105], 79,652 [121].

²²⁹ *Ibid* 79,658–9 [163].

²³⁰ *Ibid* 79,659 [165].

²³¹ Stephen Bourke, ‘Super Splitting—Two Years On’, above n 18, 13–14, 20–1, 25.

²³² *Ibid* 25.

²³³ Bruce Provan, ‘Superannuation and Family Law — Where to from here?’ (2005) 25(11) *Proctor* 27, 63; Campbell, ‘Key Judgements ...’ above n 227, 3, 11; Bourke and Murphy, above n 19, 67.

²³⁴ Justice Ian Coleman, ‘A Distinction Without a Difference? *Coghlan v Coghlan* (2005) FLC ¶93-220’ (Paper presented at the Central Queensland Law Conference, Rockhampton, 26 August 2005) 2.

approach applied. The court has a discretion to include superannuation in the s 4(1) property list which ‘should’ be exercised pursuant to the *Hickey* approach and ‘could’ be applied in certain circumstances using the *Coghlan* approach.²³⁵ His Honour stated that it is not difficult to assess whether an interest should be considered in the s 4(1) list or not and said that interests in the payment phase would probably qualify.²³⁶ Nonetheless, the *Coghlan* majority suggest that a pension in the payment phase might be better dealt with in a separate list.²³⁷

His Honour stated that ‘[n]o ready or convenient rationalisation of the difference between the differing views in *Coghlan* suggests itself.’²³⁸ His Honour noted that the approach to the assessment of contributions to superannuation taken by Warnick and O’Ryan JJ either on an asset by asset approach or a global approach is not significantly different to the approach of the majority.²³⁹ Either the asset by asset or global approach will be taken at step two. To this extent there is no difference between the majority and dissenting views. If the superannuation is included in a separate list then the majority recommend that it would be ‘extremely prudent’ to apply the four step approach and his Honour considered that in reality it would be unlikely that this strong recommendation would be ignored.²⁴⁰ However, this overlooks the fact that the preferred approach in respect of evaluating superannuation in a separate list may well produce a different result by comparison with the *Hickey* approach because the approach validates the different treatment of superannuation compared to other forms of family wealth. The reason for evaluating superannuation in a separate list is to treat it differently compared to other assets. The approach increases the difficulty of women establishing both contributions to superannuation and the need for a step three adjustment on account of future economic grounds. It therefore endorses an approach which potentially underrates and undervalues superannuation as a form of family wealth continuing the previous disadvantage to women. A detailed analysis of two decisions will demonstrate the potential result of the *Coghlan* treatment of superannuation as ‘another species of asset’.²⁴¹

B Consequences of the Preferred Approach — Two Case Examples

The first decision is the decision in *Cahill*.²⁴² This is a 2003 decision of Coleman J, a member of the *Coghlan* majority, which was reported in 2006 after the decision in *Coghlan*. The decision demonstrates the potential for inconsistency in the treatment of superannuation as property relative to other assets as well as inconsistency in the treatment of different types of superannuation ultimately impeding the fair treatment of superannuation. Notwithstanding that the decision predated *Coghlan* it illustrates the inconsistent treatment of different types of superannuation as well as the inconsistent treatment of superannuation compared to other property that is now possible after *Coghlan*.

This was a matter where the parties sought no splitting or flagging orders in respect of the superannuation interests which the husband was to retain.²⁴³ The cohabitation was of 23 years duration and the three adult children had attained the age of 18 years at separation.²⁴⁴ The husband was aged 62 and the wife 65. After the parties separated the wife returned to

²³⁵ Ibid 5.

²³⁶ Ibid 6.

²³⁷ *Coghlan* (2005) FLC ¶93-220, 79,646 [68].

²³⁸ Justice Ian Coleman, above n 234, 6.

²³⁹ Ibid 7.

²⁴⁰ Ibid.

²⁴¹ *Coghlan* (2005) FLC ¶93-220, 79,642 [43].

²⁴² (2006) FLC ¶93-253.

²⁴³ Ibid 80,295 [2].

²⁴⁴ Ibid 80,296 [11] [12]; 80,297 [19].

Denmark to live and made no contributions after that date.²⁴⁵ There was a delay in commencing proceedings after ‘the partnership ceased to exist’ as at 1995²⁴⁶ and judgment was delivered approximately 8 years after separation. Neither party had repartnered. The husband was employed as a public servant on a substantial salary of \$82 000 a year albeit that this benefit was limited by his age.²⁴⁷ The husband also received an uncommutable DFRDB pension of \$500 per week as a result of army service and a DVA pension of \$118.40 per week as a result of war service related injuries.²⁴⁸ The wife’s employment status was unclear but accepted as negligible.²⁴⁹ The husband provided support to the wife post separation of \$22 460 and she also received \$71 500 from the local council.²⁵⁰

The net total value of the non superannuation property was \$988 832.60 including principally the family home, real estate purchased by the husband post separation using the family home as security²⁵¹ with a net value of \$80 000²⁵² and collectibles. The husband lived in the family home post separation and paid the expenses. The husband had a number of superannuation entitlements namely, a prospective Comsuper entitlement with a value pursuant to the *FL(S)R* of \$447 189.12, the current DFRDB pension valued at \$429 805.49, and two relatively small interests. These were a post separation ASGARD entitlement accepted as having a value of \$35 098.39 and an AGEEST entitlement, 20 per cent of which was accumulated during cohabitation, at \$2518.00.²⁵³ The total value of the superannuation was \$914 611. The DVA pension was excluded from consideration, including at step three, because it was a payment on account of a disability.²⁵⁴ Altogether the net value of the superannuation and non superannuation was \$1 903 444.60.²⁵⁵ However, after these assets were identified and valued they were not consistently treated as s 4(1) property for the purpose of the evaluation of steps two three and four. At step two an asset by asset approach was taken to assessing contributions to some assets and a global approach to others.²⁵⁶

First of all the, of the non superannuation assets, the contributions of the parties to the family home and collectibles was assessed to be equal.²⁵⁷ Then the contributions to the Comsuper entitlement were assessed to be 60 per cent to the husband and 40 per cent to the wife²⁵⁸ after noting the artificiality of bringing it into account at the *FL(S)R* value.²⁵⁹ Next it was noted that half of the DFRDB pension was accumulated during cohabitation. No contributions assessment was made in respect of the pension and it was left to be considered at step three²⁶⁰ noting that the valuation of the pension was ‘a complete fiction.’²⁶¹ In effect it was not treated as s 4(1) property. This treatment of the DFRDB pension was open to question. The interest was an interest in the payment phase and for this reason was s 4(1) property and should have been included at step one in accordance with the *FL(S)R* value. A guaranteed income stream is a

²⁴⁵ Ibid 80,296 [11].

²⁴⁶ Ibid .

²⁴⁷ Ibid 80,305 [90].

²⁴⁸ Ibid [91]

²⁴⁹ Ibid [92].

²⁵⁰ Ibid 80,298 [28].

²⁵¹ Ibid 80,304 [86].

²⁵² Ibid [82].

²⁵³ Ibid 80,299 [41]; 80,304 [83].

²⁵⁴ Ibid 80,305 [91].

²⁵⁵ Ibid 80,301 [55].

²⁵⁶ Ibid [57].

²⁵⁷ Ibid 80,302

²⁵⁸ Ibid 80,303 [74].

²⁵⁹ Ibid [69].

²⁶⁰ Ibid 80,303–4

²⁶¹ Ibid 80,299 [40]

valuable form of wealth and issues about the lump sum valuation could have been the subject of expert evidence and dealt with in the subsequent steps. This type of income stream is in contrast to an income stream obtained from personal exertion which is usually dealt with at step three.

However his Honour said:

It is one thing to ‘treat’ superannuation as “property” to enliven the jurisdiction of the Court to make an order in respect of superannuation, another altogether to suggest that superannuation must thereby be treated the same way as existing or tangible assets when entitlements of parties are determined pursuant to s 79 of the Act.²⁶²

His Honour did not rule out the possibility that superannuation might be treated like other assets if no superannuation order is to be made. Here no orders about the superannuation were sought but three interests, the Comsuper, the AGEST and the ASGARD were included in the list of assets, the Comsuper at *FL(S)R* value.

Next his Honour considered the ‘post separation’ assets being the two small superannuation entitlements and the post separation real estate and ‘pre paid legals’ and assessed the contributions of the wife to be 10 per cent and the husband to be 90 per cent.²⁶³

Coleman J calculated that the effect of the contributions assessment overall after removing the lump sum valuation of the DFRDB pension from the list was approximately 40 per cent in favour of the wife. His Honour then assessed step three and having regard to the husband’s earning capacity, the husband’s DFRDB pension indexed for life as well as the limited earning capacity of the wife a further adjustment was made in favour of the wife of \$100 000.²⁶⁴ The ultimate result for the wife was approximately 38 per cent of the assets with the lump sum value of the DFRDB pension included and about 49 per cent with the lump sum value of the DFRDB pension excluded. While many factors come into play in this result the primary cause was the treatment of superannuation as property.

The decision treated some superannuation interests as property compared to the pre-reform law and to that extent demonstrated the benefits of the reforms. But the interest that was almost certainly s 4(1) property was treated as a resource in the pre-reform way. The decision highlights an issue that has become prominent in the case law, namely, how to deal with pensions in the payment phase. His Honour had no difficulty including some interests in the list of assets at step one, including one interest at the *FL(S)R* value (with some reservation) even though no splitting orders were sought. However, his Honour identified an issue in relation to pensions in the payment phase which has become the subject of polarised views.

The potential for unfairness to women resulting from adopting this type of approach to the treatment of superannuation as property is clear. It introduces an element of uncertainty as to outcome of the redistribution of property.²⁶⁵

The second decision considered to demonstrate the impact of the preferred approach is the post *Coghlan* decision of the Full Court in *Clives*.²⁶⁶ There the parties cohabited for a period

²⁶² Ibid 80,303 [75].

²⁶³ Ibid 80,304 [87].

²⁶⁴ Ibid 80,305 [91]–[97].

²⁶⁵ Below Appendix 11(4).

²⁶⁶ (2008) FLC ¶93-385.

of 15 years and there were two children aged 16 and 13 years.²⁶⁷ The parties also cared for the wife's six year old niece.²⁶⁸ The husband was 49 years old and a project manager.²⁶⁹ The wife was 38 years old and a part time police officer.²⁷⁰ If the wife worked full time her income would be approximately half of that of the husband.²⁷¹

The approach taken by the Full Court was first of all to apply steps one, two and three to the non-superannuation assets totalling \$647 576.²⁷² After step two the contributions were assessed at 60 percent in favour of the husband and 40 per cent in favour of the wife.²⁷³ Then a 15 per cent adjustment was made in favour of the wife at step three.²⁷⁴ The result was an adjustment to the wife of 55 per cent of these assets.

Then steps one, two and three were applied separately to the husband's and wife's superannuation interests which were each dealt with in a separate list. Thus in effect there were three lists including the non-superannuation list.

The adjustment in relation to the husband's entitlement valued at \$310 731 after step two was 62 per cent in favour of the husband.²⁷⁵ The husband had made initial contributions to his superannuation²⁷⁶ and there was also an unexplained post separation increase in the value of the entitlement.²⁷⁷ No adjustment was made in favour of the wife at step three given the disparity in age of the parties, the wife's share of the non superannuation assets and the splitting order of \$81 000 on the basis of contributions.²⁷⁸

The adjustment after step two in relation to the wife's entitlement valued at \$76 944 was equal and no adjustment in favour of the wife was made at step three.²⁷⁹ This entitlement was accumulated during the period of cohabitation.

Taking into account the proposed splitting order, the adjustment of all of the superannuation was 40.7 per cent to the wife. Overall the adjustment was almost equal with the wife receiving slightly less than the husband.²⁸⁰ Once again there were many factors at play but the treatment of superannuation as another species of asset to which the four step approach is separately applied results in a disjointed and inconsistent approach and the application of a step three adjustment to the s 4(1) list but not the superannuation lists demonstrates this.

C Commentary

To return to the extra curial comments of Justice Coleman, his Honour stated that no difference should result from the different approaches of *Hickey* and *Coghlán*.²⁸¹ His Honour said:

²⁶⁷ Ibid 82,932 [10].

²⁶⁸ Ibid.

²⁶⁹ Ibid [7].

²⁷⁰ Ibid [8].

²⁷¹ Ibid 82,939 [67].

²⁷² Ibid 82,943-4 [91]-[101].

²⁷³ Ibid 82,944 [98].

²⁷⁴ Ibid [100].

²⁷⁵ Ibid 82,945 [105]

²⁷⁶ Ibid [102].

²⁷⁷ Ibid [106].

²⁷⁸ Ibid 82,945 [105] [108].

²⁷⁹ Ibid [109]-[110].

²⁸⁰ Ibid [113]

²⁸¹ Ibid 8.

[i]t is submitted that, although the paths to a just and equitable determination appear widely disparate at the outset, by the completion of the third “step” in the process, if not earlier, the practical significance of the initial divergence resulting from which approach is adopted is likely to have disappeared.²⁸²

If this was correct then there is some force to the comment of O’Ryan J²⁸³ that ‘I am uncertain as to why it is contended that what the Full Court said in *Hickey* was wrong unless the point is simply to get to the same result by a different way.’ Justice Coleman intimates that considering superannuation in a separate list and applying the four step approach will not produce different results compared to including superannuation in the s 4(1) list. The reality, which is demonstrated by the above case analyses, is that the *Coghlan* preferred approach of the separate treatment of superannuation as another species of asset in fact sanctions differential treatment of superannuation and the practical effects have not been inconsequential. Indeed the approach is an impediment to optimising the implementation of the amendments from the perspective of the homemaker.

The *Coghlan* preferred approach appears specifically designed to address the difficulties of dealing with pensions in the payment phase as well as defined benefit interests and partially vested accumulation interests in the growth phase that have a prescribed value that creates a distortive effect unless considered separately. The result of this approach dilutes the effect of the regime in its application to these complex entitlements.

Murphy described ‘the place of Part VIIIB in the s 79 process’ as ‘new and difficult territory’ in 2004²⁸⁴ after the decision in *Hickey* and before the decision in *Coghlan*. This remains an accurate assessment.²⁸⁵ Brzostowski agreed that the drafting of the legislation is the source of the difficulty and acknowledged the cogency of the arguments of both the majority and dissenting decisions in *Coghlan*.²⁸⁶ However, he observed that the fact that the legislation treats superannuation and other assets differently supports the *Coghlan* approach.²⁸⁷ He was of the opinion that the answer to the difficulty is to ‘adopt a splitting philosophy’.²⁸⁸ He commented that although the arguments of the minority were compelling nevertheless he could not find fault with the reasoning of the majority.²⁸⁹ This may not be a concern if the two approaches produce the same outcome but otherwise it is significant. Also adopting a splitting philosophy may avoid some of the difficulties associated with the regime but in most cases will not result in a fair result for a homemaker parent with pressing financial requirements.

Although it has been argued that the approaches in *Hickey* and *Coghlan* should achieve a similar result nevertheless the *Coghlan* preferred approach predictably invited different adjustments in respect of each list. The homemaker faced the additional difficulty of proving contributions to superannuation considered in a separate list. Likewise the homemaker confronted the further complication of establishing an adjustment at step three in respect of

²⁸² Ibid 9.

²⁸³ *Coghlan* (2005) FLC ¶93-220, 79,658 [161].

²⁸⁴ Peter Murphy, ‘Superannuation — Recent Unreported Decisions’ (Paper presented at the 11th National Family Law Conference, Gold Coast, September 2004) 145, 147.

²⁸⁵ See also, Paul Doolan, ‘Confusion Reigns Supreme — The Family Court Grapples with Superannuation and Big Money Cases: Part I’ (2005) 11 *Current Family Law* 282, 284–7; Provan, above n 233, 63; Justice Garry Watts, ‘Coping with *Coghlan*’ (Paper presented at the Family Law Intensive, Sydney, 11 February 2006) 15–16; Stephen Bourke, ‘Family Law and Superannuation: Global Approach or Asset by Asset?’ (Television Education Network, 2007).

²⁸⁶ Brzostowski, above n 19, 22–3, 30.

²⁸⁷ Ibid 18–21.

²⁸⁸ Ibid 18, 30.

²⁸⁹ Ibid 25.

that list. Differential treatment of superannuation almost inevitably cleared the way for lower adjustments and thus had the potential to vitiate the improvements introduced by the amendments to some degree.

The effect of the superannuation amendments and the decision in *Coghlan* is that the difference between superannuation and s 4(1) property has been maintained. However, Justice Ian Coleman took a pragmatic view when his Honour commented:

It is submitted that for practitioners, the focus of attention should be more on the kinds of contributions, as all the judges in *Hickey* suggest, and, as they also all suggest, s 75(2), than focusing potentially unproductively on whether or not a superannuation interest should attract the label “property” or something else.²⁹⁰

Bourke and Murphy noted that prior to the amendments there had been an extensive focus on the difference between ‘property’ and ‘resources’.²⁹¹ The authors noted that after the amendments there is a similar potential for a disproportionate focus on the difference between ‘property’ and ‘superannuation as another species of asset’.²⁹² Indeed the view has been expressed that this is an anomalous result for the reason that the focus should rather be upon the nature, form and characteristics of property which is consistent with the *Hickey* approach.²⁹³

Thus the *Coghlan* preferred approach has been the subject of vigorous debate. Some commentators consider that both the *Hickey* and *Coghlan* interpretations are valid. Some commentators have expressed the view that the *Coghlan* approach is simply a different and more complicated means of achieving the same result as in *Hickey*. The majority approach represents a complex solution to a legislative drafting problem acknowledged by both the majority and minority. Otherwise, the majority decision would have resulted in the amendments having no application and the previous law continuing to apply if no orders are sought about superannuation, clearly an unintended consequence. No support for such a result can be gained from the REM or any of the prior reports. Justice Coleman considered that the fact that the Full Court had expressed a strong view, that in this situation it is nevertheless ‘extremely prudent’ to apply the four step approach, would suffice.²⁹⁴

The *Coghlan* approach to superannuation may not be as straightforward as the *Hickey* approach, but it does avoid the absurdity of the previous law continuing to apply in addition to the superannuation regime, a result that was the antithesis of what was intended. Both the majority and dissentients agree that the drafting of the legislation is ambiguous in relation to the treatment of superannuation where no superannuation order is sought or made. Amendment of the legislation to remove any ambiguity and to clarify that superannuation is now to be treated as property, even if it is not, and whether or not a splitting order is to be made, has not been mooted or undertaken to date but is justified and the detailed analyses of the cases supports this view.

²⁹⁰ Justice Ian Coleman, above n 234, 10.

²⁹¹ Bourke and Murphy, above n 19, 66.

²⁹² Ibid.

²⁹³ Ibid 65; *Guthrie & Rushton* [2009] FamCA 1144 [31]–[33]; *Hayton & Bendle* [2010] FamCA 592 [105]–[108] (both decisions of Murphy J).

²⁹⁴ Justice Ian Coleman, above n 234, 7.

D *Kennon v Spry*

The issue about whether superannuation is s 4(1) property remains unresolved.²⁹⁵ In *Hickey* submissions were made that superannuation is property for the purpose of s 4(1) and case law was cited in support of the proposition that the rights of a beneficiary under a superannuation trust deed or legislation are a chose in action and property.²⁹⁶ The Full Court in *Hickey* found it unnecessary to decide this issue in the circumstances.²⁹⁷ However, the observation that the effect of s 90MC is that ‘the expression “treated as property” should be understood as meaning “treated as property even though it is not”²⁹⁸ suggests that the Full Court considered that superannuation is not generally property.

The majority in *Coghlan* likewise found it unnecessary to consider this issue.²⁹⁹ However, *Coghlan* does not remove the need for a decision to be made about whether superannuation is s 4(1) property or not because this is one of the instances where superannuation may be considered in the s 4(1) list rather in a separate list. Thus the previous law, which was not extensive, may still be relevant to the decision whether superannuation is s 4(1) property. The majority in *Coghlan* considered that superannuation should be included in the list of s 4(1) property where it is vested.³⁰⁰ It is unclear whether pensions in the payment phase, which are clearly vested, qualify as s 4(1) property.

Subsequently the High Court in *Kennon v Spry*, in proceedings about a family trust rather than a superannuation fund, considered the issue of whether trust property is property for the purpose of s 79 proceedings.³⁰¹ French CJ, Gummow and Hayne JJ, considered that “property” as defined in s 4(1) must be given the broadest interpretation consistent with the objects of the *FLA*.³⁰² The decision demonstrates that an expansive approach should be taken to the definition of s 4(1) property. The Full Court in *Coghlan* noted that ‘the word “property” in s 79(1) means property as defined in s 4(1) and therefore will not or may not in many cases include superannuation interests’.³⁰³ The Full Court may have taken a more liberal approach after *Kennon & Spry* especially since the highly regulated nature of superannuation interests now makes them more akin to property than previously.³⁰⁴ However, Bourke speculates that some of the older discretionary forms of superannuation that pre-date the commencement of the superannuation guarantee scheme may not constitute property.³⁰⁵

²⁹⁵ Bourke and Murphy, above n 19, 63–4.

²⁹⁶ (2003) FLC ¶93-143, 78,391–2 [70].

²⁹⁷ Ibid 78,393 [76].

²⁹⁸ Ibid [75].

²⁹⁹ (2005) FLC ¶93-220, 79,640 [26]. See also *Pera & Pera* (2008) FLC ¶93-372, 82,576–7 [39] [48].

³⁰⁰ Justice Ian Coleman, above n 234, 6.

³⁰¹ (2008) FLC ¶93-388. See generally, Martin Bartfeld, ‘Equitable Remedies in Family Property: A Review of *Kennon v Spry*’ (Paper presented at the 13th Annual Family Law Intensive, Melbourne, 2 May 2009); Mark MacDiarmid, ‘What Species of Asset?’ (2009) 47(11) *Law Society Journal* 71, 72.

³⁰² *Kennon & Spry* (2008) FLC ¶93-388, 83,032 [64], 83,035 [89]. See generally, Justice Paul Brereton, ‘A Trustee’s Lot is not a Happy One: Discretionary Trusts and Self-Managed Superannuation Funds’ (2010) 34 *Australian Bar Review* 25.

³⁰³ (2005) FLC ¶93-220, 79,642 [46].

³⁰⁴ See generally, Stephen Bourke, *Super Splitting for Family Lawyers* (Certus Law 2010) 179–92. See also, Justice Garry Watts, Coping with *Coghlan*, above n 220, 3–4 citing *Picton & Picton* [2005] FamCA 1392 [94] that the accumulation interests in the growth phase in that matter were S 4(1) property.

³⁰⁵ Bourke, *Super Splitting for Family Lawyers*, above n 304, 189–90.

E *The Coghlan Preferred Approach — Guideline Rather than Binding Rule of Law*

Bourke and Murphy expressed the opinion that the preferred approach is ‘at best, a guideline.’³⁰⁶ This opinion was based on High Court and Full Court authority, as well as the tenor of the decision and was also inferred from subsequent case law. Warnick J in *Coghlan* opined that this was less than satisfactory.³⁰⁷

The Full Court in *McCulough & McCulough* addressed this issue and quoted Brennan J in *Norbis v Norbis*, a decision that endorsed the capacity of the court to provide non binding guidelines, as follows:

There may well be situations in which an appellate court will be justified in setting aside a discretionary order if the primary judge, without sufficient grounds, has failed to apply a guideline in a particular case. Where there is nothing to mark the instant case as different from the generality of cases, the failure will suggest that the discretion has not been soundly exercised. The distinction between such a guideline and a binding rule of law, though essential, may be thin in practice. But the distinction must be maintained and a failure to apply the guideline cannot be treated as an error of law: a failure to apply the guideline is no more than a factor which warrants a close scrutiny of the particular exercise of the discretion.³⁰⁸

The Full Court in *McCulough* concluded that the *Coghlan* approaches have the status of non binding guideline rather than binding rule of law. Nevertheless, the failure to apply a guideline, while not an error of law, is significant and indicative of an inappropriate exercise of discretion.³⁰⁹ Thus Justice Ian Coleman states that ‘[i]n practice it is improbable that the trial judges would ignore this guidance’.³¹⁰

Interestingly Ingleby reflected that the High Court is required to limit any attempts by the Full Court of the Family Court to extend the reach of legislative provisions because of constitutional restrictions.³¹¹ However, he concluded that the inability of the court to formulate definite rules governing the exercise of the discretion in effect widens the discretion.³¹²

F *Summary*

It had been hypothesised that after the reforms superannuation would be generally treated as property in property settlement proceedings which would introduce consistency in the treatment of superannuation compared to other assets and consistency in the treatment of different types of superannuation. It was anticipated that the four step approach would apply consistently to all forms of family wealth including superannuation, thereby generating greater certainty for parties in the outcome of proceedings. However after *Coghlan* the relationship between s 79 and pt VIII B and the treatment of superannuation as property is not a straightforward issue. The *Coghlan* approaches provide a complex answer to a lack of legislative clarity about the treatment of superannuation as property. The *2008 Evaluation* proceeded on the basis that superannuation in all its forms would be treated as property including the valuable interests such as defined benefit interests. The *2008 Evaluation*

³⁰⁶ Bourke and Murphy, above n 19, 69.

³⁰⁷ (2005) FLC ¶93-220, 79,651 [114].

³⁰⁸ (2006) FLC ¶93-282, 80,826 [34] (*McCulough*) quoting *Norbis v Norbis* (1986) FLC ¶91-712, 75,176 (*Norbis*).

³⁰⁹ *Ibid* [33]–[39].

³¹⁰ Justice Ian Coleman, ‘A Distinction Without a Difference ...’, above n 234, 7.

³¹¹ Ingleby, Richard ‘Introduction: Lambert and Lampposts: The End of Equality in Anglo-Australian Matrimonial Property Law’ (2005) 19 *International Journal of Law, Policy and the Family* 137, 140.

³¹² *Ibid*.

estimated the benefits to women of the reforms based on this assumption. This assumption was reasonable at the time but has subsequently proved to be incorrect. However after *Coghlan* the benefits of the reforms to women are less certain. The *Coghlan* approaches open the door to differential treatment of superannuation, which can operate to disadvantage women, at steps one two three and four and the case law about the principles that have developed are considered at chapters six, seven, eight and nine.

CHAPTER 6

STEP ONE: IDENTIFY AND VALUE SUPERANNUATION INTERESTS AND LIABILITIES

The first step in the four step process¹ requires the identification and valuation of property and financial resources and also requires consideration of any relevant liabilities. This step is now very different in its application to superannuation. After *Coghlan*, in general, superannuation should be considered at step one. It must be valued if a splitting order is to be made whether the interest is in the growth phase or the payment phase; and ought to be valued if no splitting order is sought. For the majority of interests a method of valuation is prescribed which for the defined benefit interests aims to value both vested and unvested components. This has largely addressed the pre-reform inconsistency in the valuation and inclusion of different forms of superannuation. Any relevant liability must also be considered. This is a striking change compared to the position prior to the amendments.

I OBLIGATION TO DISCLOSE SUPERANNUATION INTERESTS

As the Full Court in *Hickey* stated:

Section 79, unlike s 78 requires the Court to consider the whole of the property of the parties, however and whenever acquired, notwithstanding that the parties may only seek an alteration of interest in some of that property. As a consequence of the first step in the preferred approach to the determination of the s 79 proceedings, each party to the proceedings has an obligation to make a full and frank disclosure of his/her financial circumstances and all matters relevant thereto ...²

Accordingly the parties must make full disclosure of all of their superannuation interests.³ The importance of this requirement is amplified because there is no central register of superannuation interests. Once disclosure has been completed, the parties can obtain relevant information from the trustee about the interest in order to undertake a valuation.

II IDENTIFY THE SUPERANNUATION INTEREST

The first step in the four step approach as it applies to superannuation is to identify whether the superannuation interest is an interest to which pt VIII B applies.⁴ Once a determination has been made about whether the interest is a ‘superannuation interest’ within the meaning of s 90MD,⁵ what type of interest it is, whether it is in the growth phase or the payment phase, whether it is payable as a lump sum or pension or both and what type of characteristics it has, such as the ability to commute a pension to a lump sum or convert a lump sum to a pension, then a decision can be made about whether a splitting order should be made, and if so, what type.

¹ See generally above 118–20.

² (2003) FLC ¶93-143, 78,386 [40].

³ See generally, *Oriolo & Oriolo* (1985) FLC ¶91-653; *Briese & Briese* (1986) FLC ¶91-713; *Black & Kellner* (1992) FLC ¶92-287.

⁴ *Guthrie & Rushton* [2009] FamCA 1144 [19]; *Hayton & Bendle* [2010] FamCA 592 [55].

⁵ *FLA* s 90MD (definitions of ‘superannuation interest’, ‘eligible superannuation plan’).

The importance of a proper evaluation of the nature, form and characteristics of superannuation interests has become critical and may require the assistance of a relevant professional if the interest is complex.⁶ The nature of superannuation will inform the decision whether the interest is included in the list of property or whether it is included in a separate superannuation list at step one. It has been argued this should be the focus rather than whether the interest is property or not.⁷

The amendments apply to most types of superannuation and so the identification of the interest might appear to be a straightforward matter. However, in at least two cases there was an issue about whether indeed there was a superannuation interest to be considered at step one. The decisions in *Casey & Braione-Howard & DFRDB Authority*⁸ and *Dowdell & Public Trustee (NT)*⁹ demonstrate that identifying an interest is not always a simple matter. In each of these cases the member spouse had died after the commencement of proceedings but before the making of orders, an important risk to consider in this context.

In *Casey & Braione-Howard*, one of the four decisions of the *Coghlan* Full Court, the question for decision was whether the former wife was entitled to a splitting order in respect of a widow's pension payable to the husband's second wife as a reversionary beneficiary.¹⁰ It was accepted that the interest in the DFRDB Scheme was a 'superannuation interest' prior to the death of the husband. The Full Court held that the deceased husband ceased to have a superannuation interest upon his death at which time new interests personal to those entitled to them arose.¹¹ Therefore this interest was not the property of the member for the purpose of s 79 and pt VIII B did not apply.

In *Dowdell* the husband had been in receipt of a DFRDB pension at the time of his death.¹² The parties were divorced and therefore the wife had no eligibility for a spouse pension.¹³ The wife sought a unique order, namely, a type (b) percentage splitting order in respect of the husband's pension, with an operative time the day before the death of the husband.¹⁴ Strickland J held that while it is possible to make an order with a retrospective operative time, there must be property in existence at the time when the order is made.¹⁵ The wife failed to obtain the order about the pension in these circumstances.

While these two decisions illustrate that the identification of an interest as one to which the amendments apply is not necessarily straightforward, apart from interests of this unusual type and overseas superannuation interests, the amendments apply to almost all interests. Nonetheless, the decisions demonstrate that there can be uncertainty about the application of the reforms to superannuation interests in certain circumstances and that the non-member spouse can be at risk if an order about superannuation is not obtained promptly.

⁶ Stephen Bourke & Peter Murphy, 'The Place of Part VIII B in the s 79 Process after *Coghlan* (2006) 12 *Current Family Law*, 65, 71–3.

⁷ *Hayton & Bendle* [2010] FamCA 592 [55].

⁸ (2005) FLC ¶93-219 ('*Casey & Braione-Howard*').

⁹ [2007] FamCA 1276 ('*Dowdell*').

¹⁰ (2005) FLC ¶93-219.

¹¹ *Ibid* 79,633 [44].

¹² [2007] FamCA 1276 [126].

¹³ *Ibid* [127].

¹⁴ *Ibid* [124].

¹⁵ *Ibid* [132]–[140] citing and quoting *Law Smith & Seinor* (1989) FLC ¶92-050; *Casey & Braione-Howard* (2005) FLC ¶93-219.

III VALUE THE SUPERANNUATION INTEREST

Having established that the interest is an interest to which pt VIIB applies the next issue to be considered is the value of the interest. Valuation of superannuation is a complex process because superannuation is usually prospective and contingent in nature and may also be in the nature of an expectancy.¹⁶ Defined benefit interests and partially vested accumulation interests are more complex interests and the valuation methods involve the application of actuarial principles. The regime of valuation attempts to achieve both fairness and certainty in relation to the valuation of the complex interests in particular, and consistency to the extent that post reform most forms of superannuation can now be valued and dealt with under the new regime.¹⁷

Valuation is mandatory where a splitting order is made. If no splitting order is sought or made then the *Coghlan* approaches still encourage valuation although valuation pursuant to the *FL(S)R* is not mandatory.¹⁸ The majority in *Coghlan* stated that valuation is ‘necessary where a splitting order is sought, or extremely prudent where no such splitting order is sought (in order to ensure that justice and equity is achieved)’.¹⁹

In contested proceedings a valuation should be undertaken, even if no splitting order is sought, as the outcome cannot be predicted.²⁰ The fact that the parties do not seek an order about superannuation does not mean the court will not make one.²¹ Murphy commented:

it is difficult to see how a valuation in accordance with the Regulations (or approved scheme-specific method) is not required in every contested case. The first requirement of any court dealing with a s 79 case is to identify and value the property the subject of the claim. That includes superannuation. At what value is it to be included if not the Regulations value? And, if the property is included at step one at its Regulations value, how is it to have another value at another stage of the s 79 process.²²

The regime of valuing superannuation and its place in the s 79 process has been productive of much deliberation. A number of issues have emerged, some the cause of considerable dissension.

A *Obligation of the Court to Value*

One of the first issues to arise was whether the courts are required to undertake the valuation calculation. In one of the earliest cases to be decided after the startup time of the legislation, *Burr J in Gardner*²³ decided that, although the parties had agreed upon the value of the husband’s Comsuper interests, having obtained a valuation from an independent single expert, nevertheless his Honour was obliged to undertake his own determination of value.²⁴ The

¹⁶ Garry Watts, Stephen Bourke and Michael Taussig, *Super Splitting on Marriage Breakdown* (CCH, 2002) 204–6, ¶8-030.

¹⁷ But see *Trott & Trott* (2006) FLC ¶93-263.

¹⁸ (2005) FLC ¶93-220, 79,646 [65].

¹⁹ *Ibid.*

²⁰ See generally, Stephen Bourke, ‘The Fourth Step in Superannuation Orders’ (2004) 10 *Current Family Law* 11–13; Garry Watts, ‘Superannuation Valuations and Property Orders: The Full Court Gives Practical Guidance’ (2003) 16(4) *Australian Family Lawyer*, 15, 17.

²¹ See, eg, *Woollams & Woollams* (2004) FLC ¶93-195, 79,252 [120]–[125] (‘*Woollams*’).

²² Peter Murphy, ‘Superannuation — Recent Unreported Decisions’ (Paper presented at the 11th National Family Law Conference, Gold Coast, September 2004) 145, 154.

²³ [2003] FamCA 249.

²⁴ *Ibid* [63].

detailed calculation is set out in the judgment and is a good example of the complexity of the process.²⁵ This decision may have caused concern. However, in *BAR & JMR*²⁶ Young J respectfully disagreed with this approach for the reason that it usurped the role of the independent expert. The approach of Burr J has not gained currency in subsequent decisions. Thus it is not incumbent upon the court to undertake or double check any valuation.

B Time of Valuation

Another issue that has arisen for consideration by the courts is whether a valuation should be undertaken as at the time of the hearing, at the time of separation or some other time. It now appears settled that generally the valuation of superannuation should be at the time of hearing.²⁷ In this respect superannuation is treated similarly to other assets.²⁸

However, in exceptional circumstances it may be considered important to value a particular interest at a number of different dates such as the date of cohabitation, the date of marriage and the date of separation as well as at the date of the hearing.²⁹ For example in *A & A*³⁰ there had been initial and post separation contributions by the member spouse. Also the prescribed value of the entitlement was approximately double the resignation value. Therefore the value of the entitlement as at the date of separation was considered relevant. Nevertheless, this type of issue is preferably dealt with at step two when assessing contributions.³¹

C Valuation Pursuant to the FL(S)R – The ‘Real Value’ of Superannuation

A question has arisen about the propriety of considering the prescribed value of certain superannuation interests such as defined benefit interests at step one if the entitlement might not be paid for some time. In effect the prescribed valuation does not reflect the ‘real value’ of the interest to the member spouse for this reason.³² However, the view has been expressed that the fact that superannuation may be inaccessible for some time into the future is a factor to be considered at steps three or four and is not a valuation issue.³³ Also Watts J in *Trott* pointed out, in relation to the lump sum valuation of a pension, that ‘[a]ny discounting for the fact that the husband will not immediately receive the whole of the value of the amount in one lump sum is taken into account in the formula used to calculate the amount in the first place.’³⁴ Thus a discount of a valuation at step one for this reason would appear inappropriate.

Another contentious issue about the ‘real value’ of certain superannuation interests is that the standardised valuation can, notwithstanding that a discounting factor is incorporated into the valuation methodology, result in a value being given to an entitlement which is significantly

²⁵ Ibid [68]–[77].

²⁶ (2005) FLC ¶93-231, 79,856 [284].

²⁷ *Hickey*(2003) FLC ¶93-143, 78,386 [39]; *McCheyne & McCheyne* [2003] FMCAfam 19 [19]–[20] (‘*McCheyne*’); *Rushton & Rushton* [2006] FamCA 894 [71] (‘*Rushton*’); *Coventry & McNamee* [2011] FamCAFC 123 [53].

²⁸ See, eg, *Omacini & Omacini* (2005) FLC ¶93-218, 79,616 [16].

²⁹ Tom Altobelli, ‘Children’s Accommodation Needs & the Impact of the New Super Splitting Reforms’ (Paper presented at the Mid North Coast Regional Law Society Seminar, 13 September 2003) 5.

³⁰ [2006] FMCAfam 80 [60]–[80] [125].

³¹ *Coventry & McNamee* [2011] FamCAFC 123 [53].

³² *Woollams* (2004) ¶FLC 93-195, 79,237 [24]–[25], 79,244 [50], 79,252 [121]. See generally Frank, Bates ‘Discretion, Contributions & Needs’ (2005) *International Family Law* 218, 219

³³ Justice Watts, ‘Coping with *Coghlan*’, above n 220, 3. See also *H & H* (2003) FLC ¶93-168, 79,704 [51]; *Woollams* (2004) FLC ¶93-195, 79,244 [49] [52].

³⁴ (2006) FLC ¶93-263, 80,462 [109].

greater than the resignation benefit.³⁵ Subjectively the latter may be more closely aligned to the ‘real value’ of the entitlement to the member spouse. However, the methods of valuing complex entitlements are not confined to calculating the quantum of cash contributions but attempt to consider the future potential worth of both the vested and non vested components.³⁶ Therefore, it is possible that the valuation figure will bear no resemblance to either the resignation figure at the time of valuation or the actual payment ultimately received by the member. Thus the valuation figure may not reflect the ‘real value’ of the interest to the member spouse. Nevertheless, the prescribed valuation is mandated in an endeavour to achieve certainty about the value that should be ascribed to superannuation by separating couples when dividing their assets and to promote consistency in the treatment of superannuation compared to other assets as well as the treatment of different types of superannuation.

In *A & A FM Brown* considered a defined benefit interest in the growth phase of the husband which had a resignation benefit of about half the valuation benefit.³⁷ If the husband resigned before realising a condition of release then the benefit would not be maximised and would comprise only the contributions of the husband and his employer.³⁸ Then a splitting order in favour of the wife could be disproportionately large.³⁹ While in the circumstances this appeared unlikely, his Honour noted that ‘there is an element of artificiality about the Family Law value’⁴⁰ which attempts to put a current value on potential value when a condition of release is realised.⁴¹ Therefore his Honour considered the value of the entitlement at the date of separation rather than the date of hearing and made a base amount splitting order with an operative time as at that date.

However, Young J in *BAR & JMR* considered an unusual valuation anomaly where the *FL(S)R* method of valuation produced a figure significantly less than the estimated fund payout figure as at the same date.⁴² His Honour posed the question:

whether a trial Judge should, in all cases and without discretion, be bound to adopt a valuation produced in accordance with the Superannuation Regulations and Schedule 2. Alternatively is it the overwhelming requirement of the Court to achieve a just and equitable result even if it be necessary to reject or vary a Schedule 2 valuation?⁴³

His Honour proceeded on the basis of the *FL(S)R* valuation in the absence of any other evidence apart from the resignation value.⁴⁴ However, his Honour considered that the question whether a trial Judge has any discretion in relation to the standard valuation was ‘worthy of further consideration’.⁴⁵ Young J utilised a unique combination of splitting order and flagging order to address the difficult valuation issue in that case, in effect preventing implementation of the splitting order until payment was ultimately received.⁴⁶ Justice Ian Coleman agreed with Young J ‘that the current requirement of valuations in accordance with

³⁵ See generally Shane Williams and Jacqueline Campbell, ‘For a Few More Dollars – Dual Formulas Cause Dissension in Division of Superannuation Funds’ (2006) 80(11) *Law Institute Journal* 44.

³⁶ *A & A* [2006] FMCAfam 80 [73].

³⁷ *Ibid* [63].

³⁸ *Ibid* [69] [72].

³⁹ *Ibid* [75].

⁴⁰ *Ibid* [72].

⁴¹ *Ibid* [73].

⁴² (2005) FLC ¶93-231, 79,847 [216]–[217].

⁴³ *Ibid* 79,850 [238].

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* 305.

the legislation does not preclude practitioners from obtaining appropriate actuarial or other evidence with a view to advancing a client's case in relation to the "real" current "value" of a superannuation interest.⁴⁷

There are other options that have developed for addressing this issue apart from discounting the value of the entitlement at step one or taking the approaches in *A & A* or *BAR & JMR*. Increasingly applications are being made by funds for approval of alternative methods of valuation. However, individuals do not tend to pursue this option. Also the issue may be addressed when evaluating the other steps. For instance, at step four a percentage splitting order may offer protection to both the member spouse and non-member spouse. The words of Young J in *BAR & JMR* are apposite namely that 'a splittable payment made in the payment phase gives both simplicity and precision to the outcome'.⁴⁸ His Honour agreed that such an approach avoids a number of issues of uncertainty. Length of employment, relevant salary, income tax liability are all uncertain issues that are avoided if a payment splitting order is made and, in particular, a percentage payment splitting order which was the type of order made in both cases.⁴⁹ Watts J in *Trott* agreed that the making of a type (b) percentage payment splitting order can in appropriate circumstances eliminate the debate.⁵⁰

It remains to be seen if the courts are prepared to erode the effect of the prescribed valuation methodologies by accepting evidence about the real value of the entitlement. The issues can be so complex that this may be inevitable.⁵¹ However, this would weaken the impact of the amendments in a fundamental respect. One of the goals of the amendments was to ensure that a proper value is ascribed to the particularly valuable interests in respect of which this will be an issue, and to introduce a regime for valuation so that all forms of superannuation can be dealt with under pt VIII.

If the case law develops in the direction of considering and encouraging argument about the 'real value' of superannuation then the effect would be to significantly escalate the costs of proceedings for both parties. It would also add multiple methods of valuation to the existing valuation regime. Evidence of competing experts would be reintroduced and trials lengthened at considerable expense. If arguments about the 'real value' of superannuation succeeded then uncertainty about valuation would again prevail. On the other hand courts may prefer the certainty of the system of prescribed valuation instead of contested proceedings involving competing expert evidence about nebulous alternative valuation methods.

D Valuation of Pensions

The valuation of pensions in the payment phase is possibly the most contentious valuation issue to date and disparate opinions have been expressed about the appropriate treatment of these interests. There are a variety of different types of pensions and not all are problematical.⁵² For example the value of an allocated pension or market linked pension is the amount of the withdrawal benefit or account balance. There is no issue in relation to these types of pensions.

⁴⁷ Justice Ian Coleman, 'A Distinction without a Difference? *Coghlan & Coghlan* (2005) FLC ¶93-220' (Paper presented at the Central Queensland Law Conference, Rockhampton, 26 August 2005) 11.

⁴⁸ (2005) FLC ¶93-231, 79,858 [289] citing *Gardner* [2003] FamCA 249 [87].

⁴⁹ See also George Brzostowski, 'Superannuation after *Coghlan*: One Pool or Two? The Distinction with a Difference' (2006) 19(2) *Australian Family Lawyer*, 18, 30.

⁵⁰ (2006) FLC ¶93-263, 80,472 [197].

⁵¹ See, eg, *Cleary & Cleary* [2007] FamCA 999 [38]–[40] ('*Cleary*'); *Jarman & Jarman* (2006) FLC ¶93-289 ('*Jarman*').

⁵² See generally above 104–6.

It is the other types of pensions that give rise to difficulty.⁵³ The controversy arises in relation to the propriety of ascribing a lump sum value to an income stream that may be incapable of commutation. As Murphy stated, the ‘valuation methodology results in a “capitalised sum” for the pension, which is a discounted, present-day value of the income stream by reference to average life expectancy.’⁵⁴ Strong opinions have been expressed about whether or not this valuation figure should be considered at step one at all due to the artificiality of giving a lump sum value to an income stream especially where it cannot be commuted.⁵⁵ Indeed the view has been expressed that the *Perrett* approach of considering such an entitlement as a resource is a reasonable approach more reflective of the ‘real nature’ of the interest.⁵⁶

There are a number of reasons for the reluctance to take into account the lump sum value of such an interest.⁵⁷ The valuation may turn out to be inaccurate if the member spouse dies early⁵⁸ or lives longer than the actuarial estimate. As well the large values that result from the valuation methodology can create considerable distortion where such interests are dealt with in the same list as other assets.⁵⁹

In a number of early decisions, predominantly decisions of Coleman J, it was considered unrealistic and artificial to consider the amount of the valuation of a pension in the payment phase at step one and instead the interests were taken into account as a resource at step three.⁶⁰ In effect the decisions reverted to the previous law notwithstanding that this was the antithesis of the aim of the amendments.⁶¹

However, in other early decisions the view was taken that the value of a pension in the payment phase should be considered at step one⁶² because these types of interests are valuable, and appropriate evidence of difficult issues can be considered by the court within the parameters of the four step approach. Murphy commented in 2004 that ‘[t]he position with respect to pensions in the payment phase is confusing and unsettled. Full Court authority is urgently needed.’⁶³

Subsequently in *Coghlan* the Full Court decided that the appropriate way to address “the real nature” of an interest payable as a pension having a significant lump sum value is to assess it in a separate list at step one so that any special characteristics can be properly considered.⁶⁴

Coleman J sitting as the Full Court in *McKinnon & McKinnon*⁶⁵ took this approach and achieved a similar result in the circumstances of this case to the approach his Honour took in

⁵³ See generally Jacqueline Campbell, ‘Valuing Superannuation for Family Lawyers’ (Television Education Network, August 2011).

⁵⁴ Murphy, above n 22, 151.

⁵⁵ Anthony Dickey (ed), ‘What is the Purpose of Valuing Superannuation Interests under the Regulations?’ (2007) 81 *Australian Law Journal* 234.

⁵⁶ *Ibid* 235.

⁵⁷ Bourke and Murphy, above n 6, 71.

⁵⁸ See, eg, *Ennis* [2003] FamCA 1565 [85] [105].

⁵⁹ Bourke and Murphy, above n 6, 71.

⁶⁰ *Cahill* (2006) FLC ¶93-253, 80,299 [40], 80,304–5 [81] [96]; *Radhakrishnan* [2003] FamCA 1360 [70]; *Ennis* [2003] FamCA 1565 [86] [94] [105]; *Graf* [2005] FamCA 240 [78] [81] [104]; *Mackey* [2005] FamCA 276 [81] [84] [112]; *Jarman & Jarman* [2005] FMCA Fam 306 [35]–[38].

⁶¹ Murphy, above n 22, 152.

⁶² *Crown & Yarnold* [2003] FamCA 152; *McGrath & McGrath* [2003] FamCA 1061 [107] [128] (‘*McGrath*’); *OSF & OJK* (2004) FLC ¶93-191, 79,204 [66]–[68].

⁶³ Murphy, above n 22, 154.

⁶⁴ (2005) FLC ¶93-220, 79,646 [67]–[68].

Cahill, Radhakrishnan and Mackey. In effect the non commutable pension was treated as a resource only and taken into account at step three.⁶⁶ The lump sum value was irrelevant. However, as the entitlement was wholly acquired prior to the parties' relationship the result was probably appropriate in the circumstances.

After *Coghlan* a number of decisions acknowledged the lack of artifice in attributing a lump sum value to valuable pensions in the payment phase.⁶⁷ The *Ennis* approach of including the equivalent of a fortnightly pension payment at step one and otherwise considering the pension at step three was rejected.⁶⁸ The issue of considering the lump sum value of a pension at step one appeared to have been resolved until the decision of the Full Court, including Coleman J, in *Edwards & Edwards*, a case where the wife sought a splitting order in respect of the husband's DFRDB pension in the payment phase but the Federal Magistrate declined to make it.⁶⁹ Without explanation the Full Court agreed with the Federal Magistrate that because the pension was in the payment phase it could not be split.⁷⁰ In the absence of further information by way of clarification this conclusion appears to be incorrect. What flowed from this conclusion was that the Federal Magistrate considered that the prescribed valuation of the pension was of less relevance than the fortnightly amount of the pension at step one.⁷¹ The Full Court agreed⁷² despite the fact that the entitlement was accumulated during a long period of cohabitation of about 22 years and the husband had the sole benefit of the pension during the long post separation period of about 15 years. Nor was there any disagreement that the parties had an equal entitlement to the superannuation and non superannuation assets as at separation.⁷³ The parties had effected an approximately equal division of their non superannuation assets about two years after separation although the value of the wife's non superannuation property had increased more than the husband's by the time of the hearing.⁷⁴ However the division of assets did not include the superannuation.⁷⁵ By the time of the hearing the wife was aged 64 and the husband 61.⁷⁶ The three children were adults.⁷⁷ The husband had remarried.⁷⁸ The wife supported herself with an aged pension of \$303 and farm support of \$30 totaling \$333 per week.⁷⁹ The husband received a total of \$625 per week including \$415 DFRDB pension, \$50 DVA disability pension and \$160 from part time employment but had to support his current wife who received \$90 per week part pension.

The outcome was that the prescribed value of the DFRDB pension of \$313 994.66⁸⁰ was not considered nor was a splitting order made. The Full Court agreed with the approach which disregarded the significant value of the pension resulting from the application of the

⁶⁵ (2005) FLC ¶93-242 (*McKinnon*).

⁶⁶ *Ibid* 79,998–9 [4] [7], 80,001 [29]–[30].

⁶⁷ *HRDW & HSJL* [2005] FamCA 676 [48]; *C & C [No 2]* [2005] FamCA 1223 [18]; *Trott* (2006) FLC ¶93-263, 80,462 [109]; *Treloar & Treloar* [2007] FamCA 1127 [237]–[238] [270] (*Treloar*); *Laporte & Penfold* [2008] FMCAfam 1093 [230]–[233]; *Guthrie & Rushton* [2009] FamCa 1144 [24].

⁶⁸ *C & C [No 2]* [2005] FamCA 1223 [18].

⁶⁹ (2009) FLC ¶93-409 (*Edwards*). See also *Callen & Callen* [2008] FMCAfam 957 [39] (*Callen*).

⁷⁰ *Edwards* (2009) FLC ¶93-409, 83,564 [23].

⁷¹ *Ibid* [24].

⁷² *Ibid* 83,569 [65] [66].

⁷³ *Ibid* 83,570 [80].

⁷⁴ *Ibid* 83,564 [19]; 83,570 [80]; 83,574 [116]–[117].

⁷⁵ *Ibid* 83,563 [15].

⁷⁶ *Ibid* [11].

⁷⁷ *Edwards & Edwards* [2008] FMCAfam 1025 [10] [13].

⁷⁸ *Edwards* (2009) FLC ¶93-409, 83,565 [37].

⁷⁹ *Ibid* [36].

⁸⁰ *Ibid* 83,564 [18].

prescribed valuation in favour of the value of the weekly income received.⁸¹ The base amount splitting order of \$84 000 made by the Federal Magistrate in favour of the wife, which constituted 40 per cent of a different lesser lump sum First State Superannuation entitlement of \$210 000 largely accumulated post separation,⁸² was upheld.⁸³ This included an 18.85 per cent adjustment on account of the pension.⁸⁴ This amounted to \$39 585 or 12.6 per cent of the value of the pension. The wife also retained her superannuation agreed to be worth \$10 500.

The decision endorsed an approach to pensions in the payment phase that permits a decision not to make a splitting order which in turn justifies a decision to disregard the prescribed lump sum value of the entitlement. It is an example of the impact of a non-sequential application of the four steps. The decision appears to mark a return to the *Perrett* approach and is an example of the significant disadvantage to women that can result from this approach. The impact of disregarding the prescribed value of the pension was pronounced. The approach contradicts further goals of the reforms namely that superannuation, and particularly the valuable defined benefit interests, be given a certain and fair value and that different types of superannuation be treated in a consistent way. It is notable that no costs order was made against the wife although her appeal was dismissed — an acknowledgement perhaps of the injustice to the wife evident in this redistribution of the wealth of a long marriage.

The reforms treat superannuation as a valuable form of family wealth with a lump sum value in contrast to government policy which favours superannuation taken as a pension and therefore a form of income. However the decisions that have avoided evaluating pensions as property with a prescribed lump sum value show that the introduction of a regime of valuation of superannuation has not delivered on the expectation that the full value of superannuation will be taken into account when dividing family assets.⁸⁵ Given that superannuation is expected to increase in value and in the light of government policy preferring superannuation to be taken as a pension there is considerable scope for these valuable entitlements to be undervalued and underrated.

IV THE RELEVANCE OF TAXATION AND OTHER LIABILITIES

After identifying and valuing the superannuation interests any relevant liabilities must be considered.⁸⁶ In this context the potential liabilities will comprise any amount payable under an earlier payment split, any surcharge liability, any capital gains tax liability in respect of self managed superannuation funds and any withdrawal taxation liability. This generally appears to be a straightforward exercise with the exception of the issue of potential withdrawal taxation liability if superannuation is to be retained by the member spouse.

As discussed prior to making a splitting order courts must determine the value of the interest. In relation to interests that can be valued pursuant to the *FL(S)R* once the gross value has been determined pursuant to the prescribed valuation method then certain liabilities must be

⁸¹ Ibid 83,568–9 [59]–[69].

⁸² Ibid 83,564 [18].

⁸³ Ibid 83,575 [129] [133].

⁸⁴ Ibid 83,563 [16]; 83,564 [20].

⁸⁵ Above 12–14.

⁸⁶ See generally, CCH, *Australian Family Law & Practice*, vol 2 (at 536-7-11) ¶38-670–¶38-700; Stephen Bourke, ‘Super Splitting and Tax’ (Paper presented at the 11th National Family Law Conference, Gold Coast, September 2004) 447.

deducted to complete the valuation of the interest.⁸⁷ The liabilities, where relevant, are the amount of any earlier payment split and any surcharge liability.⁸⁸

If the interest is an interest in a self managed superannuation fund then potential liability for capital gains tax may be a relevant liability.⁸⁹ However, the importance of this issue should diminish from 1 July 2007 when an extension of rollover relief commenced.⁹⁰ After this time rollover relief will apply when a member spouse rolls over any entitlement of their own in the fund into a complying fund and when a non-member spouse rolls over the amount of any payment split into a complying fund. The change makes splitting orders a more attractive option in relation to self managed superannuation funds than previously.

Lastly, there is an issue about whether any potential taxation liability that may be payable upon withdrawal should be taken into account when assessing the value of an interest. If a splitting order is made then the parties will each bear the taxation liability in respect of their portion of the interest at the rate prevailing in the taxation environment at the time of payment and depending on their own personal circumstances. The problem is whether potential taxation liability should be taken into account where no splitting order is to be made and the interest is to be retained by the member spouse who will ultimately bear the responsibility for any taxation liability. The case law indicates that there is some uncertainty about this issue adding further layer of complexity and possible expense to the issue of valuation.

The difficulty with taking a potential taxation liability into account is that it is an uncertain future liability. The taxation system and the applicable taxation rates may change or categories of taxation may be abolished or new categories may be introduced.⁹¹ All of these concerns have been demonstrated as recently as 2007 when numerous changes were made to the system of taxing superannuation.⁹² Already further significant changes are mooted. However, from 1 July 2007 there is generally no taxation payable in respect of superannuation paid at the age of 60 years.⁹³ Nonetheless, the position is complex and potential taxation liability may be an issue for the member spouse.

Burr J in *Gardner* considered whether this factor should be taken into account where no splitting order would be made and said '[t]he calculation of the income tax factor is itself fraught with difficulties. It is not possible to undertake a calculation of the appropriate taxation figure with any certainty. It depends upon a number of variables ...'.⁹⁴ Ryan FM in *H & H*⁹⁵ agreed and declined to take into account a notional taxation liability about which her Honour had no evidence. However her Honour did not exclude altogether the possibility that

⁸⁷ Above 102–6.

⁸⁸ *Ibid.*

⁸⁹ See generally Stephen Bourke, 'Splitting Self Managed Superannuation' (Paper presented at the 13th National Family Law Conference, Adelaide, 6–11 April 2008) 339; Peter Crump, 'Self Managed Super Funds – Not So Simple' (Paper presented at the 13th National Family Law Conference, Adelaide, 6–11 April 2008).

⁹⁰ *Income Tax Assessment Act 1997* (Cth), amended by *Tax Laws Amendment (2007 Measures No. 5) Act 2007* (Cth) sch 4.

⁹¹ Bourke, 'Super Splitting and Tax' above n 320, 452.

⁹² See generally Commonwealth, 'Simplified Superannuation – Final Decisions' (Outcomes of Consultation, Treasury, 5 September 2006).

⁹³ *Income Tax Assessment Act 1997* (Cth) s 301.10. See generally Garry Winter and Jenni Bartlett, '2006 Budget — A Plan to Simplify and Streamline Superannuation' (2006) 28(10) *Law Society Bulletin* 22, 22; Peter Skinner, 'Superannuation and Family Law: *Kath & Kim v The Einstein Factor*' (Paper presented at the Continuing Professional Development Seminar, Adelaide, 14 February 2008).

⁹⁴ [2003] FamCA 249 [87].

⁹⁵ (2003) FLC ¶93-168, 78,705 [53]–[55] citing *Rosati v Rosati* (1998) FLC ¶92-804 ('*Rosati*').

potential tax liability might be relevant and decided that the principles outlined in the important Full Court decision of *Rosati*, a case about capital gains tax, should be applied when deciding whether or not to take a taxation liability into account. Her Honour translated the *Rosati* principles into superannuation terms and observed that the factors relevant to whether potential taxation should be assessed in valuing a superannuation interest are as follows:

- a) When the preservation age will be reached;
- b) When the member spouse is likely to retire;
- c) Whether the interest is taken as a lump sum, pension or a mixture of the two;
- d) The capacity to quantify the tax payable. This will include consideration of the effect of two reasonable benefit limits.⁹⁶

In essence these factors enable an assessment to be made about whether the realisation of the superannuation interest is imminent and the amount of any potential taxation liability given the nature of the benefit. Her Honour emphasised that each case must be considered on its own facts and decided that the issue of taxation may be relevant as a liability at step one or alternatively at step three as a s 75(2) factor.⁹⁷ The result in that case was that any potential taxation was not taken into account as a liability because the superannuation would not be available for about 15 years.

The Full Court in *Edgehill & Edgehill*⁹⁸ also endorsed the view that evidence should be provided about any potential taxation liability. The Full Court decided that in the circumstances of that case the uncertainty about whether such a liability would actually be incurred and the fact that the quantum of any liability, if incurred, would be relatively minor meant that there was no error in omitting such a liability.

The difficulty with taking any potential taxation liability into account is how to take it into account. If retirement is imminent this may be easier than if retirement is some time away and this is supported by the case law.⁹⁹ Specialist advice about taxation issues may be appropriate because it may assist the decision whether to make a splitting order and if so, what type. By way of example in *Davies & Davies* Boland J examined the taxation implications of making a splitting order, in the taxation environment that existed at the time, before ultimately deciding to make a splitting order.¹⁰⁰

To summarise, the incidence of earlier payment splits as a relevant liability will increase with time. Conversely, the overall relevance of the surcharge and CGT will diminish. The uncertainty of potential withdrawal tax unless retirement is imminent is such that it is unlikely to be considered to be a relevant liability unless realisation of the entitlement is imminent. However, it may be a factor in favour of a splitting order which will not generally be an ideal outcome for the homemaker parent with immediate needs. This issue may therefore have an impact on negotiations and result in less favourable outcomes for the homemaker wishing to maximise the retention of current assets. In contested proceedings there will be additional

⁹⁶ Ibid [53].

⁹⁷ In *Stevens & Stevens* (2005) FLC ¶93-246, 80,041[51] (*'Stevens'*) it was argued that taxation liability should not be taken into account at step one, as other liabilities are, but should be taken into account at step three. The argument was not proceeded with and was therefore not dealt with by the Full Court.

⁹⁸ [2007] FamCA 1102 [21] [66] (*'Edgehill'*).

⁹⁹ Stephen Bourke, 'Decisions of the Federal Magistrates Court' (2004) 16 *Australian Superannuation Law Bulletin* 59, 61.

¹⁰⁰ [2003] FamCA 410 [190] [193] [218] (*'Davies'*).

costs to the parties including the cost of obtaining relevant expert advice. It is a factor that could contribute to uncertainty in relation to the valuation of superannuation.

V SUPERANNUATION IN THE S 4(1) LIST OR SEPARATE SUPERANNUATION LIST OR LISTS

The decisions which preceded *Coghlan* generally included superannuation in the s 4(1) list of assets at step one unless the interest was in the nature of a pension in the payment phase. A number of the early decisions dealt with pensions in the payment phase in a vague and undefined way as a s 75(2) factor and omitted them from step one.¹⁰¹ Others applied the four step process to pensions in the usual way and included the value of them at step one.¹⁰²

However, the *Coghlan* approaches now require a decision about whether to include superannuation in the s 4(1) list or in a separate list or lists. This decision requires that the disclosure of all superannuation interests be finalised, the net value of superannuation be determined and the nature form and characteristics of any entitlements ascertained. As discussed this is not uncomplicated and in particular if a decision not to make a splitting order is made at the outset, either by the agreement of the parties or by the court, then valuation in accordance with the valuation regime may not be required. *Coghlan* outlined four situations in which superannuation might be included in the s 4(1) list¹⁰³ that have been considered in the case law.

Firstly, if the parties agree, then the interest can be included in this list.¹⁰⁴ Secondly, if the court is satisfied that the superannuation interest is in fact s 4(1) property then it can be included in this list in which case the 1992 decision of *Wunderwald & Wunderwald*¹⁰⁵ may still provide guidance. However, there has been little if any explicit consideration of whether an interest should be included in the s 4(1) list because it is in fact s 4(1) property.¹⁰⁶ The *Coghlan* preferred approach of treating superannuation as another species of asset renders an assessment of whether it is s 4(1) property by and large unnecessary.¹⁰⁷ Pensions in the payment phase meet the criteria¹⁰⁸ although this has not been the subject of authoritative determination and they are typically treated as another species of asset.

Thirdly, if the interest is of relatively small value it can be included in the s 4(1) list. What amounts to an interest of relatively small value appears to depend upon the circumstances of each case.¹⁰⁹ An interest which falls within the definition of an unsplitable interest ought to

¹⁰¹ Above 122–5.

¹⁰² *Ibid.*

¹⁰³ (2005) FLC ¶93-220, 79,645 [61].

¹⁰⁴ See, eg, *Ilett & Ilett* (2005) FLC ¶93-221, 79,666 [26][37]–[38] (*‘Ilett’*).

¹⁰⁵ (1992) FLC ¶92-315. See above 43–5.

¹⁰⁶ But see, *Casey & Braione-Howard* (2005) FLC ¶93-219, 79,634 [40]–[45].

¹⁰⁷ *Coghlan* (2005) FLC ¶93-220, 79,644 [53].

¹⁰⁸ *Mackey* [2005] FamCA 276 [44] [110]; *Coghlan* (2005) FLC ¶93-220, 79,652 [119] (Warnick J), [131] (O’Ryan J); *Trott* (2006) FLC ¶93-263, 80,462 [105]–[109]. See also Justice Ian Coleman, ‘A Distinction Without a Difference ...’ above n 47, 6.

¹⁰⁹ See, eg, *Hobbins & Hobbins* [2005] FamCA 734 [20] (*‘Hobbins’*) (\$10 100); *Aktova & Aktov* [2005] FamCA 735 [35] (\$16 053, \$872.15); *Trott* (2006) FLC ¶93-263, 80,453–4 [13]–[14] (\$19 680); *M & M* (2006) FLC ¶93-281, 80,819 [131] (\$7993, \$8352); *Wrixon & Orton* [2008] FMCAfam 232 [22] (\$8951).

qualify.¹¹⁰ An interest which does not fall within this definition but which is nevertheless small relative to the balance of the asset pool appears to qualify.¹¹¹

Finally, there may be features about the interest which require that it be dealt with in the s 4(1) list. Interests in self managed superannuation funds fall into this category.¹¹² The value of these interests is based upon the value of the underlying assets which are generally in the nature of property as commonly understood such as shares and real estate.

Otherwise superannuation will be considered in a separate superannuation list or lists.¹¹³ Pension entitlements are not generally included in the s 4(1) list at the lump sum value but are usually considered in a separate list,¹¹⁴ in particular pensions wholly acquired prior to cohabitation.¹¹⁵ Although it appeared settled that pensions in the payment phase should be considered at step one rather than dealt with at step three as a resource, this is now in doubt.¹¹⁶ Pension entitlements are often considered in a list which is also separate to other superannuation entitlements.¹¹⁷ This separate treatment is despite the fact that these interests are in fact s 4(1) property. The *Coghlan* preferred approach is expressed to enable the ‘real nature’ of this type of interest to be considered, particularly if it is not commutable.¹¹⁸

In relation to foreign superannuation interests there may still be room for the pre regime approach of deciding whether a superannuation interest is s 4(1) property and if it is not, then treating it as a resource at step three.¹¹⁹ However, Justice Garry Watts, commenting on *Lesbirel*,¹²⁰ a decision about a French superannuation interest, expressed the opinion that such an interest could have been dealt with as an another species of asset and included in a separate list at step one and then left with the owner at step four, even though this type of interest is not treated as superannuation for the purpose of pt VIII B.¹²¹

VI SUMMARY — STEP ONE

To conclude a considerable benefit of the amendments is that most superannuation interests are now explicitly taken into account at step one. Information about superannuation can now be obtained by the non-member spouse from the fund and there is a consistent regime of valuing most interests.

¹¹⁰ *FL(S)R* reg 11.

¹¹¹ *Coghlan* (2005) FLC ¶93-220, 79,645 [61].

¹¹² *Steele & Stanley* [2008] FamCA 83 [167]; *Wrixon & Orton* [2008] FMCAfam 232 [22].

¹¹³ See, eg, *Koskinas & Vasseleu* [2005] FamCA 1245 [110]; *A & A* [2006] FMCAfam 80 [100]–[101]; *Reichstein & Reichstein* [2006] FamCA 1422 [131] (‘*Reichstein*’); *O’Reilly & Renoir* [2007] FamCA 722 [45].

¹¹⁴ *HRDW & HSJL* [2005] FamCA 676 [49]; *C & C [No 2]* [2005] FamCA 1223 [19]; *Trott (2006)* FLC ¶ 93-263, 80,462 [251]; *M & M* (2006) FLC ¶93-281, 80,812–13 [96]–[97]; *Mowbray & Mowbray* [2007] FamCA 167 [2] (‘*Mowbray*’); *Treloar* [2007] FamCA 1127 [209]; *Steele & Stanley* [2008] FamCA 83 [167].

¹¹⁵ *B & B* [2005] FamCA 624 [36]–[41]; *McKinnon* (2005) FLC ¶93-242, 79,998 [4] [6].

¹¹⁶ See generally *Edwards* (2009) FLC ¶93-409.

¹¹⁷ *B & B* [2005] FamCA 624 [39]; *HRDW & HSJL* [2005] FamCA 676 [2] [49]; *Treloar* [2007] FamCA 1127 [267].

¹¹⁸ *Coghlan* (2005) FLC ¶93-220, 79,646 [68]; *C & C [No 2]* [2005] FamCA 1223 [40]; *Trott* (2006) FLC ¶93-263, 80,461 [94]–[95].

¹¹⁹ *Lesbirel & Lesbirel* (2006) FLC ¶93-301 (‘*Lesbirel*’).

¹²⁰ *Ibid.*

¹²¹ Justice Garry Watts, ‘Latest and Greatest Cases from 2006: Property Injunctions, Add Backs and Superannuation’ (Paper presented at the 7th Annual Family Law Intensive, Sydney, 10 February 2007) 28–9.

However, these benefits have been eroded in a number of ways. It is not necessary to value superannuation pursuant to the *FL(S)R* if no splitting order is sought. This has its most significant impact in relation to the valuable interests such as defined benefit interests. A prescribed valuation of these interests often but not always produces a value in excess of the resignation value. If a prescribed valuation is not undertaken then the overall pool at step one may be reduced and potentially the amount of any splitting order or set off against other assets may be diminished to the disadvantage of the non-member spouse. Also the issue of whether the court has a discretion in relation to prescribed values has not been decisively dealt with and rejected. Endorsement of such a view would contribute to significant uncertainty and expense as discussed.

Another issue at step one is the *Edwards* approach to valuing pensions in the payment phase which portends a return the *Perrett* approach, an approach which significantly undervalues these types of interests. The detrimental impact of this approach has the potential to be significant because members are encouraged to take superannuation benefits as pensions rather than lump sums where possible. Splitting orders superficially provide an answer to any opposition to assigning a significant lump sum value to an income stream but this solution will be disadvantageous to the homemaker parent whose priority is to retain the family home.

Finally the *Coghlan* preferred approach is generally being adhered to and superannuation is generally considered in a separate list at step one usually where it has any distortive effect.¹²² The preferred approach of considering superannuation in isolation from other assets for the purpose of applying steps two, three and four serves to emphasise the different nature of superannuation and sanctions different conclusions.¹²³ Adding a further level of complexity is the approach to pensions in the payment phase that are commonly considered in a list which is separate from both s 4(1) property and any other superannuation interests. O’Ryan J in *Coghlan* predicted confusion and uncertainty to be the result of the majority decision about the treatment of superannuation as property and the case law.¹²⁴

It was expected that following the reforms the process of identification, valuation and inclusion of superannuation in the list of property together with other forms of family wealth at step one would be uncomplicated. Nevertheless although the reforms apply to most types of superannuation there remains some uncertainty about this issue. Also the reforms provide valuation methods for most types of superannuation but not all. Furthermore various issues have emerged in relation the valuation of superannuation resulting in uncertainty.

The potential that existed for greater coherence in the law has been lost. The *Coghlan* preferred approach of treating superannuation as another species of asset endorses inconsistent evaluation of different types of superannuation as well as inconsistent evaluation of superannuation compared to other assets. It has had a fundamental impact on the evaluation of the subsequent steps. The following chapters present a critical analysis of each of these steps.

¹²² Bourke, ‘Super Splitting Two Years On: Case Law Review’, above n 13, 13.

¹²³ See, eg, above 149–51.

¹²⁴ (2005) FLC ¶93-220, 79,652 [124].

CHAPTER 7

STEP TWO: CONTRIBUTIONS AND SUPERANNUATION — THE EFFECT OF THE AMENDMENTS

Pre-reform, step two did not have a prominent role to play in the evaluation of superannuation in property settlement proceedings. Superannuation was generally evaluated inconsistently with other forms of family wealth at step two resulting in contributions of home makers to superannuation not being recognised in the same way as their contributions to other forms of family wealth. It was expected that after the reforms step two would be assessed in relation to superannuation consistently with other forms of family wealth. Post reform it was anticipated that step two would have substantial role to play in addressing the pre-reform disadvantage to women and that greater fairness in the distribution of all forms of family wealth would result. This Chapter initially considers the case law and legislation relevant to the assessment of step two generally and then analyses the case law about this step post reform.

I A SNAPSHOT OF CONTRIBUTIONS GENERALLY AT STEP TWO

After ascertaining the value of the property, and assessing any relevant liabilities, the second step in property proceedings is for the court to evaluate the contributions of the parties. The court must take into account both direct and indirect financial and non financial contributions by or on behalf of a party or child of the marriage to the acquisition, conservation or improvement of any of the property of the parties or either of them as well as contributions by a party to the welfare of the family.¹ This may involve assessing the relative value to be given to contributions which are fundamentally different.² No guidance is given by the *FLA* about the dilemma of the comparative treatment of the homemaker and parenting contribution and financial contributions including contributions of the income earner. A brief examination of the jurisprudence about this step in its application to s 4(1) property is apposite³ and relevant to the exercise of the s 79 power including superannuation.⁴

A *No Starting Point of Equal Contributions*

The importance of this step is unquestioned.⁵ Fogarty J in *Waters & Jurek* stated the general position thus:

The parties make different contributions to the marriage, which the law recognizes cannot simply be assessed in monetary terms or to the extent that they have financial consequences. Homemaker contributions are to be given as much weight as those of the primary breadwinner.⁶

It has also long been accepted that the contribution of the homemaker ‘should be recognised not in a token way but in a substantial way.’⁷ However, the difficulty is that it is easier to

¹ *FLA* ss 79(4)(a), (b), (c). See above 119.

² See generally, Patrick Parkinson, ‘Quantifying the Homemaker Contribution in Family Property Law’ (2003) 31 *Federal Law Review* 1 (‘Quantifying the Homemaker Contribution’) for a discussion of the dilemma.

³ See generally Greg Shoebridge, ‘Emerging Trends in relation to the Treatment of Contributions in Property Adjustments’ (2008) 13 *Current Family Law* 137.

⁴ Stephen Bourke and Peter Murphy, ‘The Place of Part VIII B in the s 79 Process after *Coghlan*’ (2006) 12 *Current Family Law* 62, 76.

⁵ See, eg, Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 496.

⁶ (1995) FLC ¶92-635, 82,379.

evaluate and quantify a financial contribution than a non financial contribution.⁸ Despite the well intended rhetoric there is nevertheless a propensity for people settling their property matters privately, with the assistance of lawyers, and the courts to undervalue the homemaker contribution which has been acknowledged.⁹

Although the early case law endorsed a starting point of marriage as a partnership with equality of contribution by both homemaker and income earner,¹⁰ in *Mallet* the High Court held that this is inconsistent with the s 79 discretion.¹¹ Although the presumption of equal contribution ceased and the unfettered nature of the judicial discretion was thus maintained, the High Court in *Norbis*¹² confirmed that the court can develop non binding guidelines to assist in the exercise of the discretion.

After *Mallet* attempts were made to reintroduce the concept of marriage as a partnership as a factor relevant to the assessment of contributions. The Full Court in *Ferraro* stated that it is inherent in the *FLA* that ‘marriage is a social and economic unit between equals.’¹³ The Full Court considered that not only are individual circumstances relevant to an assessment of contributions but also ‘an evolving social background which gives greater emphasis to the equality and partnership concepts in a marriage and, no doubt, this evolutionary process will continue.’¹⁴ This suggested a return to the previous position. Fehlberg and Behrens expressed the view that a ‘partnership’ approach takes account of the combined efforts made for the benefit of the family by parties undertaking equally important roles.¹⁵

The Full Court in *McLay* declined to reconsider *Ferraro* noting that the High Court had refused special leave in that case.¹⁶ The Full Court stated that the decision in *Ferraro* was a valuable decision about the difficulties of assessing disparate contributions but was not prescriptive.¹⁷ The Full Court said that ‘in many marriages each party contributes in ways which might be described as the normal way in our society and that in any qualitative evaluation of those matters the likely outcome is one of equality.’¹⁸ The Full Court quoted Moore J at first instance with approval that ‘it is the existence of ‘special factors’ or ‘special

⁷ *Rolfe & Rolfe* (1979) FLC ¶90-629, 78,273 quoted in *Mallet* (1984) FLC ¶91-507, 79,126; *Ferraro* (1993) FLC ¶92-335, 79,570.

⁸ Richard Ingleby, ‘Introduction: Lambert and Lampposts The End of Equality in Anglo-Australian Matrimonial Property Law?’ (2005) 19 *International Journal of Law, Policy and the Family* 137, 145–6.

⁹ See, eg, Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986) xi, 98, 240; Grania Sheehan and Jody Hughes, ‘Division of Matrimonial Property in Australia’ (Research Paper No 25, Australian Institute of Family Studies, March 2001) 32; Chief Justice Diana Bryant, ‘Finding the Balance: Women’s Access to Superannuation after Marriage Breakdown’ (Paper presented at the Australian Women’s Lawyers Conference, Sydney, 29 September 2006), 34. See also Belinda Fehlberg, ‘‘With All My Worldly Goods I Thee Endow?’: The Partnership Theme in Australian Matrimonial Property Law’ (2005) 19 *International Journal of Law, Policy and the Family* 176 for an analysis of case law.

¹⁰ *Wardman & Hudson* (1978) FLC ¶90-466, 77,384 quoting *McLeod & McLeod* (1976) FLC ¶90-073, 75,348; *Pothoff & Pothoff* (1978) FLC ¶90-475, 77,446.

¹¹ *Mallet* (1984) FLC ¶91-507, 79,111, 79,120, 79,126, 79,128–9, 79,132. See generally, Belinda Fehlberg, ‘With All my Worldly Goods I Thee Endow?’, above n 9, 178–9.

¹² (1986) FLC ¶91-712.

¹³ (1993) FLC ¶92-335, 79,573.

¹⁴ *Ibid*, 79,579.

¹⁵ Fehlberg and Behrens, above n 5, 453 citing Nareeda Lewers, Helen Rhoades and Shurlee Swain, ‘Judicial and Couple Approaches to Contributions and Property: The Dominance and Difficulties of a Reciprocity Model’ (2007) 21 *Australian Journal of Family Law* 123.

¹⁶ (1996) FLC ¶92-667, 82,900–1

¹⁷ *Ibid* 82,901.

¹⁸ *Ibid* 82,902.

skills' which attracts the added weight to a role which would not otherwise be qualitatively assessed, but be left to be considered to be within the normal range.¹⁹ The Full Court stated that '[t]he reference to "normal range" in *Ferraro* and in her Honour's judgement is not a return to a presumption of equality as a starting point or any other presumption or starting point.'²⁰ Nonetheless, the decision arguably sanctioned a prima facie guideline of equality at step two.

However subsequently the Full Court in *JEL & DDF* noted that '[t]here is no presumption of equality of contribution or "partnership"' but '[t]here is a requirement to undertake an evaluation of the respective contributions of the husband and wife' in every case.²¹ This has been referred to as the 'individualistic' approach²² or the 'evaluative' approach.²³ Fehlberg and Behrens described the 'individualistic' approach to wealth sharing in family law as viewing 'marriage as an arrangement between individuals in which efforts are made and recognised on a more discrete or separate basis.'²⁴ Also described as the 'evaluative' approach it 'recognizes, evaluates and rewards individual rather than collective effort.'²⁵

Then the Full Court in *Figgins & Figgins* again endorsed the partnership approach and considered that there should be a reduced focus on the quality and result of contributions and greater emphasis on the fact that:

Marriage is and should be regarded as a genuine partnership to which each brings different gifts. The fact that one is productive of money in large quantities is no reason to disadvantage the other.²⁶

Warnick J in *Larmar & Larmar* extensively considered the case law and contended that there are two aspects to the process of evaluating contributions, firstly, the value accorded to the role itself and, secondly, the quality of its performance.²⁷ The first involves consideration of the 'evolving social and legislative background'.²⁸ The second requires consideration of the facts of the case. This approach endorses both the concept of marriage as a partnership and the quality and value of contributions as relevant factors. Then, in *Douglas & Douglas*,²⁹ although the Full Court considered an extensive excursus by the trial Judge about contributions including the *Larmar* approach, the Full Court declined to undertake an authoritative analysis. Nevertheless Warnick J acknowledged that it would be appropriate for the Full Court to pronounce upon the propositions of his Honour in *Larmar* but considered that this case was not the appropriate case.³⁰ Finn J stated that:

in relation to the issue of assessment of contributions, I suggest that in the pluralist society of present day Australia, little assistance is to be gained from a search by trial Judges, or indeed by intermediate appellate courts, for the underlying philosophy or values of the provisions of s 79. The task – not itself always easy – is to apply those provisions to the facts of the particular case. In other words, to determine the parties' contributions (financial and non-financial, direct and indirect) to the acquisition, conservation and improvement of the past and present property of the parties and to the welfare of the parties' family.³¹

¹⁹ Ibid 82,903.

²⁰ Ibid 82,902.

²¹ (2001) FLC ¶93-075, 88,334–5 [152].

²² Fehlberg and Behrens, above n 5, 498 and generally 453–4.

²³ Belinda Fehlberg, 'With All My Worldly Goods I Thee Endow?', above n 9, 180–1.

²⁴ Fehlberg and Behrens, above n 5, 453.

²⁵ Fehlberg, 'With All My Worldly Goods I Thee Endow?', above n 9, 180.

²⁶ (2002) FLC ¶93-122, 89,302 [134] ('*Figgins*').

²⁷ [2005] FamCA 132 [233]–[237].

²⁸ Ibid [271] quoting *Ferraro* (1993) FLC ¶92-335, 79,579.

²⁹ (2006) FLC ¶93-300 ('*Douglas*').

³⁰ Ibid 81,071 [37]–[39].

³¹ Ibid 81,068 [12].

This statement emphasises the importance of confining decisions to the specific terms of s 79 rather than embarking upon a search for any social policy underpinning the legislation and confirms the narrower focus of *JEL & DDF*. A strict approach to the assessment of contributions having regard to the terms of s 79 and the circumstances rather than any underlying philosophy or values was endorsed. Nonetheless, the the concept of marriage as a partnership was revisited by the Full Court in *Sindel & Milton (aka Sindel)* a decision which lent support to the relevance of this concept.³² The position is therefore not clear. The importance of the concept of marriage as a partnership is that it recognises the difficulty of valuing the role of the homemaker parent and provides protection for and acknowledgment of this important but economically vulnerable role. This recognition is not inconsistent with the maintenance of a broad discretion or with the statutory requirements. On the other hand the strict approach requires all contributions to be evaluated in the circumstances of each case on the basis of evidence. This is not as easy to provide in the case of the homemaker contribution as is the proof of a financial contribution.

The decisions continue to display a ‘current lack of clarity and certainty’³³ about this issue. Nevertheless it has been said that in the circumstances of a moderate relationship with limited assets and contributions ‘within the normal range’ that no detailed assessment of contributions is necessary and contributions will be assessed as equal.³⁴

B Contributions Generally

Otherwise the case law has clarified the nature of step two and the factors that are relevant to the discretionary exercise of evaluating contributions. It has been established that it is not necessary for the parties to establish contributions to particular assets. A general contribution is sufficient.³⁵ ‘[T]he Court’s task is to evaluate all of the contributions from the time of the commencement of the parties’ relationship until the time of the hearing and give such weight to contributions as the Court thinks is appropriate in the circumstances.’³⁶ An exhaustive analysis of the various contributions of the parties is not required.³⁷ Nor is it necessary to establish a nexus between a homemaker and parent contribution and particular property³⁸ or that such a contribution coincided significantly or at all with ownership of the property.³⁹ In *Hickey* the Full Court stated that ‘[i]t is within discretion to alter an interest in particular property in favour of a party who made no contribution to that property.’⁴⁰ Although ‘the evaluation of contribution based entitlements inevitably moves from qualitative evaluation of contributions to a quantitative reflection of such evaluation ... [and] there will inevitably be a “leap” from words to figures’⁴¹ it is accepted that the process of evaluating contributions

³² [2010] FamCAFC 232 [66]–[72].

³³ Fehlberg, ‘With All My Worldly Goods I Thee Endow?’ above n 9, 177.

³⁴ Fehlberg and Behrens, above n 5, 499.

³⁵ *Pastrikos & Pastrikos* (1980) FLC ¶90-897, 75,653 (‘*Pastrikos*’).

³⁶ *Farmer & Bramley* (2000) FLC ¶93-060, 87,949 [68]. See also *JEL & DDF* (2001) FLC ¶93-075, 88,334 [152].

³⁷ *Norbis* (1986) FLC ¶91-712, 75,168.

³⁸ *Family Law Amendment Act (1983)* (Cth) s 36 amended s 79(4) to clarify that no nexus between a homemaker contribution and property is required.

³⁹ See generally *Farmer & Bramley* (2000) FLC ¶93-060.

⁴⁰ (2003) FLC ¶93-143, 78,390 [60].

⁴¹ *Steinbrenner & Steinbrenner* [2008] FamCAFC 193 [234].

is not undertaken in a precise mathematical way.⁴² The final adjustment is usually made in percentage terms,⁴³ although sometimes in terms of value, before evaluating step three.⁴⁴

C Additional Financial Contributions

Thus it is important that the court evaluates the circumstances prevailing in each case. A difficult aspect of assessing contributions arises where one party makes a disproportionately greater financial contribution unrelated to the relationship. This might occur at the start of cohabitation⁴⁵ or after separation⁴⁶ or during cohabitation.⁴⁷ Also case law has developed to provide guidance about the treatment of particular categories of additional contributions such as gifts from third parties, inheritances, lottery winnings and damages awards that may not have resulted from joint efforts of the parties.⁴⁸

There has been controversy about the appropriate approach to the treatment of property brought in to a relationship by one party.⁴⁹ There is early authority for treating property contributed by a party early in a relationship that has not been intermingled as separate property even in a long marriage.⁵⁰ However, Fehlberg and Behrens noted that the most significant approach is often referred to as the ‘erosion principle’ and that there has been uncertainty about whether this was based on passage of time or offsetting contributions or both.⁵¹ There is authority that the significance of substantial contributions may decrease as the length of the period of cohabitation increases.⁵² There is also authority that it is not simply the passage of time that diminishes the importance of a substantial contribution but the counterbalancing contributions of the other party.⁵³ Differing opinions about whether the offsetting contributions must exceed substantial contributions have been settled by the Full Court that clarified that they need not.⁵⁴ The Full Court in *Pierce* clarified that the weight to be given to initial contributions depends on all the circumstances and requires an examination of all other contributions of the parties and the use to which the contribution was put and ‘not so much a matter of erosion of contribution.’⁵⁵ ‘[A]n original contribution should not be carried forward as a mathematical proportion ... such a contribution is but one of a number of factors

⁴² *Figgins* (2002) FLC ¶93-122, 89,297 citing Finn J in *Farmer & Bramley* (2000) FLC ¶93-060, 87,947 [49]; *Clives & Clives* (2008) FLC ¶93-385, 82,936 [44]–[45] quoting *Norbis* (1986) FLC ¶91-712, 75168 (‘*Clives*’); *Sindel & Milton (aka Sindel)* [2010] FamCAFC 232 [65]–[66].

⁴³ *Krassas & Krassas* [2005] FamCA 803 [57].

⁴⁴ *Pastrikos* (1980) FLC ¶90-897, 75,653.

⁴⁵ See generally *W & W* (1980) FLC ¶90-872; *Pierce v Pierce* (1999) FLC ¶92-844 (‘*Pierce*’); Patrick Parkinson, ‘The Diminishing Significance of Initial Contributions to Property’ (1999) 13 *Australian Journal of Family Law* 1.

⁴⁶ See especially *Farmer & Bramley* (2000) FLC ¶93-060.

⁴⁷ See especially *Figgins* (2002) FLC ¶93-122.

⁴⁸ Fehlberg and Behrens, above n 4, 501–2.

⁴⁹ See generally Parkinson, ‘The Diminishing Significance of Initial Contributions to Property’, above n 44; Parkinson, ‘Quantifying the Homemaker Contribution’, above n 2; Fehlberg and Behrens, above n 5, 503–7; Anthony Dickey, *Family Law* (Lawbook, 4th ed, 2002) 710–11.

⁵⁰ *W & W* (1980) FLC ¶90-872.

⁵¹ Fehlberg and Behrens, above n 5, 503–4.

⁵² *Crawford & Crawford* (1979) FLC ¶90-647, 78,412 (‘*Crawford*’); *W & W* (1980) FLC ¶90-872, 75,526; *Way & Way* (1996) FLC ¶92-702, 83,404 quoting Fogarty J in *Money & Money* (1994) FLC ¶92-485 and citing *Bremner & Bremner* (1995) FLC ¶92-560.

⁵³ *Lee Steere & Lee Steere* (1985) FLC ¶91-626, 80,078. But see *Aleksovski v Aleksovski* (1996) FLC ¶92-705, 83,437 (‘*Aleksovski*’).

⁵⁴ *Bremner & Bremner* (1995) FLC ¶92-560, 81,588–9 quoting Fogarty J (dissenting) in *Money* (1994) FLC ¶92-485, 81,054. See also *Way* (1996) FLC ¶92-702, 83,404; *Kennon v Kennon* (1997) FLC ¶92-757, 84,298 (‘*Kennon*’).

⁵⁵ (1999) FLC ¶92-844, 85,881 [28].

to be considered.’⁵⁶ It may be relevant that a contribution made early in a long period of cohabitation has been intermingled or expended on family expenses.⁵⁷

These approaches are not just relevant to substantial initial contributions but also to other substantial contributions.⁵⁸ The case law in relation to the assessment of contributions in relation to post-separation assets is also complex with two main approaches.⁵⁹ The first identified by Fehlberg and Behrens requires a nexus between the property and the non-owner and the second involves no nexus but the balancing of all post-separation contributions.⁶⁰

Parkinson critiqued the uncertain state of the law and the lack of a clear conceptual basis for many decisions.⁶¹ He expressed the view that property of an individual that does not result from the joint efforts of the parties should be treated as separate property and subject to any adjustments for the contributions of the other party and any step three adjustments. He recommended the benefits to be gained from considering other family property systems that treat individual property separately.⁶²

D Special Skill Contributions

Contemporary decisions ostensibly accord a significant value to domestic contributions and in ordinary cases absent outstanding circumstances contributions may be assessed as equal. However, equality of contribution can be contraindicated in circumstances where a special contribution of an entrepreneurial nature is established.⁶³ The doctrine of special skill contributions has been described as ‘a necessary exception to the usual practice of the Court in quantifying the homemaker contribution as being equal to the efforts of the other spouse in earning income during the course of the marriage.’⁶⁴ It is generally limited to rare cases involving special skills or talent that result in exceptional net wealth. However the cases have differed in relation to the basis for the approach.⁶⁵ Even in *Ferraro* where the homemaker and parenting contributions of the wife were recognised as ‘outstanding’ over a very long marriage it was concluded that they were not equal to those of the entrepreneur.⁶⁶ It is unusual to encounter a decision where the contributions of the homemaker attain this special status.⁶⁷ Parkinson commented about the case law that ‘ultimately these cases are decided under the palm trees.’⁶⁸

⁵⁶ *White & White* (1982) FLC 91-246, 77,365 citing *Crawford* (1979) FLC ¶90-647, 78412; cited in *Pierce* (1999) FLC ¶92-844, 85,880-1.

⁵⁷ *Aleksovski* (1996) FLC ¶92-705, 83,467.

⁵⁸ Fehlberg and Behrens, above n 5, 505-7.

⁵⁹ *Ibid* 507-8.

⁶⁰ *Ibid* considering the majority and dissenting judgments in *Farmer & Bramley* (2000) FLC ¶93-060 as examples of each approach.

⁶¹ See generally, Parkinson, ‘The Diminishing Significance of Initial Contributions’, above n 49.

⁶² *Ibid*, 12, 18-20.

⁶³ *Mallet* (1984) FLC ¶91-507, 79,132; *Ferraro* (1993) FLC ¶92-335, 79,572; *McLay* (1996) FLC ¶92-667, 82,900-3; *Whiteley & Whiteley* (1992) FLC ¶92-304, 79,299; *Stay* (1997) FLC ¶92-751, 84,131-2; *JEL & DDF* (2001) FLC ¶93-075, 88,334-5 [152]. But see *Figgins* (2002) FLC ¶93-122. See generally Dickey, *Family Law*, above n 49, 709; Paul Guest, ‘An Australian Perspective on the Evolution of the Law in Relation to the Assessment of Special Contributions in ‘Big Money’ Cases: Never Mind the Law, Feel the Politics’ (2005) 19 *International Journal of Law, Policy and the Family* 148; Paul Doolan, ‘Confusion Reigns Supreme — The Family Court Grapples with Superannuation and Big Money Cases: Part II (2006) 12 *Current Family Law* 16, 18.

⁶⁴ Parkinson, ‘Quantifying the Homemaker Contribution’, above n 2, 26.

⁶⁵ Fehlberg and Behrens, above n 5, 511-21.

⁶⁶ *Ferraro* (1993) FLC ¶92-335, 79,581.

⁶⁷ *Contra Johnson & Cooper* [2004] FMCAfam 363.

⁶⁸ Parkinson, ‘Quantifying the Homemaker Contribution’, above n 2, 28.

E *The Global and Asset by Asset Approaches*

Two approaches to the assessment of contributions have developed.⁶⁹ One approach is the global approach which requires that the contributions of the parties be assessed in relation to all of the assets of the parties in a general way. The other approach is the asset by asset approach which requires that the contributions of the parties be assessed in relation to individual assets or groups of assets. Neither approach is endorsed by legislation. Either approach is acceptable. However, it is recognised that the choice of approach is not unfettered and that the circumstances of each case will dictate which approach is the most appropriate approach. Generally the global approach is the preferred approach⁷⁰ but the court has the discretion to determine whether the asset by asset approach is appropriate in the circumstances of a particular case.⁷¹ Usually this is where a special financial contribution has been made by one party to an asset. In *Zyk*⁷² the Full Court cited the example of a post separation inheritance as a circumstance that might justify taking the asset by asset approach. Also in short marriages the asset by asset approach may be the preferable approach.⁷³ As well, a calculation may be undertaken using one approach and a further calculation undertaken using the alternative approach by way of a check or balance.⁷⁴ The need to assess contributions to superannuation (in specific circumstances) appears to have emerged postreform as a further justification for applying a variation on the asset by asset approach (ie the separate pools approach to the assessment of contributions to superannuation).

F *Summary — Contributions Generally*

In summary, while the cases have provided considerable guidance about the nature of step two, the treatment of contributions perceived as having a special quality and the evaluation of contributions that are not readily capable of being ascribed a monetary value are areas that have challenged the courts and continue to be productive of debate. The foundation of the debate is the perceived dilemma of making a comparative assessment of the non-financial contributions of the homemaker parent and financial contributions which are capable of precise calculation.

II COGHLAN AND CONTRIBUTIONS

After the amendments it was expected that step two would be of greater significance because superannuation had previously been considered principally at step three. This has indeed proved to be the case.⁷⁵ The Full Court in *Coghlan* concluded that if superannuation is included in the s 4(1) list then step two is assessed in the usual way either using the asset by asset or global approaches.⁷⁶ If it is included in a separate list or lists then it will be necessary if a splitting order is sought or 'extremely prudent' where a splitting order is not sought to

⁶⁹ See generally, *Norbis* (1986) FLC ¶91-712; *Lenahan & Lenahan* (1987) FLC ¶91-814; *Zyk & Zyk* (1995) FLC ¶92-644 ('*Zyk*'). See also, Anthony Dickey, *Family Law* (Lawbook, 4th ed, 2002) 696-7; Fehlberg and Behrens, above n 5, 496-7.

⁷⁰ *Zyk* (1995) FLC ¶92-644, 82,509-10.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Douglas* [2006] FamCA 245 [7].

⁷⁴ *Bourke & Murphy*, above n 14, 66-7.

⁷⁵ Greg Shoebridge, 'Superannuation: Where Are We At, Five Years On?' (2008) 13 *Current Family Law* 70, 77-9.

⁷⁶ (2005) FLC ¶93-220, 79,645 [61] [62].

evaluate step two.⁷⁷ Curiously, when summarising the effect of the ‘preferred approach’, the majority stated that:

not only will any contributions, both direct and indirect, by either party to such superannuation interests be more likely to be given proper recognition, but the real nature of the superannuation interests in question can also be taken into account ...’⁷⁸

The majority listed matters that may be relevant both at steps two and three using the ‘preferred approach’:

the relationship between years of fund membership and cohabitation; actual contributions made by the fund member at the commencement of the cohabitation (if applicable), at separation and at the date of hearing; preserved and non-preserved resignation entitlements at those times; and any factors peculiar to the fund or to the spouse’s present and/or future entitlements under the fund.⁷⁹

These factors are very much superannuation focussed which is unsurprising given the preferred discrete treatment of superannuation. They appear to suggest that the contributions of the member spouse both prior to, during and after the end of cohabitation should be evaluated. The majority state that this ‘preferred approach’ will give ‘proper recognition’ to ‘any contributions, both direct and indirect, by *either party* to superannuation.’⁸⁰

Fehlberg and Behrens propose that the homemaker spouse will encounter greater difficulty establishing an equal or significant contribution to superannuation that is considered separately.⁸¹

Although indirect contributions are specifically acknowledged to be relevant, the specific factors focus on the direct financial contributions of the member spouse. As discussed the comparative treatment of financial contributions capable of precise calculation and homemaker and parenting contributions has historically been problematical, and continues to be problematical in relation to superannuation. The separate evaluation of contributions to superannuation may do little to remedy the problem.

Apart from these factors no further guidance was provided about why contributions to superannuation require ‘proper recognition’ and Bourke and Murphy observed that there was no obvious reason why this should be so.⁸² They postulated that the preferred approach might presage the continued relevance of the formulaic approaches.⁸³ Indeed the first two factors suggest that there is room for a mathematical or *West & Green* approach to the assessment of contributions by the member spouse before cohabitation and after separation. As discussed,⁸⁴ this pre-reform decision endorsed an agreement of the parties to a formula approach for dividing the net superannuation benefit ultimately received by the member spouse. This formula divided the benefit by the years of service of the husband, then multiplied this figure by the years of cohabitation and divided the result between the parties equally. In other words the formula resulted in an equal division of the net marital portion of the superannuation as follows:

⁷⁷ Ibid 79,646 [65].

⁷⁸ Ibid [67].

⁷⁹ Ibid [66].

⁸⁰ Ibid [67] (emphasis added).

⁸¹ Fehlberg and Behrens, above n 5, 530.

⁸² Bourke and Murphy, above n 4, 67.

⁸³ Ibid 68.

⁸⁴ Above 50.

Current net value of the fund x $\frac{\text{Number of years in the fund during cohabitation}}{\text{Number of years in the fund}} \div 2$

The *West & Green* approach assumes an even accrual of superannuation throughout the period of membership and as a consequence overvalues any original contribution and also protects it from the application of erosion principles and an assessment of the proper weight to be given to such a contribution in all the circumstances. Nevertheless, Fehlberg and Behrens considered that ‘the concrete nature of the *Webber/West & Green* approach has some benefit in making it more likely that serious consideration will be given to the wife’s contributions to that superannuation.’⁸⁵

Perhaps a *West & Green* approach to assessing contributions to superannuation may be more beneficial to homemakers than a more precise mathematical formula approach based on exact direct financial contributions that could result from an assessment of the *Coghlan* factors. If men commence cohabitation later in life after accumulating significant superannuation any initial contribution will contribute to the growth of superannuation in later years together with direct contributions made during cohabitation. Due to the effects of compounding, the value of superannuation generally escalates substantially the closer the member gets to retirement. The *West & Green* approach may benefit the homemaker if cohabitation is later in the period of superannuation accumulation notwithstanding the presumption of even accrual. Also this type of approach if based on years of membership and years of cohabitation may be of benefit to the homemaker if there were partial years at the start or end of cohabitation or periods of separation during cohabitation. Furthermore this type of approach prevents a return to the previous approach of not assessing step two at all in relation to superannuation and instead only considering it at step three.⁸⁶

Recognition of contributions to superannuation having regard to the specified factors may require greater weight to be given to the direct contributions of the member spouse thereby undervaluing the various contributions of the homemaker and overvaluing the contributions of the member spouse. The homemaker spouse will generally find it more difficult to establish a direct or indirect contribution to superannuation if the separate evaluation of superannuation requires a closer connection between the contributions and the superannuation.

Although not free from doubt, an indirect contribution to superannuation by a non-member spouse may not be established by arguing that funds contributed to superannuation were unavailable to the family.⁸⁷ This is because there is no choice about making contributions.⁸⁸ However, additional voluntary contributions may be relevant.⁸⁹ This is harsh and increases the difficulty of a non-member spouse establishing an indirect contribution.

It is of considerable concern that the isolation of superannuation in this way can diminish the impact of contributions by the non-member spouse and elevate the contributions of the member spouse. The preferred approach is not designed to elevate the contributions of the non-member spouse and it is difficult to conceive of how it could. The examination below of

⁸⁵ Fehlberg and Behrens, above n 51, 531–2.

⁸⁶ Watts J in *Trott* (2006) FLC ¶93-263, 80,471 [191] cited the post *Coghlan* decision of Coleman J in *Tran & Havier* [2005] FamCA 1127[72] as an example where no contribution finding was made to the separate superannuation pool.

⁸⁷ *B & B* [2005] FamCA 624 [42]–[44]. But see *Trott* (2006) FLC ¶93-263, 80,466 [149] quoting *Bailey & Bailey* (1978) FLC ¶90-424, 77,145, a decision predating mandatory superannuation, without comment; *Treloar* [2007] FamCA 1127 [216.3].

⁸⁸ *B & B* [2005] FamCA 624 [44].

⁸⁹ *C & C [No 2]* [2005] FamCA 223 [42].

the level of adjustments made in the decided cases in relation to the different forms of contribution will demonstrate the impact of the preferred approach.

Also the case law will be examined to assess whether the factors considered relevant to the application of step two are more narrowly restricted to superannuation matters when the preferred approach is undertaken than when superannuation is considered in the s 4(1) list. Justice Ian Coleman asserted that it was debatable as a matter of practice whether any practical consequences flow from the distinction between the *Hickey* single list approach and the *Coghlan* preferred approach.⁹⁰ As will be demonstrated this has not proved to be the outcome of assessing contributions at step two, even if unintended, and is an obstacle in the way of optimising the effect of amendments.

III CONTRIBUTIONS AFTER COGHLAN

There are obvious difficulties with drawing conclusions from an evaluation of case law which develops from the exercise of a broad discretion. Patterns that emerge from the case law cannot definitively be generalised. There will be many factors and circumstances that are relevant to the outcome in each individual case and this is no less an issue at step two. Nevertheless, after *Coghlan* jurisprudence has developed which provides some guidance in relation to the assessment of contributions generally as well as in relation to particular issues.

A General Jurisprudence after Coghlan

The jurisprudence about the assessment of contributions whether superannuation is considered in a single list or in a separate superannuation list or lists has developed in many respects. The Full Court has confirmed that contributions to superannuation must be assessed and evaluated as are contributions to other assets.⁹¹ Likewise adjustments at step two are usually undertaken by way of percentage although sometimes by way of value.⁹² However, a contributions assessment does not necessitate the making of a splitting order.⁹³ If superannuation is evaluated in a separate list then at the conclusion of step two the court may indicate that any adjustment in respect of the superannuation list may be made in relation to the non-superannuation list rather than by way of splitting order.⁹⁴ Any percentage adjustment of superannuation concluded at step two need not translate precisely into a dollar equivalent at the conclusion of the four steps.⁹⁵ The adjustment need not have a percentage or mathematical basis at all.⁹⁶

Differences peculiar to superannuation are assuming significance at step two. Where an entitlement is entirely acquired prior to cohabitation then no contributions made during cohabitation as homemaker, parent or otherwise would appear to suffice as an indirect contribution to the entitlement.⁹⁷ This appears to be contrary to *Pastrikos*⁹⁸ and the position in

⁹⁰ Justice Ian Coleman, 'A Distinction without a Difference' *Coghlan & Coghlan* (2005) FLC ¶93-220' (Paper presented at the Central Queensland Law Conference, Rockhampton, 26 August 2005) 9–10.

⁹¹ See, eg, *M & M* (2006) FLC ¶93-281, 80,817–18 [121].

⁹² *Ibid* 80,820 [137]. See also *Cleary* [2007] FamCA 999 [100] [109].

⁹³ *M & M* (2006) FLC ¶93-281, 80,813–14 [104]–[106].

⁹⁴ *Ibid*.

⁹⁵ *Ibid* 80,820 [134]–[137]; *Jarman* (2006) FLC ¶93-289, 80,948–9 [30]–[44].

⁹⁶ *Cleary* [2007] FamCA 999 [78] [100].

⁹⁷ *B & B* [2005] FamCA 624 [41]; *McKinnon* (2005) FLC ¶93-242, 79,998 [6]–[7]; *O'Reilly & Renoir* [2007] FamCA 722 [58]; *Cohen & Cohen* [2008] FamCAFC 54 [47] ('*Cohen*').

relation to s 4(1) property that it is not necessary to establish contributions to particular assets. While this may not appear to be fair on the face of it, if a member spouse contributed a pre acquired pension during the period of cohabitation this may be a significant offsetting factor.

However, if an entitlement is accumulated during a period of cohabitation then an indirect contribution made as parent and homemaker will suffice to establish a contribution.⁹⁹ Nevertheless, even where the past and ongoing contributions of a parent and homemaker are arguably of a special nature, this may not suffice to establish a contributions adjustment in excess of 50 per cent where the principle asset is superannuation, largely accumulated over a long period of cohabitation.¹⁰⁰ Direct contributions to superannuation prevail over indirect contributions as a parent and homemaker, however significant, which is arguably consistent with the position in relation to s 4(1) property.

A homemaker parent who provides support to a spouse with an interest in a defined benefit scheme necessary to attain the salary level upon which the calculation of the entitlement is based will be able to establish a contribution to the entitlement.¹⁰¹ This is also true of superannuation generally as the accumulation of superannuation is linked to the level of earnings.¹⁰² It is important to provide the court with evidence of the parties' contributions to superannuation particularly if pre and post cohabitation contributions are alleged.¹⁰³ Full disclosure of all relevant information about superannuation is required. This includes information about the acquisition of and contributions to superannuation and evidence about any initial and post separation contributions.¹⁰⁴ However, the non-member spouse is also required to provide evidence about their contributions to any superannuation which will usually be non-financial and indirect and therefore be more difficult to obtain.¹⁰⁵

The cases have also considered particular step two issues including the impact of the *Coghlan* approaches upon the global and asset by asset approaches to the assessment of contributions, the relevance, if any, of the mathematical approaches to assessing additional contributions and the treatment of contributions to pensions.

B The Global and Asset by Asset Approaches after *Coghlan*

The *Coghlan* preferred approach in a sense favours the use of a type of asset by asset approach because it endorses the separate evaluation of superannuation. However, the global and asset by asset approaches are confined to the assessment of the contributions of the parties at step two.¹⁰⁶ The *Coghlan* preferred approach applies to all steps and has been referred to as the 'two pools' or 'two lists' approach.¹⁰⁷ The majority specifically refer to the relevance of assessing the global and asset by asset approaches to contributions whether the superannuation is in a single s 4(1) list or a separate superannuation list.¹⁰⁸ There is scope for confusion.¹⁰⁹ Justice Garry Watts expressed the opinion that it is hard to envisage the

⁹⁸ (1980) FLC ¶90-897, 75,653.

⁹⁹ *B & B* [2005] FamCA 624 [45].

¹⁰⁰ *Mahoney & Mahoney* [2005] FMCAfam 439 ('*Mahoney*').

¹⁰¹ *M & M* (2006) FLC ¶93-281, 80,820 [134].

¹⁰² *Koskinas & Vasseleu* [2005] FamCA 1207 [144].

¹⁰³ *Jarman* (2006) FLC ¶93-289, 80,951 [56]; *Treloar* [2007] FamCA 1127 [242]–[243].

¹⁰⁴ *Reichstein* [2006] FamCA 1422 [139]–[140].

¹⁰⁵ *M & M* (2006) FLC ¶93-281, 80,820 [134].

¹⁰⁶ *Norbis* (1986) FLC ¶91-712, 75,167.

¹⁰⁷ *Coghlan* (2005) FLC ¶93-220, 79,646 [65]; Bourke, '*Super Splitting for Family Lawyers*' (Certus Law, 2010) 200.

¹⁰⁸ *Coghlan* (2005) FLC ¶93-220, 79,646 [65].

¹⁰⁹ See, eg, *Clives* (2008) FLC ¶93-385, 82,945 [103].

relevance of the global approach if superannuation is considered in a separate list in accordance with the preferred approach.¹¹⁰ Perhaps the majority were envisaging the possibility of multiple superannuation interests in a separate list to which the global approach or the asset by asset approaches could be applied. Nevertheless, the *Coghlan* approaches unambiguously require the application of the four step approach whether the superannuation is included in the s 4(1) list of property¹¹¹ or in a separate superannuation list¹¹² and whether or not a splitting order is sought.¹¹³ Therefore whether the superannuation is included in the s 4(1) list or in a separate list or lists, the global or asset by asset approaches to the assessment of contributions must be considered at step two.¹¹⁴ Frequently the cases do not explicitly evaluate the global or asset by asset approaches although it is generally possible to draw an inference about the approach taken.

No reference is made by the majority to the case law about the global and asset by asset approaches in postulating the preferred approach. The preferred approach is a different approach, not merely an extension of the global and asset by asset approaches. The global and asset by asset approaches remain relevant considerations in assessing step two in relation to the s 4(1) list or a separate superannuation list. This is a perplexing concept to grapple with for separating parties. O’Ryan J, dissenting, noted the case law in relation to the global and asset by asset approaches to contributions and noted that the preferred approach appears to extend this approach to all four steps.¹¹⁵ His Honour expressed disagreement with this approach. His Honour’s insight into this problematic issue has been infrequently addressed.

While the preferred approach of considering superannuation in a separate list appears to be a type of asset by asset approach, and could give rise to confusion, Boland J in *Koskinas & Vasseleu*¹¹⁶ confirmed that it was not intended to be equated with the asset by asset approach to contributions.

As a result of the *Coghlan* approaches, where there are multiple superannuation entitlements, some might be included in the s 4(1) list and others in one or more separate superannuation lists and then the asset by asset or global approaches undertaken as appropriate.¹¹⁷ It is probably safe to say that where individual superannuation interests are considered in separate lists no further consideration of the asset by asset and global approaches is necessary.

The clear obligation to assess the contributions of the parties to superannuation is undoubtedly a significant development. However, the assessment of the asset by asset and global approaches to the evaluation of contributions at step two and the assessment of the *Coghlan* approaches is at times blurred both in the literature and the case law. Furthermore, while the global approach to the assessment of contributions is generally the preferred approach in respect of non superannuation property, the asset by asset approach is evolving as the preferred approach to assessing contributions to superannuation after *Coghlan*, particularly if the interest is a pension in the payment phase. Generally this type of interest is

¹¹⁰ Justice Garry Watts, ‘Coping with *Coghlan*’ (Paper presented at the Family Law Intensive, Sydney, 11 February 2006) 6.

¹¹¹ *Coghlan* (2005) FLC ¶93-220, 79,645 [62].

¹¹² *Ibid* 79,646 [64].

¹¹³ *Ibid* 79,645 [61], 79,646 [65].

¹¹⁴ *Ibid* 79,645 [62], 79,646 [65]. See, eg, *A & A* [2006] FMCAfam 80 [100] [105] [108]–[111].

¹¹⁵ *Coghlan* (2005) FLC ¶93-220, 79,659 [166].

¹¹⁶ [2005] FamCA 1207 [172].

¹¹⁷ See, eg, *McKinnon* (2005) FLC ¶93-242, 79,998 [4], 80,000 [20]–[22].

included in a list which is separate from both the s 4(1) property and any other superannuation entitlements.¹¹⁸

The decisions of the *Coghlan* Full Court in *Ilett*¹¹⁹ and *Wilkinson & Wilkinson*¹²⁰ considered superannuation interests that had been evaluated in the s 4(1) lists. The decisions recognised the utility of adopting the asset by asset approach in circumstances involving a long separation prior to hearing resulting in a significant increase in superannuation values, or where a significant portion of an entitlement was accumulated prior to cohabitation. In *Ilett*,¹²¹ where the hearing took place approximately nine years after separation during which time the superannuation had increased significantly, the Full Court emphasised the importance of doing so correctly which requires the careful evaluation of all relevant post separation contributions of both parties. In *Wilkinson*¹²² the hearing took place approximately 7 years after separation during which time the husband's superannuation had increased significantly and the Full Court considered appropriate evidence about the reason for any post separation increase in the value of superannuation to be important. Otherwise, in the absence of evidence to the contrary, it could be assumed that the continuation of employment post separation was the sole reason.¹²³ This imposes an onus upon the non-member spouse to provide proof of the reason for the increase in value and proof of their own contribution to it, which is a heavy onus to discharge given the nature of those contributions.

The global approach is considered the appropriate approach to assessing contributions to multiple superannuation interests in the absence of full disclosure of the circumstances of the acquisition of and contributions to individual interests.¹²⁴ Conversely, where the contributions are unequivocal and the marriage is short then the asset by asset approach is more appropriate.¹²⁵

While a significant number of decisions have now been reported in relation to superannuation, few of these explicitly assess the merits of the asset by asset or global approaches in this context and the bases are frequently left to inference.

In summary, the global approach is generally the preferred approach in relation to s 4(1) assets although the asset by asset approach is appropriate if a special contribution to a particular asset requires evaluation. However, the effect of the *Coghlan* approaches is that the asset by asset approach is generally the preferred approach in relation to superannuation because 'superannuation interests are another species of asset' and this separate consideration enables proper recognition to be given to the direct and indirect contributions of either party to the superannuation.¹²⁶ Further support for this view is provided by the endorsement of the option of considering individual superannuation interests in separate lists, for example where one of the interests is a pension in the payment phase. Therefore the decisions will be examined to assess whether contributions to superannuation are indeed treated as having a special quality and the reasons given for this special treatment. Although the adjustments resulting from an evaluation of step two will be dependent upon all of the facts of each individual case, general trends are evident.

¹¹⁸ *Ibid.*

¹¹⁹ (2005) FLC ¶93-221, 79,665–6 [26] [31].

¹²⁰ (2005) FLC ¶93-222, 79,669 [4], 79,674 [25]–[26] ('*Wilkinson*').

¹²¹ (2005) FLC ¶93-221, 79,663 [17], 79,666 [31]–[34].

¹²² (2005) FLC ¶93-222, 79,673 [20], 79,674 [25].

¹²³ *Ibid.*

¹²⁴ *Reichstein* [2006] FamCA 1422 [134]–[135] [148].

¹²⁵ *Cleary* [2007] FamCA 999 [45].

¹²⁶ *Coghlan* (2005) FLC ¶93-220, 79,642, 79,646 [67].

C *Quantum of Assessments after Coghlan*

The task of evaluating the contributions of the income earner and homemaker is a difficult one because the contributions are fundamentally different in nature. The preferred approach renders this task more complicated. The decisions about the assessment of contributions in proceedings involving superannuation will be imperative to the success of the amendments in achieving fairness for the homemaker spouse. If the adjustments to the superannuation are generally less than for other assets then the amendments will fall short of the standard of substantive equality against which the reforms are evaluated.¹²⁷

After the amendments and prior to *Coghlan*, of the 22 decisions considered,¹²⁸ only two evaluated superannuation separately. In both cases higher contributions adjustments in respect of the superannuation were made in favour of the member spouse who was the husband.¹²⁹

The remaining 20 decisions included superannuation and s 4(1) property in a single list.¹³⁰ An assessment of equal contributions was evident (12)¹³¹ although some of the decisions did not include all of the superannuation in the single list (3) which was instead considered at step three.¹³² However, a significant number of decisions assessed contributions to a single list including superannuation in favour of the husband in the range of 52 per cent to 75 per cent (6).¹³³ An assessment of contributions exceeding 50 per cent in respect of a single list including superannuation in favour of the wife was uncommon (2) and minor, namely two to five per cent.¹³⁴

After *Coghlan* the trend of generally considering all superannuation and s 4(1) property in a single list has almost ceased. Nevertheless, superannuation and s 4(1) property can still be considered in a single list and the adjustments for contributions ranged from 57.5 per cent to 65 per cent in favour of the husband in two of the cases considered (5), equal adjustment in one case and 55 per cent in favour of the wife in the other two.¹³⁵ It is significant that these cases were decided about the time of *Coghlan* in 2005 and three were appeals from first instance decisions which predated *Coghlan*. In the sample of cases considered none considered all superannuation and s 4(1) property in a single list after 2005. It is likely that the approach of considering all superannuation and s 4(1) property in a single list will be uncommon in future. Nonetheless, even where the preferred approach is undertaken some superannuation may be considered in the s 4(1) list.

The preferred approach is to consider superannuation in a separate list or lists and assess step two in respect of each list. In two cases where the preferred approach was undertaken, similar contributions assessments were made in respect of the s 4(1) list and the superannuation list although neither favoured the wife, and in a third case the adjustment was equal.¹³⁶ However, in general the preferred approach resulted in different adjustments in respect of each list.¹³⁷ This introduces a considerable layer of complexity into step two. The adjustments in favour of

¹²⁷ See above 35–8.

¹²⁸ Appendices One, Two.

¹²⁹ Appendix One.

¹³⁰ Appendix Two.

¹³¹ Appendix Two (1), (2).

¹³² Appendix Two (2).

¹³³ Appendix Two (3).

¹³⁴ Appendix Two (4).

¹³⁵ Appendix Three.

¹³⁶ Appendix Four (1).

¹³⁷ Appendix Four (2).

the wife in respect of superannuation did not generally exceed 50 per cent and were usually less than the contributions assessment for the s 4(1) list in the cases considered (12)¹³⁸ except in the unusual circumstance that the wife had significant superannuation wholly or largely accumulated prior to cohabitation (2).¹³⁹ The complexity of step two where the preferred approach was adopted was accentuated where there were multiple lists and several superannuation entitlements, although the result was still that the wife received an adjustment of less than 50 per cent of the superannuation overall in the cases considered (4).¹⁴⁰ Further complexity was introduced when adjustments were endorsed for different periods.¹⁴¹ If an entitlement that was accumulated entirely prior to cohabitation was considered in a list separate from both the s 4(1) list and any other superannuation list, not surprisingly no contribution by a non-member spouse sufficed to establish an adjustment in their favour.¹⁴²

It has been considered an anomaly to treat superannuation differently to other assets¹⁴³ but the *Coghlan* preferred approach is generally adhered to.

It is acknowledged that the results extrapolated from the decided cases are based upon many factors and result from the the exercise of a broad discretion. Nevertheless, they provide a valuable general guide.

Nevertheless, after *Coghlan* the adjustments made in favour of the non-member spouse at step two in relation to superannuation evaluated in a separate list differ from and are generally less than adjustments made in respect of the s 4(1) list. The adjustments are generally no more than 50 per cent and usually less. This result is consistent with the view that the contributions of the member spouse to superannuation are considered to be superior. The degree of variability in the assessment of contributions in this small sample of cases makes it difficult to extrapolate this observed trend to contested cases more broadly. Further, this analysis does not exclude the possibility of an alternative explanation for such a pattern. For example, it may be that the member spouse had contributed to superannuation prior to cohabitation, a factor expressly considered relevant to the assessment of the direct and indirect contributions of either party to superannuation when the *Coghlan* preferred approach was formulated.¹⁴⁴ As discussed in relation to contributions generally, this would be consistent with early authority that suggests that where substantial pre marriage assets have not been intermingled there should be a credit for the contribution,¹⁴⁵ thus preserving it from the application of erosion or offsetting principles.¹⁴⁶

Arguably this result does not promote the main policy objective of the reforms of providing a coherent framework for addressing the shortcomings of the pre-reform law which failed to deliver consistency, certainty and fairness in the treatment of superannuation after separation.¹⁴⁷ Nor does it further the concurrent policy objective of consistency with government retirement incomes policy and the advancement of adequate provision for

¹³⁸ Ibid.

¹³⁹ Appendix Four (3).

¹⁴⁰ Appendix Four (4).

¹⁴¹ Appendix Four (5).

¹⁴² See above n 97 and accompanying text.

¹⁴³ *Guthrie & Rushton* [2009] FamCA 1144 [31]–[33].

¹⁴⁴ *Coghlan* (2005) FLC ¶93-220, 79,646 [66].

¹⁴⁵ Above n 50.

¹⁴⁶ See below 184–6 for an analysis of of *Trott* (2006) FLC ¶93-262 about the assessment of pre and post contributions to superannuation in practice including the relevance of formulaic approaches.

¹⁴⁷ See above 15–16.

retirement for women.¹⁴⁸ Neither does this result reflect the substantive equality standard which is the approach relied on.¹⁴⁹ Indeed the result may even fall short of a rule equality approach¹⁵⁰ such as that proposed by the *AG's Dept 1992 Discussion Paper* which proposed an automatic equal 'deemed reallocation' of the marital portion of any vested entitlement.¹⁵¹

While the variability in the outcomes of the cases makes any firm conclusion difficult to draw, a specific case analysis demonstrates a clear undervaluation of the contributions of the non-member spouse and concomitantly an overvaluation of the contributions of the member spouse.

The impact of the *Coghlan* preferred approach upon the assessment of contributions to superannuation is provided by the carefully considered decision of Watts J in *Trott*.¹⁵² By way of background information the parties had cohabited for 10 years¹⁵³ and separated approximately three and a half years before the hearing. The husband was aged 42 years and the wife 39 years and there were two children aged 11 and eight years.¹⁵⁴ The husband had reached a senior position in the police force before sustaining a work related injury after separation resulting in the crystallisation of his superannuation entitlements.¹⁵⁵ The value of these entitlements pursuant to the *FL(S)R* was \$1 865 356.50 which the husband received as a pension.¹⁵⁶ The wife had superannuation valued at \$ 19 680 which the parties agreed should be treated as property and included in the list of non-superannuation assets in accordance with *Coghlan*.¹⁵⁷ His Honour assessed the contributions of the parties to the s 4(1) list of assets, valued at \$539 168,¹⁵⁸ as 62.5 per cent to the husband and 37.5 per cent to the wife¹⁵⁹ on account of the husband's greater financial contributions including the gift of a property by his parents.¹⁶⁰

However, the husband's superannuation was dealt with as 'another species of asset' in a separate list to enable the 'real nature' of the interest to be considered.¹⁶¹ The parties were married for 10 years of the period of membership of almost 23 years.¹⁶² The husband had been a member for 10 years prior to the marriage.¹⁶³ The interest comprised two different categories (category 1 and category 2) which were analysed separately. A detailed examination of the nature, form and characteristics of and contributions to each category was undertaken.¹⁶⁴ The contributions to each were found to be different.¹⁶⁵

¹⁴⁸ Ibid.

¹⁴⁹ See above 35–8.

¹⁵⁰ Ibid.

¹⁵¹ See above 57–9.

¹⁵² (2006) FLC ¶93-263.

¹⁵³ Ibid 80,451.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 80,454 [14].

¹⁵⁸ Ibid 80,478 [251].

¹⁵⁹ Ibid 80,460 [90].

¹⁶⁰ Ibid [84]

¹⁶¹ Ibid 80, 461 [95].

¹⁶² Ibid 80,467 [152].

¹⁶³ Ibid [151].

¹⁶⁴ Ibid 80,464–467 [118]–[153].

¹⁶⁵ Ibid.

The first category was in the nature of a non commutable indexed pension¹⁶⁶ referable to the husband's injury on duty (and salary at that time) rather than the period of membership of the fund and was valued at \$1 389 163.34.¹⁶⁷ The husband would continue to receive this pension interest until the age of 60 in the event of continuing incapacity for employment and it could be partially commuted at age 55.¹⁶⁸ Because the injury occurred after separation his Honour held that the only contributions of the wife relevant to this category of interest were her additional contribution to the children because of the injury¹⁶⁹ and her contribution to the level of the husband's salary at that time.¹⁷⁰ The wife supported the husband in his promotion; relocated the family; gave up her own employment and assumed the greater homemaker and parental role as his responsibilities grew.¹⁷¹ The contribution of the wife to this category of interest was assessed at 15 per cent.¹⁷² Watts J made no reference to case law when reaching this conclusion.

The second category of interest was a commutable indexed life pension¹⁷³ valued at \$419 443.87.¹⁷⁴ His Honour noted that at age 60 the husband's superannuation would change.¹⁷⁵ Before the husband was hurt on duty the interest was a defined benefit interest in the growth phase and after that it became a defined benefit interest in the payment phase.¹⁷⁶ After the age of 60 his Honour observed that the entitlement to the pension would be based upon the level of pension and a particular accrued benefit multiple instead of salary and an accrued benefit multiple based on years of service, due to being hurt on duty.¹⁷⁷

Unlike the category 1 interest, Watts J considered the case law when assessing the contributions to the category 2 interest. His Honour noted *Bailey* that the loss of income to the family and the loss of the right to share in retirement benefits after separation were significant concomitant results of marital breakdown.¹⁷⁸ His Honour noted that no evidence had been provided about the value of the defined benefit interest at the commencement of cohabitation¹⁷⁹ and then considered how contributions to superannuation before and after cohabitation are to be assessed.¹⁸⁰ His Honour took into account the established case law that the importance of an initial contribution diminishes over time and having regard to the contributions of the other party during the period of cohabitation.¹⁸¹ While eschewing a mathematical approach to assessing initial contributions his Honour quoted *Clauson* that it does provide a rough guide.¹⁸² Although it is not definitive it may be a relevant factor and must be evaluated together with all other relevant contributions. His Honour emphasised that it is necessary to evaluate the weight to be given the initial contribution in all the circumstances having regard to *Pierce*.¹⁸³

¹⁶⁶ Ibid 80,461 [94].

¹⁶⁷ Ibid 80,462 [104].

¹⁶⁸ Ibid 80,464–5 [118]–[125].

¹⁶⁹ Ibid 80,466 [142] [145].

¹⁷⁰ Ibid [143].

¹⁷¹ Ibid [144]–[145].

¹⁷² Ibid [148].

¹⁷³ Ibid 80,461 [94].

¹⁷⁴ Ibid 80,462 [102].

¹⁷⁵ Ibid 80,465 [126].

¹⁷⁶ Ibid 80,465–6 [127]–[136].

¹⁷⁷ Ibid.

¹⁷⁸ Ibid 80,466 [149].

¹⁷⁹ Ibid 80,467 [153].

¹⁸⁰ Ibid 80,467–9 [149]–[172].

¹⁸¹ Ibid 80,467 [154], citing *Bremner* (1995) FLC ¶92-560.

¹⁸² Ibid, quoting *Clauson* (1995) FLC ¶92-595.

¹⁸³ Ibid [154], quoting *Pierce* (1999) FLC ¶92-844, 85,881 [28].

His Honour then considered whether the *Webber/West and Green* formulaic approach had any ongoing role to play in the assessment of contributions and observed that the *Coghlan* factors relevant to an assessment of contributions at step two seemed to suggest that *West & Green* may continue to be relevant.¹⁸⁴ After considering case law that might suggest a continuing role for a formulaic approach¹⁸⁵ his Honour stated ‘it would still be a matter to assess the weight and effect of the “time served” contributions in the context of a history of all other contributions made by each party.’¹⁸⁶ However, his Honour observed that ‘[p]robably the *West & Green* debate will be revisited by a future Full Court.’¹⁸⁷ His Honour expressed the view that ‘the “*West & Green*” approach does not fit comfortably with how the Court assesses contributions in relation to other property and assets.’¹⁸⁸

His Honour noted that the husband continued to make contributions to the fund after separation but also observed that the wife continued to make her contributions as a parent and homemaker during that time.¹⁸⁹ The contribution of the wife to this less valuable category of interest was assessed to be 40 per cent.¹⁹⁰ Indeed this adjustment was the highest adjustment of the three adjustments at step two but was in relation the least valuable of the three lists. In total the assessment of the contributions of the wife to all of the husband’s superannuation at step two amounted to 20.8 per cent compared to 37.5 per cent of the s 4(1) property. When evaluated both in relation to the s 4(1) property and the superannuation the step two adjustments represented an adjustment of approximately 25 per cent.

Ultimately an additional payment of \$94 354 was made on account of step three which was about 4 per cent of the entirety of the superannuation and other property and about 17.5 per cent of the net property excluding superannuation.¹⁹¹ The final overall adjustment represented approximately 28.65 per cent.¹⁹² This decision highlights the unfairness that can result from the separate evaluation of step two in relation to superannuation and the lack of consistency which is apparent when this step is implemented separately in respect of the s 4(1) assets. Moreover the husband’s additional contributions to superannuation were treated as more valuable than his additional contributions to the other assets.

D *West & Green and the Mathematical/Formulaic Approaches after Coghlan*

As previously discussed the *West & Green* and like formulaic or mathematical approaches had been used prior to the amendments to calculate the marital portion of superannuation in various ways for the purpose of assessing contributions. Generally the approaches sought to quarantine pre and post cohabitation contributions and were utilised to determine the amount of any offset against other assets.¹⁹³ Theoretically such an approach also provides greater certainty with regard to the outcomes of the step two evaluation of contributions.

¹⁸⁴ Ibid 80,469 [166].

¹⁸⁵ Ibid 80,468–9 [163]–[165] citing *McKinnon* (2005) FLC ¶93-242; *Cameron & Cameron* [2004] FamCA 819.

¹⁸⁶ Ibid [167].

¹⁸⁷ Ibid [169].

¹⁸⁸ Ibid [170].

¹⁸⁹ Ibid 80,467 [150].

¹⁹⁰ Ibid 80,469 [172].

¹⁹¹ Ibid 80,477 [244] [246] 80,478 [247] [248.2].

¹⁹² Ibid 80,478 [252].

¹⁹³ Justice Garry Watts, ‘Coping with *Coghlan*’, above n 110, 9. See generally *BAR & JMR* (2005) FLC ¶93-231, 79,853–5 [262]–[273]. See also above 49–51.

A formulaic approach to superannuation was recommended by the *A-G's 1998 Position Paper* but was not implemented. If implemented, without there being a further adjustment at step three, then this may have introduced rule equality rather than substantive or result equality.¹⁹⁴

After the amendments, the potential unfairness to the non-member spouse of a rigid application of a mathematical approach was recognised in a number of cases because of the focus on the contributions of the member spouse to the exclusion of other relevant contributions.¹⁹⁵ This type of approach disregards the actual value of contributions made to superannuation at different relevant times and assumes even accrual or equal contribution throughout the period of membership.¹⁹⁶ It fails to acknowledge that contributions to superannuation during cohabitation can result in growth after separation. The early cases emphasised the need to assess all of the contributions to superannuation.¹⁹⁷ However, at least in one instance, the rejection of a mathematical approach arguably resulted in a less generous step two adjustment to the homemaker spouse than might have been achieved using a mathematical approach.¹⁹⁸ The adjustment was also considerably less than the step two adjustment in relation to the s 4(1) property.¹⁹⁹

As noted, the Full Court in *Coghlan* stated that when evaluating the contributions of the parties to superannuation considered in a separate list, a number of factors might be relevant including the number of years of cohabitation referable to the period of membership of the fund and the actual contributions of the member spouse as at the time of cohabitation, separation and hearing.²⁰⁰ No specific detail was provided about how this type of information might be relevant apart from the general statement that the 'preferred approach' enables 'proper recognition' to be given to the contributions of the parties to the superannuation and also enables 'the real nature' of the interest to be determined.²⁰¹ The nature of these factors may suggest that there is still room for a mathematical or formulaic approach.²⁰² Consequently, after *Coghlan*, the formulaic 'time served' approach has been described as 'less heretical than in earlier times'²⁰³ in relation to a short childless marriage which lends further support to this view. Commentators have noted that there is 'more than a hint that direct, financial post-separation contributions to superannuation are to be given additional weight — or, at least, weight at the expense of (usually predominantly indirect) contributions to the build-up of the base of superannuation interest which grows post-separation.'²⁰⁴

However, subsequent decisions have stated that any roughly mathematical approach must be considered in the context of all other contributions and is just one factor to consider.²⁰⁵ The *West & Green* approach has not been endorsed as a 'preferred approach'.²⁰⁶ In fact the Full Court in *M & M* stated:

¹⁹⁴ See generally above 34–8.

¹⁹⁵ *Cahill* (2006) FLC ¶93-253, 80,303 [71]; *Cameron & Cameron* [2003] FamCA 1204 [76] ('*Cameron*'); *Gunning & Gunning* [2003] FMCAfam 404 [39]; *BAR & JMR* (2005) FLC ¶93-231, 79,856 [279].

¹⁹⁶ *McGrath* [2003] FamCA 1061 [115]. See also *Mowbray* [2007] FamCA 167 [23] [28]–[29] a post *Coghlan* authority.

¹⁹⁷ *Cameron* [2003] FamCA 1204 [77]; *BAR & JMR* (2005) FLC ¶93-231, 79,826 [72].

¹⁹⁸ *BAR & JMR* (2005) FLC ¶93-231, 79,859 [296] [298].

¹⁹⁹ *Ibid* [296].

²⁰⁰ (2005) FLC ¶93-220, 79,646 [66]. See above 142.

²⁰¹ *Coghlan* (2005) FLC ¶93-220 [66]–[68].

²⁰² See, eg, *Trott* (2006) FLC ¶93-263, 80,469 [167].

²⁰³ *McKinnon* (2005) FLC ¶93-242, 80,000 [16].

²⁰⁴ Bourke and Murphy, above n 4, 69.

²⁰⁵ *Trott* (2006) FLC ¶93-263, 80,469 [167]; *Treloar* [2007] FamCA 1127 [239]–[240].

²⁰⁶ *Trott* (2006) FLC ¶93-263, 80,469 [169].

121. We do not find a contribution assessment based on a calculation of years of marriage divided by the years the member had been in the fund to be helpful. In the context of considering contributions pursuant to s 79 it has never been necessary to apply a mathematical formula in the way we have described. All that is required is that the contributions of the parties be evaluated in relation to superannuation as they are to other assets. Further there may be real injustice in doing so as there is frequently far less contributed to a fund in the early years of membership compared to later years. A formulaic approach does not take account of the years in which greater contributions were made, often later in a marriage, nor the effect of contributions over many years of marriage which may have diluted initial contribution ...

123. In our view it is clear ... that the majority in *Coghlan* ... was concerned with a consideration of actual contributions where they were ascertainable. The relationship between the years of fund membership and cohabitation might be relevant in a defined benefits scheme whereas actual contributions made by the fund member at the commencement of the cohabitation might be relevant to an accumulation fund where in both cases the marriage was of short duration. However, in our view there is nothing said by the majority in *Coghlan* ... that would give any support for the application of some kind of a formula or that contributions to superannuation whatever the nature of the fund, should be treated in a different way from contributions to other property under s 79(4). This is so in our view whether the superannuation is considered as part of one pool of assets or in a separate pool.²⁰⁷

Thus the Full Court clarified that the years of fund membership relevant to the period of cohabitation is a relevant consideration in relation to a defined benefit interest in the context of a short marriage. Similarly the value of an entitlement at the time of cohabitation, at separation and at the time of hearing is relevant to an accumulation interest in a short marriage.

Although this decision appears to put to rest any ongoing relevance of the formulaic approaches, ultimately the Full Court obtained guidance from just such an approach.²⁰⁸ This perplexing conclusion cast considerable doubt upon the unequivocal views expressed about this issue.²⁰⁹ The Full Court stated that if insufficient specific evidence is provided to assess the contributions of the non-member spouse to superannuation then a formulaic approach may provide some basic assistance although it is just one aspect of contributions to be assessed with all others.²¹⁰ This places the onus upon the non-member spouse to establish the nature and quality of their contributions rather than upon the member spouse to establish the actual value of superannuation at cohabitation, separation and trial. Arguably the onus should also be on the member spouse to prove the value of the contribution to superannuation not referable to cohabitation preferably supported by actuarial evidence. The difficulty in that case was that the value of the pension was considerably greater than the other assets and eventually the wife sought no splitting order.

Subsequently the Full Court in *Mowbray*²¹¹ again firmly rejected the continued relevance of the *West & Green* approach because such a narrow approach suggests that the contributions that are relevant to non superannuation assets are not also relevant to superannuation.²¹² The Full Court confirmed that this is erroneous²¹³ and reiterated the necessity for an evaluation of all relevant contributions,²¹⁴ an approach that has also been taken to address the issue of initial and post separation contributions to superannuation in other cases.²¹⁵

²⁰⁷ (2006) FLC ¶93-281, 80,817-8 [121] [123].

²⁰⁸ Ibid 80,820 [134].

²⁰⁹ See *Fayette & Fayette* [2007] FamCA 834 [60]-[61].

²¹⁰ *M & M* (2006) FLC ¶93-281, 80,820 [134]; *Treloar* [2007] FamCA 1127 [239]-[243].

²¹¹ [2007] FamCA 167 [28]-[29].

²¹² Ibid [16]-[17].

²¹³ Ibid [29].

²¹⁴ Ibid.

²¹⁵ See, eg, *Reichstein* [2006] FamCA 1422; *Steele & Stanley* [2008] FamCA 83.

However, in the later decision of *Treloar* a formulaic approach was found to be relevant in relation to a medium length marriage with two children where the husband had a significant period of membership prior to cohabitation notwithstanding the absence of a valuation of the entitlement at the commencement of cohabitation.²¹⁶

In the context of longer marriages, as the Full Court in *M & M* noted, a formulaic approach fails to take account of the fact that generally less is contributed to superannuation in the early years and greater contributions are made later on. There is no even accrual over time and therefore an expert valuation of an initial contribution would be likely to produce a considerably lower value than that obtained using a formulaic approach. Even if such a valuation is obtained the value of an initial contribution to superannuation ought to be treated in the same way as an initial contribution to s 4(1) property. In the context of a long relationship a substantial initial contribution may be offset by the contributions of the other spouse.²¹⁷ A combination of time, intermingling and proportionality gradually diminishes the weight of such a contribution.²¹⁸ An initial contribution to superannuation should not be treated as a more valuable or special contribution than an initial contribution to s 4(1) property generally in a long relationship.

However the contrary view might be that, in accordance with early authority about the effect of initial contributions where there has been no intermingling of a substantial initial contribution, an initial contribution to superannuation should be quarantined.²¹⁹ There is unlikely to be intermingling of pre-cohabitation superannuation unless it has been paid and utilised for family purposes. The effect of a formulaic approach is that it increases the importance of the initial contribution. Moreover using a formulaic approach to quarantine post separation contributions fails to take account of the impact of the compounding effect of contributions made during cohabitation. It is also open to challenge if the other party is making post separation contributions to the care of children. Although any amount quarantined as a result of a formulaic approach must still be considered at step three, the practical effect of this may be minor. Accordingly this type of approach risks undervaluing the homemaker contribution and elevating the importance of a direct financial contribution to superannuation.

Although not completely free from doubt it would appear that generally the *West & Green* or formulaic approach to the assessment of contributions to superannuation has not been endorsed by the case law. As observed by Chief Justice Diana Bryant:

Given the tendency to undervalue the homemaking contribution, such an approach is highly problematic for women and is likely to diminish their contributions in comparison with men's direct financial contributions to the superannuation fund. Additionally, pre-cohabitation contributions will be given disproportionate weight in comparison with those made during the life of a marriage and this is especially disadvantageous to women in long marriages.²²⁰

Her Honour commented that *M & M* has authoritatively determined that formulaic approaches to the assessment of contributions to superannuation should not be used and that such

²¹⁶ [2007] FamCA 1127 [236]–[243].

²¹⁷ See above n 57; *Lee-Steere* (1985) FLC ¶91-626, 80,078.

²¹⁸ See above 173–4.

²¹⁹ *Ibid* n 50.

²²⁰ Chief Justice Diana Bryant, above n 9, 34.

contributions should be assessed as are contributions to non-superannuation property.²²¹ This view has been endorsed in subsequent decisions.²²²

However, relevant evidence may assist in an accurate assessment and evaluation of contributions to superannuation in the usual way although there is no mathematical exactitude about the process. The Full Court decisions in *Ilett*²²³ and *Wilkinson*²²⁴ endorsed the correct use of the asset by asset approach to the assessment of contributions supported by appropriate evidence as a means of assessing pre and post cohabitation contributions to superannuation and other assets.

Two alternative approaches have been suggested by the Full Court in *Clives* for addressing significant initial contributions to superannuation.²²⁵ One was to assess any greater initial contribution to superannuation, then assess the contributions during cohabitation and finally assess contributions for the period after separation. Thus contributions are assessed for different periods. The other approach was to deduct the present day value of the entitlement at the commencement of cohabitation and only assess the contributions of the parties to the balance. This not only preserves the initial contribution to superannuation intact, unlike initial contributions to other property, but also inflates the impact of it by comparison. These approaches give more status to initial contributions to superannuation than to other assets²²⁶ and the latter approach verges on being a variety of formulaic approach.

The position remains unclear if the decisions suggest that there may be some utility in a formulaic approach. The preferable view, which accords with the pre-reform law about the treatment of greater initial contributions to s 4(1) property, is that '[t]he importance of the imbalance of initial contribution will lessen as the period of cohabitation continues' and that the weight to be attributed to it must be considered having regard to all of the circumstances.²²⁷

Nonetheless a *Webber/West & Green* approach has the advantage that it ensures that step two is evaluated in relation to superannuation rather than omitted which was the position with the pre-reform law. Furthermore it ensures that 'serious consideration' is given to indirect non financial contributions to superannuation.²²⁸ Arguably such an approach is more logical for parties to understand and relatively simple to calculate.²²⁹ It has the potential advantages of being cost effective and consistent.

The disadvantages are that a credit for post separation contributions to superannuation ignores the reality that the growth of superannuation post separation will not usually be solely referable to post separation contributions. Such a credit may also disregard post separation contributions by the non member spouse for example to the care of children. Also in relation to initial contributions such an approach ignores the reality that there is no even accrual in

²²¹ Ibid 37.

²²² See generally *Reichstein* [2006] FamCA 1422; *Mowbray* [2007] FamCA 167; *Treloar* [2007] FamCA 1127; *Steele & Stanley* [2008] FamCA 83; *Clives* (2008) FLC 93-385; *Guthrie & Rushton* [2009] FamCA 1144.

²²³ (2005) FLC ¶93-221, 79,666 [31]–[34].

²²⁴ (2005) FLC ¶93-222, 79,674 [25]–[26].

²²⁵ (2008) FLC ¶93-385, 82,945 [104].

²²⁶ Jacqueline Campbell, 'Key Judgments in Superannuation' (Speech delivered at the Law Institute of Victoria Annual Family Law Conference, Melbourne, 21 October 2005) 6.

²²⁷ *Trott* (2006) FLC ¶93-263, 80,467 [154].

²²⁸ *Fehlberg and Behrens*, above n 5, 532.

²²⁹ See above 177.

value and the early accumulation of superannuation tends to have a lesser value.²³⁰ Furthermore in the uncommon but not unknown case where the non member spouse cares for a child of the relationship prior to cohabitation this contribution may not be valued and assessed.

E *Post Separation Contributions to Superannuation Elevated?*

It is unsurprising that, when superannuation is evaluated in a separate list, the assessment of contributions has a superannuation focus and disproportionate weight is afforded to the post separation contributions of the member spouse. The case law establishes that where there is a delay between separation and hearing, it will be difficult for the post separation contributions of the non-member spouse to exceed the contributions of the member spouse even in a long marriage with a modest post separation period.²³¹ The homemaker is unlikely to establish an equal or greater contribution to superannuation if there is a significant delay²³² and possibly if the delay is not particularly lengthy.²³³ However, even when superannuation is evaluated in the s 4(1) list, where step two is not only focussed on contributions to superannuation but has a wider focus, post separation contributions to superannuation can have a disproportionate effect.²³⁴

Nonetheless, mandatory post separation contributions to superannuation by an employer will not generally result in an adjustment in favour of the member spouse.²³⁵ Conversely additional post separation contributions by a member spouse by way of salary sacrifice may warrant an adjustment in favour of the member spouse.²³⁶ Post separation contributions to superannuation may be partially offset by a greater contribution by the non-member spouse to the care of children post separation.²³⁷ If the interest is a defined benefit interest then contributions by a non-member spouse to promotions and salary increases during cohabitation are relevant to any post separation increase in value.²³⁸ Relevant contributions include relocating the family, leaving paid employment and assuming greater parental responsibilities.²³⁹

Even where the contributions of the parties are assessed as being equal at separation almost certainly an adjustment will be made in favour of the member spouse as at the time of trial.²⁴⁰ This method of compartmentalising contributions in relation to different periods is increasingly gaining currency.²⁴¹ In effect it is replacing the *West & Green* approach to assessing the impact of non marital contributions. It compounds the detrimental effect of the separate treatment of superannuation.

²³⁰ See, eg, *A & A* [2006] FMCAfam 80 [27] [63].

²³¹ See, eg, *Koskinas & Vasseleu* [2005] FamCA 1207 [145].

²³² See, eg, *Cahill* (2006) FLC ¶93-253, 80,303 [72] [74]; *Lambrinidis & Koulakis* [2004] FMCAfam 3 [102]–[103]; *BAR & JMR* (2005) FLC ¶93-231, 79,820 [38], 79,858–9 [292]–[293] [298]; *Ilett* (2005) FLC ¶93-221, 79,666 [39]; *Wilkinson* (2005) FLC ¶93-222, 79,674 [27]; *Edwards* [2009] FLC ¶93-409, 83,570 [80], 83,572 [94]–[95].

²³³ See, eg, *A & A* (2006) FMCAfam 80 [36] [123] [138].

²³⁴ *Ilett* (2005) FLC ¶93-221; *Wilkinson* (2005) FLC ¶93-222.

²³⁵ *O'Reilly & Renoir* [2007] FamCA 722 [75].

²³⁶ *Reichstein* [2006] FamCA 1422 [97] [100]–[103].

²³⁷ *Ibid* [145]. See also *Trott* (2006) FLC ¶93-263, 80,466–7 [142] [150].

²³⁸ *Trott* (2006) FLC ¶93-263, 80,466 [143]–[145].

²³⁹ *Ibid*.

²⁴⁰ See, eg, *Ilett* (2005) FLC ¶93-221, 79,666 [39]; *Wilkinson* (2005) FLC ¶93-222, 79,674 [25]–[27]; *A & A* [2006] FMCAfam 80 [123] [127].

²⁴¹ *Ibid*. See, eg, *M & M* (2006) FLC ¶93-281, 80,819–20 [132]–[137]; *Doherty & Doherty* (2006) FLC 93-256, 80,338 [7]–[8] ('*Doherty*'); *O'Reilly & Renoir* [2007] FamCA 722 [54] [102]–[103]; *Edwards* (2009) FLC ¶93-409, 83,570 [75] [78], 83,572–3 [95] [101] [107].

In conclusion, notwithstanding that the decisions endorse the importance of homemaker and parental contributions both during cohabitation and after separation, in reality insufficient weight is given to the impact of these contributions upon post separation increases in the value of superannuation. Also inadequate weight is given to the fact that post separation increases in the value of superannuation are due in part to contributions made during cohabitation. As a result the special status of contributions to superannuation by the member spouse has been preserved.

F Contributions and Pensions in the Payment Phase

The *Coghlan* approaches unequivocally require step two to be assessed in relation to superannuation whether included in the s 4(1) list or a separate list. After *Coghlan* this approach has generally prevailed,²⁴² notwithstanding that the preferred approach has the status of a guideline only.²⁴³ Thus a pension should no longer simply be treated as a resource or income at step three²⁴⁴ and the *Perrett* approach²⁴⁵ and the *Ennis* approach²⁴⁶ should no longer be relevant.

Pensions are now consistently considered in a separate list when evaluating contributions.²⁴⁷ They are also frequently considered in a list which is separate from other superannuation entitlements.²⁴⁸ Step two is undertaken even where a pension entitlement was entirely accrued prior to cohabitation²⁴⁹ and an assessment of the contributions of the non-member spouse is 'nil' with the result that it is realistically only considered at step three. In the circumstances of a short childless marriage where the member spouse commences receiving a pension prior to cohabitation, the non financial contributions of the non-member spouse made during cohabitation do not entitle the non-member spouse to a contributions adjustment in respect of the pension.²⁵⁰ A roughly formulaic approach may be one relevant factor when evaluating the contributions of the parties to a pension in the payment phase but all contributions must be considered.²⁵¹

Pensions in the payment phase are treated differently to s 4(1) property even though they should in fact qualify as s 4(1) property. This is an important issue because if they were evaluated in the list of s 4(1) property and the step two adjustments remained consistent with adjustments made prior to the amendments, then the homemaker would be in an improved position overall because of the significant lump sum values resulting from the application of

²⁴² See, eg, *HRDW & HSJL* [2005] FamCA 676 [35]–[39]; *C & C [No 2]* [2005] FamCA 1223 [18]–[19]; *McKinnon* (2005) FLC ¶93-242, 79,998 [6]; *Trott* (2006) FLC ¶93-263, 80,466 [148], 80,469 [172]; *Jarman* (2006) FLC ¶93-289, 80,946 [18]–[21].

²⁴³ *Trott* (2006) FLC ¶93-263, 80,471 [191].

²⁴⁴ *Jarman* (2006) FLC ¶93-289, 80,949–50 [45]–[48]; *Treloar* [2007] FamCA 1127 [237]–[238].

²⁴⁵ See above 46.

²⁴⁶ See above 132–3.

²⁴⁷ *Trott* (2006) FLC ¶93-263, 80, 453–4 [13]–[14], 80,460–1 [91]–[95]; *M & M* (2006) FLC ¶93-281, 80,812–3 [96]–[97]; *Jarman* (2006) FLC ¶93-289, 80,945–6 [14]–[15] [17]–[18]; *Treloar* [2007] FamCA 1127 [231]–[242]; *Cleary* [2007] FamCA 999 [27] [29] 63]–[64] [67]; *Cohen* [2008] FamCAFC 54 [6] [36] [47]; *Steele & Stanley* [2008] FamCA 83 [100] [167] [176]–[177].

²⁴⁸ See, eg, *B & B* [2005] FamCA 624 [39] *Trott* (2006) FLC ¶93-263, 80,453–4 [13], 80,460–1 [91]–[95]; *Treloar* [2007] FamCA 1127 [231] [235]–[236] [242].

²⁴⁹ *B & B* [2005] FamCA 624 [41]–[42]; *McKinnon* (2005) FLC ¶93-242, 80,001 [30]; *Cohen* [2008] FamCAFC 54 [18] [47]; *O'Reilly & Renoir* [2007] FamCA 722 [55] [58] (in relation to a pre-cohabitation pension in the growth phase).

²⁵⁰ *Cohen* [2008] FamCAFC 54 [37].

²⁵¹ *M & M* (2006) ¶93-281, 80,817 [120] (quoting *Trott* (2006) FLC ¶93-263, 80,469 [166]–[170]); *Treloar* [2007] FamCA 1127 [239]–[242].

the valuation regime. However, in reality pensions are not generally treated as s 4(1) property and are also treated differently to other types of superannuation. In none of the cases considered (10) did a non-member spouse establish an equal contribution to this type of interest at the time of the hearing.²⁵² This was the case irrespective of the length of the marriage. However in two of these the husband had a pre-cohabitation pension in the payment phase and in one the wife had a pre-cohabitation pension in the payment phase. Rarely if ever does the non-member spouse achieve an adjustment in respect of contributions in excess of 50 per cent. No contribution of the non-member spouse will suffice to establish a contribution to a pension entirely acquired prior to cohabitation which only favours women in the unusual situation where they are the owners of a pension in the payment phase wholly acquired prior to cohabitation.²⁵³

The approach taken to pensions is important for the reason that government policy tends to favour and encourage the pension option where it is available to a member. However, while the case law supports a movement away from considering a pension in the payment phase only at step three, and requires an assessment of the contributions of the parties to be undertaken at step two, the adjustments are low.²⁵⁴ This could in future become a significant issue for women.

IV SUMMARY — CONTRIBUTIONS & SUPERANNUATION

The *FLA* does not provide guidance about how the different types of contributions to the family and to property should be evaluated. After the 1983 amendment which resulted in s 79(4)(c), it is not necessary for the homemaker to establish a direct link between non financial contributions and the acquisition, conservation or improvement of property. However, otherwise the comparative treatment of different types of contributions is not regulated. Notwithstanding the sentiments expressed in the case law about contributions generally, that the non financial contributions of the homemaker must be given proper consideration, this type of contribution is not necessarily considered to be equal to other types of financial contributions, and the difficulties involved in quantifying these contributions remain unresolved.

It was expected that after the reforms the evaluation of contributions would be undertaken in relation to the entire pool of assets including superannuation as was assumed in the *2008 Evaluation* statistical analysis of settlement outcomes, and that contributions to superannuation would be assessed similarly to and together with non-superannuation assets. A post-reform distribution of assets that favoured women was expected to result from such consistency in the treatment of superannuation at step two. As demonstrated in the case analysis presented this assumption was not realised for those cases that came before the courts. Nevertheless it is significant for women that after the reforms and after *Coghlan* the contributions assessment should now be undertaken in relation to superannuation. Superannuation is generally no longer only considered at step three. However the *Coghlan* preferred approach is that generally step two is evaluated in relation to superannuation which

²⁵² Appendix Five.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

is assessed in a separate list. The analysis presented here has demonstrated that as a result the anticipated benefits have not been optimised, yet the overall benefit of the reforms to women is undisputed.

Specifically direct contributions to superannuation by the member spouse appear to be given a special status almost akin to valuable contributions of an entrepreneurial nature. This may be because they are more easily quantifiable. On the other hand the non-financial contributions of the non-member spouse to superannuation are undervalued compared to the contributions of the member spouse perhaps because it is more difficult to produce evidence of them and therefore they are more difficult to quantify. The step two adjustments made in respect of superannuation indicate that there is no consistency in the recognition of marriage as an equal partnership and in this respect little appears to have changed.²⁵⁵ Broad discretion results in considerable variation in outcomes of the step two assessment of contributions. Nevertheless, as the case analysis demonstrates, a financial bias is evident in relation to adjustments made on account of contributions.

Step two adjustments to the non-member spouse tend to be greater when superannuation is considered in the s 4(1) list. Unsurprisingly adjustments to the non-member spouse tend to be less in respect of superannuation evaluated separately as this results in a superannuation focus, that is, establishing a direct nexus between the contribution and the superannuation, which is difficult for the non-member spouse to equal and seemingly impossible to exceed. The onus upon the non-member spouse to prove their contribution to superannuation is more difficult to discharge than the onus upon the member spouse to prove their contribution which is further complicated when there is an issue about contributions made prior to cohabitation and after separation. Also, while a mathematical approach to contributions is apparently eschewed, nevertheless there is a trend towards compartmentalising contributions for different periods. The effect of this is to exacerbate the difficulty of a non-member spouse establishing a significant contribution to superannuation.

Sandor perceptively observed prior to the commencement of the superannuation reforms:

Assuming that superannuation is brought into the equation, it seems that the next significant issue is taking proper account of non-financial contributions. The value placed on such contributions will be an important determinant of whether the new superannuation division provisions make an impact on the continuing relative disadvantage experienced by women at the end of a marriage.²⁵⁶

An analysis of the cases where the preferred approach was implemented discloses lower step two adjustments to the non-member spouse in respect of superannuation compared to the member spouse and also compared to adjustments in respect of s 4(1) property. This suggests that there is a 'continuing relative disadvantage experienced by women', despite the improvements resulting from the amendments. It suggests that the contributions of member spouses to superannuation rank more highly than the indirect and non financial contributions of non-member spouses.

²⁵⁵ Sheehan and Hughes, above n 9, 1–2, 35.

²⁵⁶ Danny Sandor, 'To Have and to Hold Till the Super Do We Part — Women and Marital Separation: Superannuation Implications' (Paper presented at the Economic Policy Summit on Women & Retirement Savings, University of New South Wales, 7 September, 2001) 15.

If substantive equality were to be realised contributions to superannuation should be treated in a similar way to contributions to other property rather than extraordinary and deserving of additional recognition and special treatment. In the absence of equal recognition of the indirect contributions of the homemaker to superannuation, the recognition accorded to the impact of the marriage upon the capacity to earn and therefore accumulate superannuation in future at step three is vital.

CHAPTER 8

STEP THREE: SUPERANNUATION AND THE ASSESSMENT OF STEP THREE FACTORS

The pre-reform role of step three in property settlement proceedings had been significant and it was expected that after the reforms it would be different but nevertheless substantial. It was expected that all relevant step three factors, including future earning capacity and the allied ability to accumulate superannuation, would be evaluated and any adjustment calculated in relation to all assets, including superannuation. It was unclear to commentators at the time the degree to which this adjustment would favour women having regard to the expected outcomes of the earlier links in the chain of legal reasoning. First of all this Chapter examines the legislation and case law relevant to the assessment of step three generally and then the post-reform case law about step three and superannuation is analysed.

I STEP THREE GENERALLY

After considering the contributions of the parties at step two certain factors must be evaluated at step three. These factors are both present and future focussed but largely the latter. In the past these factors had been referred to as ‘future needs’ or ‘maintenance’ factors, labels which have now been renounced.¹ These factors relate to the relative economic positions of the parties and now tend to be labelled ‘s 75(2) factors’ although the group of relevant factors extends beyond the terms of s 75(2). In fact the starting point is s 79(4) which sets out the matters to be taken into account. These include the effect of a proposed order on the earning capacity of a party,² the existence of other orders under the *FLA* affecting a party or child,³ and actual or potential child support.⁴ Finally, any relevant s 75(2) factors must be taken into account.⁵ When an order for spousal maintenance is sought, these 19 factors must be evaluated to establish a need for spousal maintenance as well as an ability to pay.⁶ However, when they are considered in s 79 proceedings at step three they are considered in a more general way and it is not obligatory to establish a financial need before an adjustment is made.⁷ There is no requirement that a separate adjustment be made for each relevant factor. The factors are considered collectively.⁸ Not all of the factors will be relevant to s 79 proceedings and only relevant factors need be considered.⁹ Relevance will be determined by reference to the overarching requirement that orders for property settlement must be ‘just and equitable’ having regard to s 79(2).¹⁰ Step three is not confined in its application to assets in respect of which a contributions assessment has been made.¹¹ Nor is step three limited to assets in existence at the time of the hearing in respect of which a contributions assessment

¹ *Clauson* (1995) FLC ¶92-595, 81,907.

² *FLA* s 79(4)(d).

³ *FLA* s 79(4)(f).

⁴ *FLA* s 79(4)(g). The Full Court in *Clauson* (1995) FLC ¶92-595, 81,911 emphasised that, ‘it should not be forgotten that the payment of child support in no way compensates the custodial parent for the loss of career opportunity, lack of employment mobility and the restriction on an independent lifestyle which the obligation to care for children usually entails ...’

⁵ *FLA* s 79(4)(e).

⁶ *FLA* ss 74, 72.

⁷ *Collins & Collins* (1990) FLC ¶92-149, 78,043-4-6 (‘*Collins*’).

⁸ *Tomasetti* (2000) FLC ¶93-023, 87,391 [113]–[114]; *Van Der Linden & Kordell* (2010) FamCAFC 157 [89].

⁹ *Dickey, Family Law* (Lawbook, 4th ed, 2002) 718–19; *Collins* (1990) FLC ¶92-149, 78,043-4-6.

¹⁰ *Waters & Jurek* (1995) FLC ¶92-635, 82,375.

¹¹ *Polonius & York* [2010] FamCAFC 228 [119].

had been made.¹² A disparity in the respective financial positions of the parties may be relevant even if no adjustment is made for contributions.¹³ Indeed a causal nexus between any economic discrepancy and the period of cohabitation may not be required although it is not entirely free from doubt.¹⁴ Fehlberg commented that this is consistent with the view of marriage as a partnership and allows step three adjustments in favour of the homemaker to be deployed to achieve substantive equality.¹⁵

In 1995 Fogarty J remarked upon the significance of this step in *Waters & Jurek* and stated that ‘the centre of gravity in the determination of property cases has, especially in more recent times, moved to the evaluation of the s 75(2) factors, and the significance of that has been heightened because of recent Full Court decisions which have emphasized those provisions and indicated that they should be given real rather than token weight.’¹⁶ Any adjustment at step three is usually made by way of percentage but can be by way of lump sum if the asset pool is modest.¹⁷ Adjustments made in percentage terms in the range of 10 per cent to 20 per cent of s 4(1) property in favour of the homemaker spouse have been recognised as routine.¹⁸ However, adjustments outside the usual range may be appropriate and it is important to consider the real monetary impact of a proposed adjustment.¹⁹ In cases involving significant wealth or short marriages step three adjustments might be atypical.²⁰ However in high asset cases where step two adjustments are less significant than step three may be utilised to achieve a more generous result.²¹ Fehlberg and Behrens commented that generally ‘it appears that in high-asset cases, courts look at the dollar amount awarded to the wife on the basis of contributions and conclude that if this is more than enough for her to comfortably live on, no further adjustment is required.’²²

Arguably the usual range of adjustments may now be lower for a number of reasons including the superannuation reforms, the higher workforce participation of women, albeit part time and casual, as well as the shared parenting reforms. Chief Justice Diana Bryant writing extra curially in 2006 considered whether the shared parenting reforms would reduce the

¹² Ibid [114]–[119].

¹³ Ibid.

¹⁴ *Farmer and Bramley* (2000) FLC ¶93-060, 87,950 [70]–[72], 87,981 [220] (cf *Kay and Guest JJ*); *Douglas* [2006] FamCA 245 [123]; *Polonius & York* [2010] FamCAFC 228 [115]–[119].

¹⁵ Fehlberg, Belinda, ‘With All My Worldly Goods I Thee Endow?': The Partnership Theme in Australian Matrimonial Property Law' (2005) 19 *International Journal of Law, Policy and the Family* 176, 181–2.

¹⁶ (1995) FLC ¶93-635, 82,376, quoted in Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 540. See also Patrick Parkinson, ‘The Diminishing Significance of Initial Contributions to Property’ (1999) 13 *Australian Journal of Family Law* 1, 30, cited in Fehlberg and Behrens, *ibid*, 540.

¹⁷ Justice John Faulks, ‘The Division of Property and Superannuation under the Family Law Act 1975: A Practical Consideration of the Evidence which should be Presented to a Court with Particular Reference to the Question of Superannuation’ Family Court of Australia, 1998, 18–19, citing *Re Parrott v Public Trustee of NSW* (1994) FLC ¶92-473, 80,906.

¹⁸ *Clauson* (1995) FLC ¶92-595, 81,911; John Dewar, Grania Sheehan and Jody Hughes, ‘Superannuation and Divorce in Australia’ (Working Paper No 18, Australian Institute of Family Studies, 1999) 30 (15 to 25 per cent) 9 (‘1999 Working Paper’). See also Rebecca Bailey-Harris, ‘The Role of Maintenance and Property Orders in Redressing Inequality: Re-opening the Debate’ (1998) 12 *Australian Journal of Family Law*, 3, 12–13; Fehlberg and Behrens, *above n 16*, 469 (10–15 per cent).

¹⁹ *Ennis* [2003] FamCA 1565 [113] citing *Phillips & Phillips* (2002) FLC ¶93-104, 88,985 [66]–[67] (‘Phillips’).

²⁰ Fehlberg, *above n 15*, 187; Fehlberg and Behrens, *above n 16*, 545, citing *JEL & DDF* (2001) FLC ¶93-075; *Ferraro & Ferraro* (1993) ¶92-335.

²¹ Fehlberg and Behrens, *above n 16*, citing *Figgins & Figgins* (2002) FLC ¶93-122; *Farmer & Bramley* (2000) FLC ¶93-060.

²² Fehlberg and Behrens, *above n 16*, 545.

adjustments made at step three.²³ However Chief Justice Bryant considered that a shared parenting arrangement would not necessarily remove the need for an adjustment because it would not necessarily result in parity of earning capacity.²⁴ Also Chief Justice Bryant noted that the effect of any extra income from additional paid employment may be offset by a reduction in child support.²⁵ If the Family Tax Benefit is divided, which can occur when care is shared for over 35 per cent of the time, this would further reduce the income of usually mothers.²⁶

In 2008 Fehlberg and Behrens said '[i]n the context of what looks like a general shift towards a starting point of equality of contributions, step three of the s 79 process has been of increasing significance. Conversely, the combined effect of the recent superannuation splitting and shared parenting reforms may well be to reduce the likelihood of significant adjustments made in wives' favour under s 75(2) in future.'²⁷

As well the *2008 Evaluation* concluded that the mean share of property received by the wife after the superannuation reforms had reduced compared to the 1980s and 1990s.²⁸ It was hypothesised that the inclusion of superannuation in the pool of family wealth may have reduced the need for an adjustment at step three for women with dependent children.²⁹ However further specificity was beyond the scope of the *2008 Evaluation*.

Then the *2009 Parenting Reforms Evaluation* considered the impact of the 2006 parenting reforms on, inter alia, property settlements.³⁰ The findings are cautious because they are based only on interviews with family law professionals but suggested that 'mothers may, on average, be receiving a reduced share of the property since the introduction of the reforms'³¹ in the vicinity of about five per cent.³² The *2009 Parenting Reforms Evaluation* considered this could be due to mothers trading off property settlement for greater care of children but could also be due to reduced step three adjustments for mothers and increased adjustments for fathers having regard to s 75(2)(c).³³ The view was expressed that further research about this would be useful.³⁴

A study based on interviews with separated parents published in 2010 considered, inter alia, whether there would be a reduction in the s 75(2) adjustment made in favour of women after the parenting reforms as a result of an increase in equal time and substantial time

²³ Chief Justice Diana Bryant, 'Finding the Balance: Women's Access to Superannuation after Marriage Breakdown' (Paper presented at the Australian Women's Lawyers Conference, Sydney, 29 September 2006) 57–8.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Belinda Fehlberg, Christine Millward and Monica Campo, 'Post-Separation Parenting Arrangements, Child Support and Property Settlement: Exploring the Connections' (2010) 24 *Australian Journal of Family Law* 214, 214–15.

²⁷ Fehlberg and Behrens, above n 16, 540.

²⁸ Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post Reform Practice and Settlement Outcomes' (2008) 22 *International Journal of Law Policy and the Family* 206, 223 ('*2008 Evaluation*')

²⁹ Ibid 226.

³⁰ Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Report, Australian Institute of Family Studies, December 2009) 9.6.2 223–30 ('*2009 Parenting Reforms Evaluation*'). See also Fehlberg, Millward and Campo, above n 26.

³¹ *2009 Parenting Reforms Evaluation*, above n 30, 225.

³² Ibid 230

³³ Ibid 225–6.

³⁴ Ibid. 230.

arrangements.³⁵ The connection was found to be unclear but perhaps supported the outcomes of the *2009 Parenting Reforms Evaluation*.³⁶ There is little if any more recent empirical work that presents a current average for this adjustment post reform. The confluence of reform in the property and parenting area that has implications for the 75(2) adjustment means that it is difficult to isolate a specific cause of any general shift in the redistribution of asset wealth at step three, nevertheless trends in case law are emerging.

It appears to be accepted about s 79 that '[t]he objective of the section is not to equalise the financial strengths of the parties'.³⁷ Section 79 'is not a source of social engineering or as a means of evening up of the financial positions of the parties to a marriage.'³⁸ Nevertheless, it has been persuasively argued that more could legitimately be achieved at step three to redress the economic imbalances that flow from separation³⁹ and thereby achieve substantive rather than formal equality. However, step three has not been consistently or vigorously used to equalise any economic disadvantage between parties resulting from marriage.⁴⁰ This is notwithstanding that '[i]t has long been recognized that in most cases the most valuable "asset" which a party can take out of the marriage is a substantial, reliable, income-earning capacity',⁴¹ a critical factor in accumulating adequate superannuation. It has been contended that 'there is a continuing need for clear legislative principle to guide the courts in relation to the remedying of the effects of the sexual division of labour on divorce, which would incorporate a substantive equality approach rather than assuming the equality of the parties.'⁴²

Two of the s 75(2) factors are relevant to the ability to accumulate superannuation, namely, earning capacity⁴³ and the duration of the marriage and the extent to which it has affected earning capacity.⁴⁴ The 1986 report *Settling Up* concluded that little or no account was taken of the impact of the depreciation of earning capacity in property settlements⁴⁵ although these factors properly enable this to occur. Even when comparative earning capacity is taken into account at step three the results frequently belie the principled rhetoric and, as noted, commentators consider that a more robust approach could be adopted.

Indeed such a course has been adopted in the United Kingdom. Chief Justice Diana Bryant noted that the important United Kingdom decisions of the House of Lords in *White v White*⁴⁶ and *Miller v Miller; McFarlane v McFarlane*⁴⁷ now endorse as a relevant factor when redistributing property upon marital breakdown the provision of compensation for the economic effects of the marriage.⁴⁸ The *White* approach promotes the concept of marriage as an equal partnership by means of a yardstick of equal division in property proceedings rather

³⁵ Fehlbeg, Millward and Campo, above n 26.

³⁶ Ibid 236.

³⁷ *Mallet* (1984) FLC ¶91-507, 79,127.

³⁸ *Kennon* (1997) FLC ¶92-757, 84,303.

³⁹ Bailey-Harris, 'The Role of Maintenance and Property Orders...', above n 18, 12-14.

⁴⁰ Ibid; Fehlbeg, 'With All My Worldly Goods I Thee Endow', above n 15, 181-2, 187.

⁴¹ *Clauson* (1995) FLC ¶92-595, 81,911 citing *Best & Best* (1993) FLC ¶92-418, 80,295. See also Bruce Smyth and Ruth Weston, 'Financial Living Standards after Divorce' (Research Paper No 23, Australian Institute of Family Studies, December 2000) 3.

⁴² Kristie Dunn, 'Splitting the Difference: Superannuation, Equality and Family Law' (1998) 12 *Australian Journal of Family Law* 1, 9.

⁴³ *FLA* s 75(2)(b).

⁴⁴ *FLA* s 75(2)(k).

⁴⁵ Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986) 98 ('*Settling Up*').

⁴⁶ [2001] 1 AC 596.

⁴⁷ [2006] UKHL 24.

⁴⁸ Chief Justice Diana Bryant, above n 23, 41-5.

than endorsing the ‘reasonable requirements’ for housing and capitalised income approach.⁴⁹ The *Miller* and *McFarlane* approaches endorse the *White* approach, and clarify the relevant principles, namely that the needs of the parties or disadvantage sustained by the parties resulting from the relationship must be compensated from a proper share of the matrimonial assets. The *McFarlane* approach introduces the concept of compensating a party from the marital assets for the disadvantage sustained by the manner in which the parties conducted their marriage.⁵⁰ These cases are high asset cases defined by Ingleby to be cases ‘where the parties’ assets and resources exceed what is reasonably required to meet what might be referred to as reasonable needs.’⁵¹ While the relevance of the principles extracted from the relatively rare high asset decisions might be questioned in relation to the low and medium asset cases, Ingleby maintained that ‘the rules which emerge from the big money cases do have an impact (however undetermined or indeterminable) on the outcomes of other cases.’⁵² Moreover a more robust application of step three factors should be easier to establish in low and medium asset cases than in cases where ‘reasonable needs’ are not an issue.

Chief Justice Bryant stated that these decisions have sanctioned a more progressive approach ‘than Australia in giving effect through property settlement to the reality of women’s post separation poverty.’⁵³ Chief Justice Bryant commented ‘it would seem that the approach in *McFarlane*, which takes account of the realities of gender roles in marriage, has much to recommend it as a way of addressing women’s well documented poverty after separation.’⁵⁴ Ingleby commented that while the English and Australian matrimonial property systems have in common the exercise of a broad discretion guided by a list of factors designed to reduce inequality, nevertheless the *White* approach has the effect of actively promoting substantive equality, a different concept.⁵⁵

Accordingly the comment of Fogarty J in *Waters & Jurek* about s 75(2) that ‘[t]he provision does not invite a process of social engineering ... [t]he court can only apply one or more of the paragraphs of that provision where it is satisfied that that step is relevant to arriving at a just and equitable result’⁵⁶ remains apposite in the Australian context.

Prior to the amendments superannuation that had not yet vested was chiefly taken into account at step three as income or a financial resource in the course of s 79 proceedings.⁵⁷ Eligibility for superannuation was also a relevant factor.⁵⁸ Finally, any factors necessary to achieve justice in this context could be considered.⁵⁹ Therefore step three had played a significant role in the endeavour to factor superannuation into the division of property after separation notwithstanding that the result was unsatisfactory.

After the amendments it was expected that the role of step three would be different and perhaps diminished. The improved capital distribution expected to result from a proper

⁴⁹ See generally Rebecca Bailey-Harris, ‘Fairness in Financial Settlements on Divorce’ (2001) 117 *Law Quarterly Review* 199.

⁵⁰ Family Law Newswatch, *Financial Provision: Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 (2 June 2006) <http://www.familylaw.co.uk/searchDetail.aspx?artl_id=618>.

⁵¹ Richard Ingleby, ‘Introduction: Lambert and Lampposts: The End of Equality in Anglo-Australian Matrimonial Property Law?’ (2005) 19 *International Journal of Law, Policy and the Family* 137, 138.

⁵² *Ibid* 138.

⁵³ Chief Justice Diana Bryant, above n 23, 41–2.

⁵⁴ *Ibid* 45.

⁵⁵ Ingleby, ‘Lambert and Lampposts...’ above n 51, 138–9.

⁵⁶ (1995) FLC ¶92-635, 82,376. See also, *BAR & JMR* (2005) FLC ¶93-231, 79,825 [68].

⁵⁷ *FLA* s 75(2)(b).

⁵⁸ *FLA* s 75(2)(f).

⁵⁹ *FLA* s 75(2)(o).

valuation and consideration of superannuation at step two was forecast to reduce the need for adjustment at step three. Moreover it was expected that if splitting orders were made to put parties in a similar position upon retirement this might obviate or decrease the need for an adjustment. Nevertheless, this overlooks the fact that the amendments were precipitated by previous injustice and facilitating appropriate consideration of superannuation does not per se dispense with the need to properly assess relevant step three factors.

The allied issue of the capacity to accumulate superannuation that results from earning capacity had not been a prominent step three factor prior to the amendments perhaps due to the relatively recent expansion of superannuation. However, this factor should be more significant at step three as the value of superannuation continues to increase.

II STEP THREE AFTER THE STARTUP TIME AND PRIOR TO COGHLAN

As the amendments did not alter s 79 or s 75(2) the case law provides guidance about how the amendments impact upon step three. Soon after the startup time and prior to *Coghlan* a number of factors relevant to the application of step three in relation to superannuation were identified.

Almost immediately it was acknowledged that care is required to avoid double counting superannuation by assessing the lump sum value of the interest at step one and then making a further adjustment in respect of the interest at step three.⁶⁰ This cautionary approach was accepted whether the entitlement was to be retained intact by the member spouse or subject to a splitting order.⁶¹ Nevertheless, there was an acknowledgment that ongoing earning capacity and the associated capacity to accrue superannuation in the future might still be relevant factors at step three notwithstanding that the entitlement has already been considered at steps one and two.⁶²

Another issue considered at this early stage was whether superannuation could still be treated as a resource at step three as previously. In certain circumstances this was considered appropriate. In one decision superannuation wholly acquired after separation was considered as a resource at step three.⁶³ Also, some early decisions, although not all, continued to treat pensions in the payment phase as a resource at step three.⁶⁴ However, in *Hickey*⁶⁵ the Full Court found that all four steps apply to superannuation whether or not it is property and whether or not a splitting order is sought or made. This decision limited the scope for superannuation to be considered only at step three.

In one case where the *FL(S)R* did not provide for a method of valuing a particular type of interest, and the amount of the alternative valuation was considerably less than the estimated payout figure, the anomaly was taken into account at step three.⁶⁶ In another decision the fact that a superannuation interest was not available in the near future was not considered to be a

⁶⁰ *Cahill* (2006) FLC ¶93-253, 80,305 [95]–[96]; *Gardner* [2003] FamCA 249 [120].

⁶¹ *Hobbs & Hobbs* [2003] FamCA 1490 [56] (*‘Hobbs’*).

⁶² See, eg, *Cahill* (2006) FLC ¶93-253, 80,305 [90]–[97].

⁶³ *Gardner* [2003] FamCA 249 [36].

⁶⁴ *Crown & Yarnold* [2003] FamCA 152 [65] [87]–[89]; *Cahill* (2006) FLC ¶93-253, 80,304–5 [82] [95]–[96].

⁶⁵ (2003) FLC ¶93-143, 78,392 [75].

⁶⁶ *BAR & JMR* (2005) FLC ¶93-231, 79,852 [259].

relevant step three factor where the entitlement was comparatively small.⁶⁷ Also, there was an acknowledgment that the inclusion of an entitlement as an asset at step one could change the level of adjustments traditionally made at step three.⁶⁸

Turning now to the analysis of the 21 cases included in Appendix Six, prior to *Coghlan*, generally the decisions (15) made the step three adjustment in relation to the s 4(1) property and superannuation combined because generally s 4(1) property and superannuation were evaluated in a single list.⁶⁹ As a rule this adjustment was made in favour of the wife (13) and ranged from five per cent to 25 per cent⁷⁰ which was within the previously accepted range. In one case no adjustment was made and in another an adjustment of five per cent was made to the husband.⁷¹

However, even at this early stage a number of decisions (6) initiated a trend of making the step three adjustment only in respect of the s 4(1) property.⁷² This foreshadowed a subsequent area of debate about the appropriate basis for doing so. The adjustment was almost always in favour of the wife (5) and ranged from 10 to 20 per cent but of a smaller pool.⁷³ This percentage, if calculated as a proportion of the combined s 4(1) property and superannuation, would be lower.

III COGHLAN AND STEP THREE

In *Coghlan* the wife appealed against a decision of the trial Judge to award her 60 per cent of an asset pool excluding the superannuation entitlements of the parties with no adjustment made for s 75(2) factors.⁷⁴ No splitting order was sought or made. The effect of the trial Judge's decision was that the wife's income from employment, the husband's income from his pension and the other roughly equal superannuation entitlements of the parties were set off against each other at step three.

The Full Court held that the four step approach applies whether superannuation is considered in the s 4(1) list of property, or whether the preferred approach is taken and it is dealt with in a separate list or lists.⁷⁵ This is so whether or not a splitting order is sought. Indeed a step three factor was relied on by the Full Court to justify the application of the four step approach to superannuation even where no pt VIIIB order is sought.⁷⁶ The Full Court recognised that if superannuation is considered in the s 4(1) list then future superannuation entitlements of the parties might be relevant at step three having regard to any step two adjustment and any proposed splitting order.⁷⁷ The Full Court confirmed that if the preferred approach to superannuation is taken then the present and future superannuation prospects of the parties are relevant at step three having regard to any proposed division of s 4(1) property and any

⁶⁷ *Cameron* [2004] FamCA 294 [10] [39]–[40] *contra Wrona* (2004) FLC ¶93-207, 79,366–7 [14], 79,368 [18]–[22].

⁶⁸ *Hobbs* [2003] FamCA 1490 [55]–[56].

⁶⁹ Appendix Six (1).

⁷⁰ *Ibid*

⁷¹ *Ibid*.

⁷² Appendix Six (2).

⁷³ *Ibid*.

⁷⁴ (2005) FLC ¶93-220, 79,636 [1] [2].

⁷⁵ *Ibid* 79,645–6 [61]–[62] [65].

⁷⁶ *Ibid* [57]–[58].

⁷⁷ *Ibid* [62].

proposed splitting order.⁷⁸ The Full Court said that certain factors are relevant at step three⁷⁹ to enable the ‘real nature’ of superannuation interests to be taken into account.⁸⁰ By way of clarification the Full Court stated:

When we refer to “the real nature” of the relevant superannuation interest, we are referring to the fact that notwithstanding that its value according to the Regulations may well be calculated to be a very significant amount, that superannuation interest may be no more than a present or future periodic sum, or perhaps a future lump sum, the value of which at the date of receipt is unknown.⁸¹

This was the extent of the guidance provided about the role of step three after the amendments and reservations have been expressed about it.⁸² The Full Court suggests that step three can be used to address the issue of the significant lump sum values that can result from valuing complex interests. This conflicts with an important goal of the reforms which is to ensure that a proper value is ascribed to these types of interests. It is paradoxical that prior to the amendments step three had a role to play in the attempt to take superannuation into account and thus lessen the unfairness to women of past limitations. However, after *Coghlan*, the role of step three may be to diminish the impact of the amendments and reduce the benefits to women.

IV STEP THREE FACTORS AFTER COGHLAN

After *Coghlan*, factors relevant to the assessment of step three continued to develop. The importance of caution in relation to an adjustment on account of superannuation at step three if it is already included at step one was reiterated.⁸³ The relevance of any step two adjustment,⁸⁴ any proposed division of s 4(1) property⁸⁵ and any proposed splitting order was reaffirmed.⁸⁶ The effect of a reduction in the entitlement of a member spouse due to a proposed splitting order and any corresponding increase in the entitlement of a non-member spouse were factors confirmed to be relevant to the necessity for and the quantum of any step three adjustment.⁸⁷ Also relevant was the fact that a significant splitting order which put the parties in a similar position upon retirement could remove or reduce the need for a step three adjustment.⁸⁸ However, if after a splitting order the member spouse still has a greater superannuation entitlement as well as a greater earning capacity and ability to accumulate

⁷⁸ *Ibid* [64] [69].

⁷⁹ *Ibid* [66].

⁸⁰ *Ibid* [67].

⁸¹ *Ibid* [68].

⁸² *Hayton & Bendle* [2010] FamCA 592 [104]–[108].

⁸³ *Ilett* (2005) FLC ¶93-221, 79,666 [40]; *Wilkinson* (2005) FLC ¶93-222, 79,676–8 [32]–[39]; *McKinnon* (2005) FLC ¶93-242, 80,001 [30]; *Trott* (2006) FLC ¶93-263, 80,477 [233].

⁸⁴ *Ilett* (2005) FLC ¶93-221, 79,666 [40]; *Wilkinson* (2005) FLC ¶93-222, 79,678 [39]; *Trott* (2006) FLC ¶93-263, 80,475 [212].

⁸⁵ *Coghlan* (2005) FLC ¶ 93-220, 79,646 [64]; *Koskinas & Vasseleu* [2005] FamCA 1207 [173]; *Clives* (2008) FLC ¶93-385, 82,945 [108].

⁸⁶ *Coghlan* (2005) FLC ¶93-220, 79,645–6 [62] [64]; *Wilkinson* (2005) FLC ¶93-222, 79,677–8 [37]–[39]; *Koskinas & Vasseleu* [2005] FamCA 1207 [173]; *A & A* [2006] FMCAfam 80 [167]; *Trott* (2006) FLC ¶93-263, 80,475 [212]; *McCulough* (2006) FLC ¶93-282, 80,826 [37]; *Clives* (2008) FLC ¶93-385, 82,942 [80].

⁸⁷ *Wilkinson* (2005) FLC ¶93-222, 79,677 [37]–[38]; *Clives* (2008) FLC ¶93-385, 82,945 [108].

⁸⁸ *A & A* [2006] FMCAfam 80 [167].

superannuation in the future, this was recognised to be a relevant consideration at step three.⁸⁹ The extent of any future working life expectancy was also accepted as a relevant factor.⁹⁰

Other issues were clarified by the post *Coghlan* decisions. If the lump sum value of an uncommutable pension in the payment phase is included at step one then it should not also be considered as income at step three pursuant to s 75(2)(b)⁹¹ although the fact that it is indexed might be a relevant factor.⁹² This is despite the fact that the prescribed valuations of pensions take indexation into account. If a pension in the payment phase was precipitated by a disability and is also the income source of the member spouse this may be a relevant consideration at step three.⁹³ However, the fact that the non-member spouse receives an income from exertion does not offset the income of the member spouse from a pension at step three where there is no splitting order.⁹⁴ The nature of income from personal exertion differs from income from a superannuation entitlement to which the non-member has indirectly contributed.⁹⁵

The fact that a comparatively significant entitlement is not available for some time now appears to be a relevant consideration at step three pursuant to s 75(2)(f)⁹⁶ despite the fact that the prescribed valuations incorporate consideration of this issue.⁹⁷ Nonetheless, step three may provide an option for addressing the higher values resulting from the regime of valuing complex entitlements and taking into account the ‘real value’ of an entitlement to the member spouse in certain circumstances. The problems of sanctioning consideration of the ‘real value’ of superannuation have been discussed⁹⁸ and are no less relevant if the issue is considered at step three. It would add to the complexity, costs and uncertainty of proceedings. This factor is also a relevant factor at step four.

These factors provide considerable assistance in relation to the assessment of step three. However, there are nevertheless significant step three issues that would benefit from further Full Court guidance.

The extent to which the issues of earning capacity and ability to accrue superannuation are recognised at step three will be significant in assessing the impact of the amendments.

V THE IMPACT OF COGHLAN UPON STEP THREE ADJUSTMENTS

The decisions will be examined to evaluate the adjustments that result from evaluating step three in respect of the s 4(1) list and any superannuation lists with a view to ascertaining whether the factors relevant to the evaluation of step three are assessed in a systematic way in

⁸⁹ *Koskinas & Vasseleu* (2005) FamCA 1207 [175]; *A & A* [2006] FMCAfam 80 [148]–[149] but see [167]; *Trott* (2006) FLC ¶93-263, 80,477 [234]; *Reichstein* [2006] FamCA 1422 [125] [151]; *Clives* (2008) FLC ¶93-385, 82,945 [107].

⁹⁰ *Clives* (2008) FLC ¶93-385, 82,945 [107].

⁹¹ *C & C [No 2]* [2005] FamCA 1223 [15] [46]; *Treloar* [2007] FamCA 1127 [270].

⁹² *C & C [No 2]* [2005] FamCA 1223 [46]; *Laporte & Penfold* [2008] FMCAfam 1093 [248].

⁹³ *M & M* (2006) FLC ¶93-281, 80,820 [138].

⁹⁴ *Coghlan* (2005) FLC ¶93-220, 79,637–8 [13]–[16], 79,646–7 [69]–[70]; *Jarman* (2006) FLC ¶93-289, 80,949–50 [47]–[48].

⁹⁵ *Jarman* (2006) FLC ¶93-289, 80,949–50 [47]–[48].

⁹⁶ *B & B* [2005] FamCA 624 [47]; *C & C [No 2]* [2005] FamCA 1223 [46]; *Lesbirel* (2006) FLC ¶93-301, 81,087 [47]; *Reichstein* [2006] FamCA 1422 [151]. *Contra Cameron* [2004] FamCA 819 [39]–[40].

⁹⁷ *Trott* (2006) FLC ¶93-263, 80,462 [109].

⁹⁸ Above 158–60.

relation to both the s 4(1) property and the superannuation and whether the outcomes of that assessment are similar. The nature of the preferred approach suggests that the outcomes of assessing step three separately in relation to each list may be different.

A *Step Three: Superannuation in the S 4(1) List*

After *Coghlan*, in the decisions where superannuation was included in the s 4(1) list (5), step three was assessed overall in the usual way. The range of adjustments generally favoured the wife (4) and ranged from four to 12.5 per cent.⁹⁹ An adjustment was made in favour of the husband in one case and was 22.5 per cent.¹⁰⁰ The degree of adjustment at step three will be affected by the size of the asset pool in each case. A percentage adjustment which appears small per se may not be modest when applied to a high asset pool. None of the decisions involved high asset pools.¹⁰¹ In addition the adjustments will be affected by the particular circumstances of each case. Further, as discussed, apparently lower step three adjustments may be a consequence of other factors including the shared parenting reforms and greater workforce participation by women as well as the superannuation reforms.¹⁰² These are limitations in the way of extrapolating a ‘usual range’.

Also these cases were decided around the time of the *Coghlan* decision and it is perhaps not surprising that subsequently any trend of considering superannuation in the s 4(1) list and applying step three in the usual way diminished, and as will be examined below the preferred approach of considering superannuation in a separate list prevailed.

B *Step Three: The Preferred Approach — Superannuation in a Separate List or Lists*

The *Coghlan* preferred approach requires that step three be considered in relation to the s 4(1) list and also any separate superannuation lists. There was apprehension about whether step three would have a more limited superannuation focus in respect of superannuation in separate lists and whether this would result in reduced adjustments. However, no preferred approach has been endorsed in relation to the assessment of step three where superannuation is considered in a separate list or lists and no real analysis has been undertaken about step three in this context. Consequently the court’s evaluation of step three has proceeded in an uncoordinated way. It is difficult to categorise the approaches that have been taken in an orderly manner.

Step three adjustments may be made in respect of the s 4(1) property only. Alternatively the step three adjustments may be made overall in relation to the s 4(1) property and the superannuation. Both are apparently endorsed by *Coghlan*.¹⁰³ A step three adjustment only in respect of a superannuation list has not received consideration in the cases considered. The adjustment may be assessed by percentage or in terms of value and a proposed splitting order is a relevant factor. However, the implementation of the different approaches has proved to be complicated as will be discussed.

In three cases decided after *Coghlan* the separate step two adjustments for the different lists were calculated as a proportion of the combined s 4(1) property and superannuation lists. Then step three was considered in relation to the single step two adjustment and the adjustment, if any, made either from the s 4(1) list or from the combined s 4(1) property and

⁹⁹ Appendix Seven.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Above 197–9.

¹⁰³ *Trott* (2006) FLC ¶93-263, 80,474–5 [209]–[211].

superannuation lists. However, there was no analysis in these cases about the underlying basis for the approach and the need for this is demonstrated by the results. The adjustments made in these cases illustrate the complexity of proceeding in this way. In one case there was no step three adjustment and no splitting order that might account for this.¹⁰⁴ In another, a step three adjustment of 2.5 per cent of the s 4(1) list was made in favour of the wife, no step three adjustment was made in relation to the superannuation and a splitting order was made based on contributions.¹⁰⁵ In this case the purpose of the combined step two calculation is difficult to fathom. In the third, a six per cent step three adjustment of the combined lists was made in favour of the wife and a splitting order was made.¹⁰⁶

Thus, although step three was applied to the combined step two adjustment, the ultimate step three adjustment did not necessarily apply to both superannuation and s 4(1) property. It is difficult to conceive of a reason for merging the step two adjustments if the step three adjustment applies only to the s 4(1) list. In two of the cases, including the case where the step three adjustment applied only to the s 4(1) property, a splitting order was made, purportedly a relevant issue. However, unless the parties were at the point of retirement and the superannuation was to be shared equally, then this should not be a determinative factor. Nevertheless, a proposed splitting order is one of many step three factors to be considered. None of the step three adjustments in these decisions was significant. They were not within the previously accepted range of 10–20 per cent although as discussed, the effect of the superannuation reforms and parenting reforms as well as the greater involvement of women in paid employment may have had an impact upon the previously accepted range of adjustments.¹⁰⁷ Furthermore adjustments at step three are also determined by the facts and circumstances of each individual case including the size of the asset pool.¹⁰⁸ Although it might be argued that this is to be expected if the inclusion of superannuation significantly enlarges the pool, it is also arguable that the impetus for the amendments was the need to redress a significant imbalance which should not reduce the impact of otherwise relevant factors. The approach is a perplexing one and adds complexity to an already difficult area. It is said to be sanctioned by *Coghlan* but equally it is contrary to the preferred approach of the separate treatment of superannuation. The approach has not developed into an approach of general application. Nevertheless, the approach is indicative of uncertainty about the preferred approach at step three in this context.

To reiterate, step three may be considered individually in respect of the s 4(1) list and any superannuation list or lists. Whether step three is different and has a superannuation focus when evaluated in relation to superannuation in a separate list has not received specific consideration in the case law. *Coghlan* appears to endorse this approach and stated that the ‘real nature’ of the interest can be considered when evaluating step three in relation to superannuation separately.¹⁰⁹ This suggests that the step three factors may not have the same impact in relation to all lists and may have a superannuation focus where undertaken in relation to the separate superannuation list or lists. The issue has not received explicit analysis. Separate consideration of superannuation at step three in this way can result in different adjustments in respect of the different lists that are not particularly generous, as will be demonstrated below in the detailed case analysis.¹¹⁰

¹⁰⁴ *C & C [No 2]* [2005] FamCA 1223 [38] [43] [45] [47].

¹⁰⁵ *Koskinas & Vasseleu* [2005] FamCA 1207 [138] [145] [172] [175]–[177].

¹⁰⁶ *Reichstein* [2006] FamCA 1422 [139] [148]–[149] [152] [155].

¹⁰⁷ Above 197–9.

¹⁰⁸ *Ibid.*

¹⁰⁹ (2005) FLC ¶93-220, 79,646 [67].

¹¹⁰ Appendix Eight.

However, the stronger trend after *Coghlán* favours the step three adjustment being made only in relation to the s 4(1) property despite step three being considered in relation to each of the s 4(1) and superannuation lists and even where no splitting order is made.¹¹¹ This is notwithstanding that the relevant s 75(2) factors would suggest otherwise. This is of considerable significance. If there are comparatively greater adjustments to the non-member spouse of s 4(1) property this result may be less objectionable. However, the adjustments to s 4(1) property in the cases considered (11) appeared to be modest at best.¹¹² The adjustments ranged between two per cent to 23 per cent, which is particularly modest if calculated as a proportion of the total of all superannuation and s 4(1) property. In two cases the adjustments were less than 10 per cent. In two cases the adjustments were between 20 and 25 per cent and seven were in the range of 10 to 20 per cent. Splitting orders were made in favour of the wife in a significant number of cases (7) but not all¹¹³ which may be significant if the split is equal and retirement is imminent. However, otherwise an adjustment in favour of the non-member spouse in respect of any superannuation list because of ongoing needs related to the marriage such as disparity in earning capacity and ability to accumulate superannuation in future may well have been justified. Indeed because generally women live longer there might be an argument for increasing the step three adjustment not depressing it. These findings may suggest that the s 75(2) adjustment might have remained at the pre-reform level and applied to the reduced asset pool. If this is the case the reforms have not resulted in an expansion of the adjustment to take into account the total pool including superannuation, but neither have they depressed the adjustment.

Lastly, another approach to step three has been to make individual step two adjustments in respect of any s 4(1) and superannuation lists and then assess the step three factors in an overall way rather than individually for each list. However, the step three adjustment, if any, was then assessed by way of value rather than percentage.¹¹⁴ By way of example, *Watts J in Trott*¹¹⁵ considered step two separately in relation to each list but then considered each of the relevant s 75(2) factors in an overall way. The process was not repeated specifically for each of the three lists. The step three adjustment was intended to relate to all three lists and was made by way of value.¹¹⁶ The Full Court in *Jarman* stated ‘that there is no obligation on a trial Judge or Magistrate to express in percentage terms the adjustment that he or she proposes to make on account of s 75(2) matters. This adjustment can be made by reference to the transfer or retention of assets and/or a sum of money.’¹¹⁷ The Full Court in *Hobbins* said ‘[i]t is well-established that in addressing the sufficiency of an order or adjustment, regard must be had to the monetary consequence, not just the percentage adjustment underlying it.’¹¹⁸ This approach should prevent lower step three adjustments to the non-member spouse resulting from a narrower focus on superannuation matters to the detriment of the non-member spouse. A broader consideration of s 75(2) factors ought to favour the non-member spouse. However, the reality of the adjustments made at step three in the cases considered (4) suggests

¹¹¹ Appendix Nine.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Appendix Ten.

¹¹⁵ (2006) FLC ¶93-263, 80,474–7.

¹¹⁶ *Ibid* [244] [246]

¹¹⁷ (2006) FLC ¶93-289, 80,949 [40]. See, also, *Trott* (2006) FLC ¶93-263, 80,477–8 [246]–[248]; *M & M* (2006) FLC ¶93-281, 80,814 [109].

¹¹⁸ [2005] FamCA 734 [68].

otherwise.¹¹⁹ While this type of approach might appear to be the fairest approach the adjustments when translated into percentages were modest.¹²⁰

More than one approach may be undertaken by way of cross check, that is, any proposed percentage adjustment be considered in relation to the s 4(1) list and then cross checked as a percentage of all lists.¹²¹

Thus, while the decisions have provided guidance about factors relevant to step three in the superannuation context, as Watts J in *Trott* observed about the process:

208. There is still some debate about the preferred approach when considering 79(4)(d)–(g) matters in the context of an asset by asset approach or a “number of pools” approach to contributions. In this case there are three pools and the contributions to them have been assessed in different proportions.

209. Although contributions under “step two” might be looked at either on a global basis (one pool of property and superannuation together) or on an asset by asset basis (separate pools), the preferred approach for the assessment of any adjustment under Section 79(4)(d)–(g) has still not been defined at an appellate level.¹²²

His Honour noted that there is authority for a single adjustment to be made at step three in relation to all of the property, including any superannuation, an approach which his Honour favoured in the circumstances of that case.¹²³ His Honour also noted that there is authority for an adjustment to be made in relation to the s 4(1) list only and considered that *Coghlan* permitted the choice.¹²⁴ However, although *Coghlan* clarified that step three must be evaluated in respect of each of one or more lists, the specific issue of making an adjustment in relation to one list and not others was not addressed. It is difficult to envisage the circumstances where it is appropriate to make a step three adjustment in relation to the s 4(1) list and not the superannuation list. Altobelli considered the *Levick* approach, where the step three adjustment was made only in respect of the non-superannuation assets, and remarked at the lack of a ‘jurisprudential basis’ for it.¹²⁵ The decision predated *Coghlan* but has received currency since then in a number of decided cases¹²⁶ although both the *Hickey* and *Coghlan* approaches suggest otherwise. One commentator opined about the basis for this approach:

The rationale is normally that by the time a party retires and is able to take his or her superannuation entitlement, the very fact of retirement removes the most significant s 75(2) factor namely capacity for employment and income. Such an approach has an initial attraction however it ignores any matters relevant to the fund, its management, employer contribution and growth.¹²⁷

In other words, upon retirement it would be expected that the parties will be in similar positions having no dependent children, no ongoing employment and similar requirements.¹²⁸

¹¹⁹ Appendix Ten.

¹²⁰ *Ibid.*

¹²¹ *Trott* (2006) FLC ¶93-263, 80,477–8 [244]–[248].

¹²² *Ibid* 80,474 [208]–[209].

¹²³ *Ibid* [209]–[211].

¹²⁴ *Ibid.*

¹²⁵ Tom Altobelli, ‘Children’s Accommodation Needs & the Impact of the New Super Splitting Reforms’ (Paper presented at the Mid North Coast Regional Law Society Seminar, 13 September 2003) 10.

¹²⁶ Appendix Nine.

¹²⁷ David Berman, ‘Superannuation Revisited — Where are We Now?’ (Paper presented at the Continuing Professional Development Seminar, Adelaide, 25 February 2009) 13. See also Stephen Bourke, ‘Super Splitting — Two Years On: Case Law Review’ (Paper presented at the 14th Annual Family Law Masterclass, Sydney, 10–11 May 2005) 14.

¹²⁸ Commonwealth, ‘Superannuation & Family Law’ (Position Paper, Attorney-General’s Department 1998) 31 (‘A-G’s Dept 1992 Discussion Paper’).

This might be apposite if the parties are approaching retirement and a splitting order effecting an equal division of superannuation having equal consequences is proposed. However, even an equal splitting order will not always mean that the non-member spouse is left in the same position as the member spouse. Substantive equality can have regard to the fact that women do not have similar retirement needs to men as it is recognised that generally women live longer than men, a factor that might properly be considered relevant within the parameters of s 75(2).

There have now been a number of Full Court decisions involving step three in relation to superannuation in different respects. However, an overall ‘preferred approach’ to step three in this context has not yet been defined with precision and the implementation of step three has proceeded in an unsystematic way.

C A Case Example

The impact of the lack of a preferred approach to the evaluation of step three after the reforms and after *Coghlan* is demonstrated by a case example. The Full Court in *Jarman & Jarman* considered an appeal and cross appeal by the parties about the treatment of superannuation in property settlement proceedings. By way of background the parties were married for approximately 27 years.¹²⁹ There were two surviving adult children and the husband and wife were aged nearly 55 and 50 years respectively at trial.¹³⁰

At first instance F M Roberts had divided the assets into superannuation assets and non-superannuation assets.¹³¹ The net value of the non-superannuation assets was found to be \$380 821.¹³² In relation to the superannuation the wife had a defined benefit in the growth phase valued at \$45 170.¹³³ The husband had an accumulation interest in the growth phase valued at \$14 157.¹³⁴ The husband also had a defined benefit pension in the payment phase valued at \$864 775 which crystallised when he retired on the grounds of ill health after separation.¹³⁵ It had been valued eight months prior to that at \$407 096. This pension was therefore the most valuable of all of the family wealth.¹³⁶ The pension was payable for life and was indexed.¹³⁷ As at 23 June 2004 the annual rate of the pension payment was \$52 147 per annum. The total value of the superannuation was \$924 102¹³⁸ and the total of both s 4(1) property and superannuation was \$1 304 923. The superannuation was therefore considerably more valuable than the s 4(1) property. Also the wife was employed and earned an income of approximately \$40 000 per annum.¹³⁹

Federal Magistrate Roberts assessed the contributions of the wife to the s 4(1) assets to be 59 per cent for the sole reason that the value of the wife’s inheritance included in the s 4(1) list of property was \$135 000 and value of the husband’s inheritance in that list was \$64 700. This was not challenged on appeal.¹⁴⁰ This percentage amounted to \$224 684.39 for the wife and \$156 136.61 for the husband.

¹²⁹ (2006) FLC ¶93-289, 80,944 [6].

¹³⁰ Ibid.

¹³¹ Ibid 80,945 [12].

¹³² Ibid [13]–[15].

¹³³ Ibid 80,945–6 [16]–[17].

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid 80,944 [8].

¹³⁸ Ibid 80,946 [17].

¹³⁹ Ibid 80,945 [9].

¹⁴⁰ Ibid 80,946 [19]–[20].

His Honour assessed the contributions of the parties to superannuation to be 60 per cent to the husband and 40 per cent to the wife and commented on the paucity of information about the issue.¹⁴¹ This outcome was upheld by the Full Court.¹⁴² Forty per cent amounted to \$369 640.80 for the wife and 60 per cent for the husband amounted to \$554 461.20. After taking into account the superannuation entitlement of the wife valued at \$45 170 a further amount was due to her of \$324 470.80 after step two.

In relation to the consideration of step three factors the position was unclear. Federal Magistrate Roberts considered these factors but nevertheless expressed disquiet about considering the valuation of the husband's pension while not valuing the income of the wife from paid employment.¹⁴³ His Honour said '[c]learly, this is a factor that must be taken into account under Section 79(2) of the Act.'¹⁴⁴ His Honour then jumped from calculating the contributions adjustments to making final orders.¹⁴⁵ His Honour concluded that the wife should retain s 4(1) assets to the value of \$311 850, about 82 per cent, and retain her superannuation, about 4.9 per cent of all of the superannuation. Altogether this totals \$357 020 or about 27.4 per cent overall.

The husband argued about the adequacy of the reasons and asserted that the additional 23 per cent of the s 4(1) assets allocated to the wife was "manifestly excessive".¹⁴⁶ This additional sum amounted to \$87 165.61. This additional adjustment to the wife in relation to the s 4(1) assets did not offset the amount of her entitlement of \$324 470.80 on the basis of the assessment of contributions after taking into account the amount of her own entitlement. No splitting order was made to reflect the finding as to the contributions of the parties to the superannuation list although both parties sought it in relation to the pension.¹⁴⁷ The approach taken by his Honour enabled the wife to retain the family home. However, in essence the husband's pension was taken into account by giving the wife an additional adjustment out of the s 4 (1) assets in the previous way.

The Full Court disagreed with the husband's complaint about the adequacy of his Honour's reasons and considered that it was clear that the 23 per cent adjustment to the wife of the s 4(1) assets was both on account of the contributions of the wife to the husband's superannuation as well as for s 75(2) matters.¹⁴⁸ This additional amount of \$87 165.61 of the s 4(1) assets did not even offset the amount due to the wife of her 40 per cent entitlement to the superannuation in the sum of \$324 470.80 let alone provide any step three adjustment. This is notwithstanding that the Full Court disavowed any approach of equating earned income from employment against pension income.¹⁴⁹

The Full Court expressed the view that there is no obligation on a trial Judge or Magistrate to express adjustments at step three in percentage terms.¹⁵⁰ Although the Full Court considered

¹⁴¹ Ibid [21].

¹⁴² Ibid 80,951–2 [54]–[57].

¹⁴³ Ibid 80,946–7 [23]–[24].

¹⁴⁴ Ibid 80,80,947 [24].

¹⁴⁵ Ibid.

¹⁴⁶ Ibid 80,949 [45].

¹⁴⁷ Ibid 80,947 [25].

¹⁴⁸ Ibid 80,948–9 [37].

¹⁴⁹ Ibid 80,950 [48].

¹⁵⁰ Ibid 80,949 [40].

that the outcome ‘may well be generous to the husband’¹⁵¹ the Full Court declined to interfere and dismissed the appeal.¹⁵²

The cross appeal of the wife was that too little weight had been given to the value of the husband’s pension.¹⁵³ The wife asserted that she had contributed to the significant increase in the pension and disputed the contributions adjustment in relation to the superannuation. In any event the cross appeal failed and she did not ultimately realise the amount of the contributions assessment in relation to the superannuation which fell short by about \$195 309.58. Inexplicably she did not also dispute the approach taken to step three.

The adjustment at step three made to the wife in the sum of \$87 165.61 on account of the adjustment due to her for 40 per cent of the superannuation in the sum of \$324 470.80 and also for step three factors is incomprehensible. Perhaps the first instance decision proceeded on the basis that the pension should only be considered as a resource. It is not entirely clear. The step three assessment was not evaluated in a transparent way. It may not have been the ideal case for a detailed consideration of a preferred approach to step three in proceedings involving superannuation but it does demonstrate the lack of clarity and fairness that can result from the absence of such an approach.

VI THE SCOPE FOR CONSIDERING SUPERANNUATION ONLY AS A RESOURCE AFTER PART VIIB

After the amendments the early case law prior to *Coghlan* continued to consider superannuation as a resource at step three in certain circumstances. Relevant circumstances included where an overseas pension was unavailable for some time¹⁵⁴ and where an interest was accumulated entirely after separation.¹⁵⁵ In addition a pension in the payment phase was evaluated at step three as an income stream¹⁵⁶ reverting to the previous approach to this type of entitlement. Although there was one example of the application of the four step approach to a pension in the payment phase during this period¹⁵⁷ this was the exception and the trend of considering pensions in the payment phase only at step three then continued.¹⁵⁸ In particular Coleman J favoured the approach of evaluating pensions in the payment phase at step three only. His Honour said in *Cahill* ‘a guaranteed income stream, of a substantial order, will be treated within the context of s 75(2). It is income, it will always be income and it is a powerful s 75(2) factor.’¹⁵⁹ The underlying basis for this view is that inflated values result from the application of the valuation regime to these types of entitlements, a particularly important issue if the pension is not commutable. Coleman J was instrumental in taking a practical approach to the perceived incongruity of assigning a lump sum value to a pension entitlement that may never be commutable. The difficulty with these types of interests is that the option of a splitting order might be detrimental to the non-member spouse in the event of

¹⁵¹ Ibid 80,950 [49].

¹⁵² Ibid 80,952 [64].

¹⁵³ Ibid

¹⁵⁴ *Hickson* [2003] FamCA 1091 [89].

¹⁵⁵ *Gardner* [2003] FamCA 249 [36].

¹⁵⁶ *Cahill* (2006) FLC ¶93-253, 80,304 [82].

¹⁵⁷ *McGrath* [2003] FamCA 1061 [116] [126]–[134].

¹⁵⁸ *Ennis* [2003] FamCA 1565 [66]–[88] [94]; *Radhakrishnan* [2003] FamCA 1360 [139]; *Mackey* [2005] FamCA 276 [83]–[84].

¹⁵⁹ (2006) FLC ¶93-253, 80,304 [82]. See also, Anthony Dickey, ‘What is the Purpose of Valuing Superannuation Interests Under the Regulations?’ (2007) 81 *Australian Law Journal* 234, 235.

the early death of the member spouse. Similarly an offset might be detrimental to the member spouse in the event of early retirement for example. Nevertheless, it is difficult to argue with the view of Murphy that ‘to treat a pension as a financial resource is, it can be argued, the antithesis of treating it as property, which is what s. 90MC mandates’,¹⁶⁰ a comment that was admittedly made prior to *Coghlan*.

Shortly prior to *Coghlan* and after *Hickey*, a small entitlement was considered in the list of s 4(1) property and the *Cahill* resource approach was rejected.¹⁶¹ Thereafter *Coghlan* left little scope for superannuation to be considered only as a resource¹⁶² except in very limited circumstances.¹⁶³ Superannuation that has been quarantined may constitute an exception,¹⁶⁴ for example where the entitlement is an overseas entitlement entirely accumulated before cohabitation.¹⁶⁵

The *Coghlan* preferred approach can nevertheless produce a similar outcome to that prior to the amendments, for example where a pension in the payment phase is wholly acquired prior to cohabitation.¹⁶⁶ If the value of the entitlement is included in a separate list at step one and no contribution can be established by the non-member spouse at step two, there may be little or no adjustment at step three which effectively results in the entitlement being quarantined.¹⁶⁷ Then when step three is considered in relation to the s 4(1) list the entitlement would be a relevant factor. In these circumstances the result is probably justified.

After *Coghlan*, the circumstances where it is considered appropriate to treat superannuation only as a resource were considerably reduced.¹⁶⁸ However, notwithstanding the decisions to the effect that a non commutable pension in the payment phase cannot simply be considered as income at step three where the wife indirectly contributed to it, after the decision of the Full Court in *Edwards* there is now a significant degree of doubt.¹⁶⁹ The decision appears to mark a return to the view that there is no rational reason for giving a lump sum value to an entitlement that can never be received as a lump sum.¹⁷⁰ The majority Coleman and Cronin JJ, with whom Finn J agreed, concurred with the view of the Federal Magistrate that the prescribed value of the pension was of less relevance than the amount of the weekly income received from the pension.¹⁷¹ The decision appears to sanction an approach of treating it as a resource although the Full Court noted that the Federal Magistrate had acknowledged the contribution of the wife to the pension.¹⁷² The significance of this view in diminishing the impact of the amendments cannot be underestimated and is borne out by the ultimate outcome.¹⁷³ The pension in the payment phase of the husband was almost entirely accumulated during the 22 years of marriage. He received the whole pension during the 15

¹⁶⁰ Peter Murphy, ‘Superannuation — Recent Unreported Decisions’ (Paper presented at the 11th National Family Law Conference, Gold Coast, September 2004) 145, 152.

¹⁶¹ *Wrona* (2004) FLC ¶93-207, 79,368 [19]–[22].

¹⁶² *Trott* (2006) FLC ¶93-263, 80,469 [170]; *M & M* (2006) FLC ¶93-281, 80,812–3 [96]–[97]; *Treloar* [2007] FamCA 1127 [270].

¹⁶³ *Trott* (2006) FLC ¶93-263, 80,469 [170], 80,477 [234].

¹⁶⁴ *Ibid.*

¹⁶⁵ *Lesbirel* (2006) FLC ¶93-301, 81,083 [11]–[12].

¹⁶⁶ See, eg, *B & B* [2005] FamCA 624; *McKinnon* (2005) FLC ¶93-242.

¹⁶⁷ See, eg, *Cohen* [2008] FamCAFC 54.

¹⁶⁸ See, eg, *Jarman* (2006) FLC ¶93-289, 80,949–50 [45]–[48]; *Treloar* [2007] FamCA 1127 [237]–[238] [270].

¹⁶⁹ See above 162–3; (2009) FLC ¶93-409.

¹⁷⁰ *Ibid* 83,571 [90].

¹⁷¹ *Ibid* 83,564 [23]–[26] 83,571[90]– [91].

¹⁷² *Ibid* 83,565 [34].

¹⁷³ *Ibid* 83,563–4 [12]–[20].

year period of separation. It was valued at \$313 993.66 at the hearing. The wife received an offset of \$39 585 from an accumulation interest in respect of the pension or about 12.6 per cent of the value of the pension, a result which was upheld by the Full Court.¹⁷⁴ It is of interest that at the rate of payment of \$415 per week this amounts to approximately two years worth of pension payments ($\$39585 \div \$415 = 95.39 \div 4 \text{ weeks} = 23.85 \text{ months}$), by chance the same result as in *Perrett*.¹⁷⁵

VII STEP THREE — SUMMARY

Prior to the amendments step three had a major role to play in bringing superannuation into account in property proceedings. After the amendments step three remains relevant because the amendments did not change s 79(4) or s 75(2). However, the role is significantly different in particular after the decision in *Coghlan*. The step three factors must be evaluated whether superannuation is in the s 4(1) list or in a separate list. The process of doing so remains a difficult issue. It will in future be uncommon to encounter property proceedings that do not involve superannuation and this is therefore important. The significant cases demonstrate the complex nature of the process in this context. The case law has developed relevant factors to be considered but it is difficult to extrapolate overall guidance about a preferred approach to step three. The comment has been made that:

There is nothing in Part VIII B to indicate with certainty that the s 75(2) factors apply in the same way to superannuation as to non-superannuation property. The s 75(2) factors may impact on superannuation differently and to a different extent than on non-superannuation property.¹⁷⁶

This issue has not been explicitly addressed. However, while acknowledging the limitations,¹⁷⁷ the decisions appear to suggest that where superannuation is considered in a separate list a notional adjustment in favour of the homemaker spouse at step three is unlikely or insignificant¹⁷⁸ and not within the previously acceptable range¹⁷⁹ especially when calculated as a proportion of the total of superannuation and s 4(1) property. More significantly the basis for a homemaker establishing a step three adjustment in relation to the s 4(1) property but not superannuation has not been clearly analysed. This separate assessment of step three in relation to superannuation has the potential to lessen the impact of the amendments and falls short of delivering substantive equality for women.

Coghlan suggests that step three should be considered in respect of each list and there is uncertainty about whether the application of step three is different in nature when assessed separately in respect of the s 4(1) assets and the superannuation list or lists. If it is different there has been little explanation provided in the cases about why a step three adjustment may be appropriate in relation to a s 4(1) list but not at all or to a lesser extent in relation to a separate superannuation list. Perhaps the explanation is that step four considerations about the mix of assets to be retained by the parties have intruded into step three. The notional adjustments that can result from the evaluation of step three can become blurred with the actual adjustments resulting at step four particularly when the notional percentage

¹⁷⁴ Ibid 83,575 [130].

¹⁷⁵ Above 46.

¹⁷⁶ CCH, *Australian Family Law & Practice*, vol 2 (at 536-7-11) 28,911, ¶37-525.

¹⁷⁷ Above 207–8.

¹⁷⁸ Appendices Eight, Nine.

¹⁷⁹ See above 199–201.

adjustments do not appear to correlate with the ultimate outcome.¹⁸⁰ There can appear to be a blurring of the steps.¹⁸¹ In some decisions the mix of assets and proposed orders appear to be decided at step three, or earlier in the case of a splitting order, while step four is simply used to stand back and consider whether overall the adjustment is just and equitable.¹⁸² In others the notional adjustments in respect of each of the superannuation and s 4(1) lists at the conclusion of step three are not necessarily reflected in the actual division of assets at the conclusion of step four. This issue is examined further in Chapter 9.

The failure to distinguish between the notional adjustments made at steps two and three in respect of the separate lists and the actual distribution of assets at step four can be a source of confusion. Transparency about these separate issues, the notional adjustments and then the actual mix of assets is important to aid an understanding of the ultimate outcome.

The implementation of step three in practice will have a significant impact on the extent of the benefit to women resulting from the amendments.¹⁸³ One thing that can be said with certainty is that, far from step three being of reduced relevance after pt VIIIB, it has a much more complex role. It had an important role in attempting to address the previous unfairness to women. However, after *Coghlan* the extent of its role in optimising the impact of the amendments is harder to assess. The benefits of the amendments are in part counterbalanced by the changed nature of steps two and three. The step three adjustments may be reduced after *Coghlan*. Significantly step three adjustments commonly apply only in respect of the s 4(1) list. The lack of jurisprudential basis for this development¹⁸⁴ still has not been clarified. The justification may be in part due to the increased size of the asset pool, any immediate unavailability of superannuation and also the fact that any sharing of retirement provision will put the parties in a similar position upon retirement. However, there is currently no general rule of splitting superannuation. It is also important not to lose sight of the fact that the previous approaches to superannuation were productive of considerable unfairness to women. The mere fact that superannuation must now be transparently considered in property proceedings cannot automatically reduce the relevance of step three. The relevant factors must still be properly assessed.

The role of step three had never been as progressive as it might have been and is not used to compensate the homemaker for the impact of the role upon earning capacity and the allied ability to accrue superannuation to a significant extent. Despite the legislative endorsement of the relevance of these factors the case law suggests that in fact inadequate weight is given to them. The adjustments after *Coghlan* are arguably not significant. The trend is to address step three only in relation to the s 4(1) property and these adjustments translate into more modest adjustments when considered as a proportion of the total of s 4(1) property and superannuation.

The complexity of step three is compounded by the fact that it is not uncommon for parties to have multiple superannuation entitlements and the step three assessments may differ for each. Pensions tend to be considered separately from both the s 4(1) property and any other superannuation. Perhaps the variety of permutations at step three after the amendments is indicative of a response to a need for flexibility in relation to this step depending on the circumstances of each case and the proposed orders. It may also underline the nature of the

¹⁸⁰ See, eg, *Jarman* (2006) FLC ¶93-289; *Warner & Warner* [2008] FamCAFC 156 ('*Warner*').

¹⁸¹ See, eg, *McCulough* (2006) FLC ¶93-282.

¹⁸² See, eg, *Head & Head* [2006] FamCA 551 ('*Head*').

¹⁸³ *2008 Evaluation*, above n 28, 212.

¹⁸⁴ Altobelli, 'Children's Accommodation Needs ...', above n 125, 10.

four step approach, namely four interrelated steps rather than four sequential steps. However, the depreciation of earning capacity, which is such a major economic product of cohabitation and raising a family, is not considered a significant factor at step three applied to superannuation notwithstanding that s 75(2) would appear to endorse it as such.

The analysis of the case law reveals complexity and uncertainty about step three in property settlements involving superannuation. There is no authoritative approach and therefore no consistency about the appropriate approach to evaluating step three. It is arguable that fairness has not resulted from the variety of approaches taken as the outcomes fall well short of the standard of substantive equality. It might be argued that the approach taken to step three by Watts J in *Trott*¹⁸⁵ offers a simpler solution. There Watts J made a cash lump sum adjustment on account of step three.¹⁸⁶ This amount was then cross checked in percentage terms as a proportion of all superannuation and s 4 (1) property, as a proportion of the category 2 superannuation and s 4(1) property and finally as a proportion of the s 4 (1) property only.¹⁸⁷ It perhaps provides a simpler more transparent approach.

Contrary to the expectation that step three would be evaluated in relation to all forms of family wealth including superannuation after the reforms, the analysis of the case law discloses a complex, inconsistent and uncertain variety of approaches which ultimately may impede a fair outcome. However, academic commentary at the time of the reforms predicted a possible reduction in the level of step three adjustments as a consequence of the assessment of step two in relation to all property including superannuation. A considerable transfer of wealth to women was predicted to be the result of this assessment. The similar level of adjustment to a pool that generally excludes superannuation highlights a continuation in the pattern of pre-reform adjustment taking place post reform. This is perhaps not surprising given that the transfer of wealth predicted at step two has not generally occurred to the degree that was expected.

Lastly it is important to consider the effect of the amendments upon the distribution of the assets at step four, and in particular the ability of the homemaker to retain the family home.

¹⁸⁵ (2006) FLC ¶93-263.

¹⁸⁶ *Ibid* 80,477 [244] [246].

¹⁸⁷ *Ibid* 80,478 [247] [248].

CHAPTER 9

STEP FOUR: THE JUST AND EQUITABLE REQUIREMENT AFTER THE AMENDMENTS

Pre-reform step four had limited application in relation to superannuation especially in the circumstance where it was the main asset. Post reform it was expected that the ability to make payment splitting orders would add flexibility to the process of making just and equitable orders at step four. Therefore it was not expected that splitting orders would be made in every case and that in the light of the greater amount of family wealth to be divided it would still be possible for the homemaker to retain the family home. This Chapter analyses the case law and legislation both about the nature of step four generally and also about the evaluation of this step after the reforms in proceedings involving superannuation.

I STEP FOUR AS A SEPARATE STEP

Before the court can make an order altering the property interests of the parties the court must be satisfied that the order is just and equitable in all the circumstances having regard to the s 79(4) factors.¹ This fourth step has relatively recently been recognised as a separate and distinct exercise pursuant to s 79(2).² The mechanical consideration of steps two and three does not automatically suffice to satisfy s 79(2).

II NEGATIVE DRAFTING OF S 79(2)

Section 79(2) provides:

The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

Thus s 79(2) is drafted in negative terms and Strauss J in *Ferguson & Ferguson* succinctly summarised the effect as follows:³

[t]he main purpose of sec 79(2) is to ensure that the Court will not alter the property rights of the parties, unless it is satisfied that cogent considerations of justice require it to do so, and that if the Court decides that it is requisite to make any order under the section, the Court must be satisfied that the alterations so ordered, will go no further than the justice of the matter demands. Whether it is just and equitable in all the circumstances to make any and what order, involves a consideration of the matters which the Court is required to take into account under sec 79(4)(a) to (e) ...

However, Thackray AJ in *Woollams*⁴ noted that the Full Court in *Hickey* cast step four in a more positive way and noted that the consequence of the negative drafting of s 79(2), namely that orders must not be made unless they are just and equitable, is that the orders must be just and equitable.⁵

¹ See generally, Dickey, *Family Law* (Lawbook, 4th ed, 2002) 677–84; CCH, *Australian Family Law & Practice*, vol 2 (at 529-12-10) ¶37-640.

² See above 7.

³ (1978) FLC ¶90-500, 77,615 quoted in *Rogers & Rogers* (1980) FLC ¶90-874, 75,539.

⁴ (2004) FLC ¶93-195, 79,239 [33], citing *Hickey* (2003) FLC ¶93-143, 78,386 [39].

⁵ *Ibid* 79,244 [53]

III STEP FOUR REQUIRES CONSIDERATION OF S 79(4) FACTORS AND OTHER RELEVANT FACTORS

The expression ‘just and equitable’ has been described as a ‘familiar judicial measure’⁶ requiring the court to consider both the circumstances of each case and the s 79(4) factors when deciding whether it is just and equitable to make a s 79(1) order. The s 79(4) factors are not exclusive and s 75(2)(o) enables ‘any fact or circumstance which ... the justice of the case requires to be taken into account’ to be considered. Dickey⁷ referred to Strauss J in *Schokker & Edwards*⁸ and Hogan J in *Marinko & Marinko*⁹ in support of the proposition that while the s 79(4) factors must be considered in determining whether the order is just and equitable, nevertheless all of the circumstances must be considered and these cannot be exhaustively defined. Therefore, consideration of the s 79(4) factors in deciding whether an order is just and equitable is not necessarily conclusive. All of the relevant circumstances, which may include circumstances that are not relevant to s 79(4), must be considered, although the discretion is not at large. Altobelli¹⁰ flagged the possibility that such a broad approach to s 79(2) might enable the needs of children for accommodation to be considered notwithstanding that otherwise step three does not admit of such a consideration.

IV THE NATURE OF THE RELATIONSHIP BETWEEN SS 79 (1), (2), (4)

The precise nature of the relationship between ss 79(1), (2) and (4) was considered by Dawson J in *Mallet* who described the s 79(2) obligation as ‘the overriding requirement and it admits of no presumptions in the consideration of the relevant circumstances, including those which sec 79(4) requires the Court to take into account.’¹¹ This observation suggests that the just and equitable requirement applies to the evaluation and assessment of adjustments at steps two and three. Dickey agreed.¹² He considered the relationship between sub-ss (2) and (4) and noted that in some decisions sub-s (2) was considered before sub-s (4), and in others sub-s (4) was considered before sub-s (2), and in yet others both were considered together. He considered that while consideration of the sub-s (4) factors is obligatory in considering sub-s (2), nevertheless sub-s (2) imposed the overarching requirement and stated:

In considering whether to make an order, and if so what order to make, under s 79(1), the court must taken into account the seven considerations set out in subs (4). This is indeed clear from the introductory words of subs (4). However, any order the court proposes to make having taken into account these seven considerations is subject to the requirement of justice and equity under subs (2). Subsection (2) thus has an overriding effect on the exercise of the court’s discretion under subs (1) taking into account the considerations of subs (4). Subsection (4) is not, however, entirely subordinated to subs (2). In its own way, subs (4) has a reciprocal, controlling effect upon subs (2), in that the content of the notion of justice

⁶ See generally, Timothy North, ‘Certain Outcomes in uncertain Times’ (Paper presented at the 14th National Family Law Conference, Canberra, 18–22 October 2010) 6–7, citing *Thomas v Mowbray* (2007) CLR 387 [476].

⁷ Anthony Dickey, *Family Law*, above n 1, 682.

⁸ (1986) FLC ¶91-723, 75,259.

⁹ (1985) FLC ¶91-609, 79,944.

¹⁰ Tom Altobelli, ‘Children’s Accommodation Needs & the Impact of the New Super Splitting Reforms’ (Paper presented at the Mid North Coast Regional Law Society Seminar, 13 September 2003) 12.

¹¹ (1984) FLC ¶91-507, 79,132.

¹² Dickey, *Family Law*, above n 7, 678.

and equity with which subs (2) is concerned is broadly governed by the seven considerations set out in subs (4) (citations omitted).¹³

On this view the requirement to consider the justice and equity of whether to make a s 79(1) order and if so, what type of order, applies to steps two and three as well.¹⁴ While the step four considerations are interwoven with the step two and three considerations, s 79(2) is the overarching and ultimate consideration. The nature of this relationship has proved to be a challenging issue in the superannuation context in the light of the *Coghlan* approaches.

V THE RATIONALE UNDERPINNING S 79(2)

The Full Court in *Phillips* referred with approval to the case law about the rationale for s 79(2).¹⁵ The percentage adjustments made at steps two and three may not produce a just and equitable result. Therefore the actual impact of the order must be considered. Section 79(2) requires that the order must be just and equitable, not merely the percentage adjustment. The Full Court said of the nature of the fourth step ‘[i]t is necessary to “stand back” and consider if overall the ultimate award was just and equitable to both parties.’¹⁶ It has been stated that ‘there has been an undue focus ... on the percentage outcome of property proceedings rather than on the actual property to be received or retained by each party.’¹⁷ The mix of assets to be retained by the parties is a major consideration at step four.¹⁸ The implementation of this rationale in practice after the amendments will be considered.

VI IMPACT OF THE AMENDMENTS ON S 79(2)

The Full Court in *Hickey*¹⁹ said ‘[t]he superannuation legislation introduced reforms which are directed to how a court will deal with a superannuation interest at steps one and four of the preferred four step approach in the determination of an application under s 79.’ As has already been discussed, in fact the reforms have had a considerable impact upon each of the four steps and the last of the steps to be considered is step four. The option of a splitting order has now been added to the range of orders that can be made at step four which is a significant development. The case law has developed a range of factors relevant to the determination of a fair mix of assets and superannuation to be retained by the parties.

Nonetheless, issues have arisen about step four in this context. One issue is whether the just and equitable requirement is considered only in a strictly sequential way after the s 79(4) factors have been evaluated, and therefore is a stand alone step, or whether it is also a relevant consideration throughout the evaluation of the s 79 (4) factors. The amendments and the *Coghlan* approaches complicate this issue. Another issue is whether step four is confined to considering the fair mix of assets that the parties are each to retain or whether it is also a substantive adjusting step enabling further adjustments to be made to the quantum of the parties’ entitlements after adjustments at steps two and three.

¹³ Ibid 678–9. See also *Woollams* (2004) FLC ¶93-195, 79,242 [42]. But see North, above n 6, 3–5.

¹⁴ Dickey, *Family Law*, above n 1, 678–9.

¹⁵ (2002) FLC ¶93-104, 88,985 [67].

¹⁶ Ibid 88,986 [70].

¹⁷ *Teal & Teal* [2010] FamCAFC 120 [75] (*‘Teal’*).

¹⁸ Ibid [70].

¹⁹ (2003) FLC ¶93-143, 78,393 [75].

VII A PROVISIONAL CONSIDERATION AND FINAL REQUIREMENT?

Prior to *Coghlan* and after the amendments at least one decision concluded that it was only after steps two and three had been considered that it was possible to decide at step four whether it was just and equitable to make a splitting order as part of the decision about the mix of assets to be retained by the parties.²⁰ The just and equitable evaluation was undertaken in a sequential way.

However, other decisions took the view that the decision about whether or not to make a splitting order should be considered at an earlier stage in the process. In effect this requires that the justice and equity of such an order be considered at an earlier stage of the s 79 process rather than only at the end.²¹ This approach is not inconsistent with the approach of Dawson J in *Mallet* and accords with the view of Dickey.²² The approach suggests that the justice and equity of the composition of assets to be retained by the parties, including whether a splitting order should be made, are factors that should be considered from the start and at each step not merely at the conclusion. On this view the propriety of labelling s 79(2) as ‘step four’ might be a matter for reconsideration. Thus one commentator contended that the four steps are interrelated but not necessarily sequential.²³

The Full Court in *Coghlan* summarised the appropriate approach whether or not a splitting order is sought or made and also whether the interest is included in a separate list or in the s 4(1) list of property.²⁴ First value the interest, then assess the contributions, then the other s 79(4) factors must be considered and finally the justice and equity of the proposed order must be considered.²⁵ Whether the four steps should be applied first to the s 4(1) list and then the superannuation list or lists or vice versa was not explicitly discussed. The *Coghlan* approaches suggest a sequential application of the four steps. However, the majority justified the application of the four step approach where no superannuation order is sought on the basis of s 79(2).²⁶ This suggests that step four has an application that overarches the entire s 79(1) process and is not simply a consideration which comes into play at the conclusion of the three earlier steps. As noted in the dissenting judgment of Warnick J²⁷ the majority rely on s 79(2), where there is no superannuation order sought and where the superannuation is not s 4(1) property, to require the application of the four step approach. Presumably, a just and equitable order about the other property in these circumstances could not be made after the reforms without applying the four step approach to the superannuation as well. This reasoning suggests that s 79(2) is not only relevant after the s 79(4) factors have been considered but has a wider relevance, including whether the four step approach applies at all. The *Coghlan* approaches, in particular the preferred approach of the separate treatment of superannuation, appear to increase the difficulty of the overall approach to step four. At issue is whether the court must apply the four step approach to the separate superannuation lists first, provisionally make a decision whether or not to make a splitting order, then consider the step four approach to the s 4(1) list, considering s 79(2) throughout, and finally consider step four overall.

²⁰ *Levick* (2006) FLC ¶93-254, 80,319 [48].

²¹ *Hobbs* [2003] FamCA 1490 [28] [48]–[49] [59]; *Gardner* [2003] FamCA 249 [92] [120]; *Ennis* [2003] FamCA 1565 [78]–[82] [86]–[87].

²² Above 217.

²³ Stephen Bourke, ‘Super Splitting — Two Years On: Case Law Review’ (Paper presented at the 14th Annual Family Law Masterclass, Sydney, 10–11 May 2005) 25.

²⁴ (2005) FLC ¶93-220, 79,642–3 [46]–[48].

²⁵ *Ibid* 79,645–6 [61]–[65].

²⁶ *Ibid* 79,645 [58].

²⁷ *Ibid* 79,658 [160].

Whether there is a priority when applying the four step approach to different lists has not received explicit consideration in subsequent decisions. Since a proposed splitting order is a relevant factor at step three and even step two this suggests that step four is relevant at an early stage in the process and that the superannuation list or lists might be provisionally considered first.

After *Coghlan*, step four has been used in relation to the separate superannuation list to justify a splitting order without considering steps two and three at all.²⁸ However, it is now clear that this is not an appropriate application of step four.²⁹ In another decision, namely *Koskinas & Vasseleu*,³⁰ the decision to make a splitting order was concluded at step two, also an approach that was not subsequently endorsed.³¹ Otherwise this decision confirmed that s 79(2) is a relevant consideration throughout the process, not only as a final step. The decision suggests that to refer to the evaluation of s 79(2) as ‘the fourth step’ might be inappropriate as it was clearly a consideration from the commencement of the s 79 process and was interwoven with, whilst overarching, the s 79(4) considerations.

In subsequent decisions, whilst the relevance of s 79(2) in a provisional way is acknowledged during the evaluation of the s 79(4) factors, s 79(2) is also treated as the final critical step enabling an overall assessment of the justice and equity of all orders.³² The reasoning is that it is not possible to decide if orders are just and equitable without first considering the s 79(4) factors.³³ The provisional relevance of s 79(2) prior to undertaking the final assessment enables a proposed splitting order to be factored into the s 79 process without finalising any decision about the order until the overall assessment of the justice and equity of all of the proposed orders is made.³⁴ This is consistent with the approach prior to the amendments although the process is more complicated.

The inextricable relevance of s 79(2) both throughout the four step approach and at its conclusion can be illustrated by the decision in *Clives*.³⁵ The Full Court observed that the effect of the fourth step, where the preferred approach was implemented, was that if there was an appealable error in relation to a separate superannuation list then there must be a reconsideration of the exercise of the discretion in relation to all lists.³⁶ This decision provides significant guidance about the application of step four in this context.

Thus the just and equitable requirement is interrelated with and overarches each of the other steps but must then be considered again at the conclusion of step three. The overarching nature of this step permits cross checking throughout the process. Then the proposed orders and the mix of assets that flow from them must be reconsidered at step four to ensure that ultimately the s 79 order is just and equitable.

²⁸ See, eg, *McCullough & McCullough* [2005] FamCA 1318 [45] [67]–[71]; *Head* [2006] FamCA 551 [47]–[52].

²⁹ *McCullough* (2006) FLC ¶93-282, 80,824 [25]–[28].

³⁰ [2005] FamCA 1207 [145]–[149].

³¹ See, eg, *Trott* (2006) FLC ¶93-263, 80,470 [176]–[179].

³² *Ibid* 80,469–70 [173]–[179]; *McCullough* (2006) FLC ¶93-282; *Clives* (2008) FLC ¶93-385.

³³ *McCullough* (2006) FLC ¶93-282, 80,824 [25]–[26], 80,826 [37] [39].

³⁴ *Trott* (2006) FLC ¶93-263, 80,470 [178]–[179]; *McCullough* (2006) FLC ¶93-282, 80,829 [69]–[70]; *Clives* (2008) FLC ¶93-385, 82,942 [80]–[81].

³⁵ (2008) FLC ¶93-385.

³⁶ *Ibid* 82,942–3 [84]–[90].

VIII IS STEP FOUR A SUBSTANTIVE ADJUSTING STEP?

After commenting that the fourth step has assumed a greater significance after the superannuation amendments, Murphy succinctly summarised a further issue relevant to the nature of step four thus:

A central issue which arises in respect of this fourth step is whether it involves the structuring of just and equitable orders to effect an outcome otherwise arrived at by the application of the first three steps or, by contrast, whether the fourth step permits of a substantive (or, indeed, any) further adjustment being made to the overall result.³⁷

In a decision made before the commencement of pt VIIB the Full Court in *Phillips* said:

In determining an application pursuant to s 79 findings will usually be made as to the entitlements of the parties, expressed as a percentage of the net assets of the parties having regard to the matters of contribution and the other factors. However, when considering whether or not the overall result is just and equitable a further adjustment may be warranted depending on the circumstances of the case.³⁸

Thus the Full Court endorsed the view that step four can be a substantive adjusting step.

After the amendments, two views developed. The first view is that no further adjustment of entitlements is appropriate at step four because step four is governed by any s 79(4) adjustments and s 79(2) only enables the just and equitable mix of assets to be determined.³⁹ Faulks J in *Aktova & Aktov*⁴⁰ considered that to determine otherwise would result in the court having an additional discretion not regulated by any principles other than the broad concept of justice and equity.

The second view accords with the pre startup time authority that step four could require a further substantive adjustment in addition to adjustments made at steps two and three in certain circumstances.⁴¹ Consideration of the actual assets to be retained by each party, including whether one party is to retain the greater proportion of their superannuation, may require ‘the making of an order slightly outside the precise percentage arrived at as a result of the statutory imperatives’⁴² particularly when the asset pool is modest or earning capacity is slight.⁴³ The fact that an entitlement to be retained is likely to be subject to taxation has been considered an acceptable reason for such an adjustment.⁴⁴ Furthermore, if a member spouse is required to retain superannuation that is not available for some time as a significant portion of their property settlement this has also been considered an acceptable reason for an adjustment.⁴⁵ As well this has been recognised as an adjustment factor at step three.⁴⁶ Indeed

³⁷ Peter Murphy, ‘Superannuation — Recent Unreported Decisions’ (Paper presented at the 11th National Family Law Conference, Gold Coast, September 2004) 145, 148.

³⁸ (2002) FLC ¶93-104, 88,986 [74]. See also *Manolis & Manolis* [2011] FamCAFC 105 [65]–[66] where the Full Court endorsed a further adjustment resulting from step four via reconsideration of steps two and three.

³⁹ *OSF & OJK* (2004) FLC ¶93-191, 79,197 [16]–[19]; *Aktova & Aktov* [2005] FamCA 735 [36]–[38].

⁴⁰ [2005] FamCA 735 [38].

⁴¹ *Levick* (2006) FLC ¶93-254, 80,320–2 [55]–[69]; *H & H* (2003) FLC ¶93-168, 78,704 [51], 78,710 [82]–[83], 78,711–12 [86]–[88]; *Woollams* (2004) FLC ¶93-195, 79,243 [44]; *Hezemans & Hezemans* [2004] FamCA 865 [25] [53] [55] [57]–[58] (‘*Hezemans*’); *Hobbins* [2005] FamCA 734 [4] [79].

⁴² *Teal* [2010] FamCAFC 120 [71]

⁴³ *Ibid* [70]–[75]. The Full Court considered an adjustment of 3 per cent to be substantial in the circumstances.

⁴⁴ *Levick* (2006) FLC ¶93-254, 80,321 [65].

⁴⁵ *Ibid*; *H & H* (2003) FLC ¶93-168, 78,704 [51], 78,710 [82]; *Woollams* (2004) FLC ¶93-195, 79,243–4 [44] [51]; *Hezemans* [2004] FamCA 865 [56]–[57]; *Hobbins* [2005] FamCA 734 [2] [4] [33] [76].

⁴⁶ See above 204.

*Coghlan*⁴⁷ appears to endorse consideration of this issue at both steps three and four. Likewise the Full Court in *Hobbins*⁴⁸ did not appear concerned that an adjustment for this reason had been made at step four rather than step three.

Nonetheless, Murphy considered that there had been an unwillingness to make any significant adjustments to a result reached after the conclusion of step three.⁴⁹ Murphy concluded that the legislation does not provide any bar to the fourth step being a substantive adjusting step and noted that s 79(2) is not limited to s 79(4) factors in establishing whether orders are just and equitable. He said '[i]n essence, giving the fourth step substance recognises the fallibility of the second and third steps of the preceding process; it recognises that each of the second and third steps themselves require the exercise ... of a discretion which is both broad and imprecise.'⁵⁰ Murphy was not concerned about the objection of Faulks J that this would leave the court to make any adjustment at step four without the benefit of specific guidelines.⁵¹ He concluded that the preponderance of decisions suggested that a substantive adjustment was possible but in reality significant adjustments had not materialised.⁵² However, the wives in *Woollams*,⁵³ *Hezemans*⁵⁴ and *Hobbins*⁵⁵ might disagree that the adjustments made in favour of their husbands were not significant.

Thus the balance of authority and opinion appear to favour step four as an adjusting step. Since at step three the court is able to take into account 'any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account'⁵⁶ it might be considered unnecessary to have a further discretion at step four. As previously discussed it is arguable that after the amendments the boundaries between steps three and four are blurred.⁵⁷

If step four is characterised as a discretionary step in relation to percentage adjustment not just in relation to the manner of allocation of family wealth then it is arguable that further complexity and uncertainty is introduced into the s 79 process. The consequence of this may be to add another layer of difficulty to the process for separated couples and lawyers attempting to negotiate settlements. This promotion of the exercise of unrestrained discretion by judges may result in additional expense and compound and reinforce the uncertainty characteristic of the preceding steps. It may enhance the appeal of a mathematical or formulaic approach if such an approach limits expense and promotes certainty about the treatment of superannuation after separation.

IX RELEVANT STEP FOUR FACTORS

Evaluating the composition of assets to be retained by the parties is crucial to assessing the justice and equity of proposed orders.⁵⁸ The amendments provide the additional option of a

⁴⁷ (2005) FLC ¶93-220, 79,646 [67]–[68].

⁴⁸ [2005] FamCA 734 [4] [78]–[80].

⁴⁹ Murphy, above n 37, 150.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ (2004) FLC ¶93-195, 79,252 [123] (adjustment to the husband of 10 per cent).

⁵⁴ [2004] FamCA 865 [53]–[64] (adjustment to the husband of 13.5 per cent).

⁵⁵ [2005] FamCA 734 [4] [79] (adjustment to the husband of approximately 6 per cent).

⁵⁶ *FLA* s 75(2)(o).

⁵⁷ See, eg, *Hobbins* [2005] FamCA 734 [76]–[80].

⁵⁸ *Doherty* (2006) FLC ¶93-256, 80,340 [17].

splitting order but provide no guidance about when the discretion to make a splitting order should be exercised. Nevertheless, the case law has endorsed various factors as being relevant to the assessment of step four. The process remains a balancing exercise which is dependent upon all of the circumstances of each case.⁵⁹ Coleman J identified the conundrum to be that where there is both s 4(1) property and superannuation, in effect there is real and notional money.⁶⁰ His Honour said about this step ‘[i]t is always difficult where one party is receiving “real money” ... and the other is receiving a mixture of real money and notional money, to be completely satisfied that an outcome is just and equitable’.⁶¹ The decision about the proportions of each that should be retained by the parties was recognised as a difficult one.

A *Retention of the Matrimonial Home*

The view has been expressed that the fourth step now requires a more careful consideration of the composition of assets to be retained by the parties than prior to the superannuation amendments.⁶² Generally, step four will require consideration of whether it is just and equitable for one party to retain all or a large proportion of the tangible assets and whether the other party should retain all or a major part of the superannuation or something in between. In many cases the major assets will be the superannuation and the family home. Commentators were concerned that the reforms would diminish the chances of the non-member spouse retaining the matrimonial home,⁶³ perhaps the only positive aspect of the previous position. Studies continue to demonstrate that after separation women are worse off than men and it can be very difficult for a homemaker to become a homeowner again in the event that they do not retain the family home.⁶⁴ The enlargement of the capital base resulting from the inclusion of superannuation and the possibility of splitting orders becoming the norm were the reasons for this concern. Furthermore, the effect of leaving the family home upon children, already suffering as result of separation, has been considered an important factor.⁶⁵ Indeed the REM specifically averted to the fact that ‘housing needs of children should be considered and there will be occasions where it may not be appropriate to divide the superannuation.’⁶⁶

Altobelli observed that the s 79(2) just and equitable requirement has become more significant after the superannuation amendments.⁶⁷ He considered that a wide interpretation of s 79(2) might enable the needs of children including their accommodation needs to be considered⁶⁸ and indeed, this factor has been considered important in relation to the decision about the mix of assets. On the other hand Benjamin contended that ‘[t]he reduction in house share for the parent carer has made outright ownership even less attainable’ than before the reforms.⁶⁹

⁵⁹ *Hickey* (2003) FLC ¶93-143, 78,386 [39]; *Coghlan* (2005) FLC ¶93-220, 79,645–6 [62] [64] [65].

⁶⁰ *Cahill* (2005) FLC ¶93-253, 80,306 [102].

⁶¹ *Ibid.*

⁶² *Murphy*, above n 37, 163.

⁶³ Jenni Millbank, ‘Hey Girls, Have We Got a Super Deal for You: Reform of Superannuation and Matrimonial Property’ (1993) 7 *Australian Journal of Family Law* 104, 115–17; John Dewar, Grania Sheehan and Jody Hughes, ‘Superannuation and Divorce in Australia’ (Working Paper No 18, Australian Institute of Family Studies, 1999) (‘1999 Working Paper’), 29–30; Robert Benjamin, ‘Splitting Super: Whither the Family Home?’ [4 July 2003] *Lawyers Weekly* 11, 11; Altobelli, ‘Children’s Accommodation Needs ...’ above n 10, 11–12; Jacqueline Campbell, ‘Splitting the Super ... and Selling the Home’ (2003) 77(9) *Law Institute Journal* 56, 60.

⁶⁴ *Millbank*, above n 63, 116–17.

⁶⁵ *1999 Working Paper*, above n 533, 30; Benjamin, above n 63, 11.

⁶⁶ Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2001 (Cth) (‘REM’) 9.

⁶⁷ Altobelli, ‘Children’s Accommodation Needs ...’, above n 63, 10–12.

⁶⁸ *Ibid.* 12.

⁶⁹ Benjamin, above n 63, 11.

The *2008 Evaluation* found ‘a strong nexus between the treatment of superannuation on divorce and the matrimonial home.’⁷⁰ The survey findings provide a point of comparison for interpreting the findings from the case analysis. The findings from the *2008 Evaluation* demonstrate that where the husband’s superannuation was ‘divided’⁷¹ he retained the family home in around half of all cases (46 per cent). The wife received the family home at settlement in only 14 per cent of these cases.⁷² Women were significantly less likely than men to retain the family home where the husband’s superannuation was divided. When the husband’s superannuation was kept by him and a compensating transfer was made to the wife, 42 per cent of the women in this group kept the family home on settlement.⁷³

There are limitations in comparing the findings of the *2008 Evaluation* with the results of the case analysis. In particular, as previously discussed,⁷⁴ each of the research projects is based on different samples. In addition, the discretionary nature of property settlement negotiations results in a high degree of variability in outcomes reflecting the specific circumstances of each case. Nevertheless, the case analysis may support a nexus between splitting superannuation and preserving the family home for the non-member spouse.

The analysis of the cases showed that the wife retained the family home in a significant number of cases overall although not in every case.⁷⁵ Of the 62 cases considered⁷⁶ the wife retained the family home in 28 cases.⁷⁷ The husband retained the family home in 15 of the cases.⁷⁸

As to the possible nexus between splitting orders and the retention of the family home, of the 32 cases where a splitting order was made in favour of the wife,⁷⁹ the wife retained the family home in 10 cases and the husband in six cases.⁸⁰ By contrast, in the 27 cases where no splitting order was made the wife retained the matrimonial home in 17 cases and the husband in seven cases.⁸¹

The decisions may suggest that where no splitting order is made in favour of the wife, the wife has a greater chance of retaining the home. Conversely where a splitting order is made in favour of the wife the wife may have a reduced chance of retaining the home. Splitting orders may impact upon the ability of a non-member spouse to retain the family home consistent with the findings of the *2008 Evaluation*. However, the causal direction of such a conclusion remains unclear and requires further research to consider, in particular, whether splitting orders are not made because the preference of women is to retain the family home or whether

⁷⁰ Grania Sheehan, April Chrzanowski and John Dewar, ‘Superannuation and Divorce in Australia: An Evaluation of Post Reform Practice and Settlement Outcomes’ (2008) 22 *International Journal of Law Policy and the Family* 206, 222 (‘2008 Evaluation’).

⁷¹ *Ibid*, 216 means cashed in and shared; split or flagged for splitting or otherwise actually sharing the entitlement.

⁷² *Ibid* 222 Table 1. This leaves a balance of 14 per cent apparently unaccounted for.

⁷³ *Ibid*

⁷⁴ Above 2.

⁷⁵ Appendix Eleven.

⁷⁶ *Ibid* (note that in three of the cases there was no family home).

⁷⁷ *Ibid* (in 14 of the cases the husband retained other real estate).

⁷⁸ *Ibid* (in four of the cases the wife retained other real estate).

⁷⁹ *Ibid* (in three of the cases a where a splitting order was made in favour of the husband, the husband retained the family home in two of the cases and the wife in the third).

⁸⁰ *Ibid* (it was sold in 13 cases).

⁸¹ *Ibid* (it was sold in three cases).

conversely the availability of splitting orders means it is more difficult for women to retain the family home.

B *To Split or Not to Split*

After the amendments consideration must now be given to whether a splitting order should be made and the impact of that course.⁸² If the factors support the making of a splitting order then there is a further relevant factor to consider and that is whether the superannuation should be divided in the same proportions as the other assets or not. The decision whether or not to make a splitting order requires knowledge and understanding of complex superannuation entitlements and the impact of such an order in respect of each of the parties.⁸³ This requires consideration of the type and phase of any superannuation interests as well as any other circumstances relevant to the interests. Proposed orders about the s 4(1) assets must also be considered. It is not necessary to divide the s 4(1) property and superannuation in the exact proportions concluded after the adjustments at steps two and three in respect of each of the lists⁸⁴ although this may be considered appropriate.⁸⁵ Indeed it may be considered appropriate to make no splitting order and leave one party with the majority of the s 4(1) assets in certain circumstances.⁸⁶ Or a splitting order may be made in circumstances where neither party sought one.⁸⁷ In order to enable the court to make a decision about whether or not a splitting order should be made each party should provide evidence and make submissions in support of their respective positions.⁸⁸ Section 79(2) must be considered in relation to both parties not only the non-member spouse.⁸⁹

The option of making splitting orders adds flexibility to the discretion exercised by the court to alter property interests. Nevertheless, if a splitting order is proposed, then consideration must be given to the type of splitting order that is appropriate having regard to s 90MT as well as the nature, form and characteristics of the superannuation, including whether it is in the growth phase or the payment phase.⁹⁰ Generally, the base amount splitting order is appropriate where the interest is in the growth phase because the member spouse can continue to contribute to the entitlement without benefiting the non-member spouse. The percentage splitting order is usually appropriate where the entitlement is in the payment phase. However, this type of order can be used if the entitlement is in the growth phase but is no longer being contributed to.⁹¹ Information must be obtained about the type of interest and whether the benefits are payable as a pension, lump sum or combination of both. In addition to details about the s 4(1) property, any other superannuation entitlements will also be relevant to the decision whether a splitting order should be made in respect of a particular interest.⁹²

⁸² See generally, Stephen Bourke and Peter Murphy, 'The Place of Part VIII B in the s 79 Process after *Coghlan*' (2006) 12 *Current Family Law* 62, 78–81 for examples.

⁸³ See generally, Bourke, *Super Splitting for Family Lawyers* (Certus Law, 2010) 227–41.

⁸⁴ *Levick* (2006) FLC ¶93-254, 80,320–2 [55]–[69]; *H & H* (2003) FLC ¶93-168, 78,710 [83]; *OSF & OJK* (2004) FLC ¶93-191, 79,206–7 [90].

⁸⁵ *H & H* (2003) FLC ¶93-168, 78,709 [77]; *Winwood-Smith & Duffy* [2005] FMCAfam 171 [97] [98].

⁸⁶ *Stapleton & Stapleton* [2004] FamCA 401 ('*Stapleton*'); *Weston & Weston* [2004] FamCA 453 ('*Weston*'); *Weir & Weir* [2005] FamCA 96 ('*Weir*').

⁸⁷ *Woollams* (2004) FLC ¶93-195, 79,252–4 [117]–[128].

⁸⁸ See, eg, *Levick* (2006) FLC ¶93-254, 80,320–1 [60]–[66]; *Davies* [2003] FamCA 410 [243]; *Koskinas & Vasseleu* [2005] FamCA 1207 [147]; *Doherty* (2006) FLC ¶93-256, 80,340–1 [19]–[24].

⁸⁹ *Levick* (2006) FLC ¶93-254, 80,321 [66]; *Gardner* [2003] FamCA 249 [125]–[126]; *H & H* (2003) FLC ¶93-168, 78,710–11 [82]–[87]; *Head* [2006] FamCA 551 [50]; *Lopez & Hagarty* [2007] FMCAfam 908 [157]–[164].

⁹⁰ Stephen Bourke, 'The Fourth Step in Superannuation Orders' (2004) 10 *Current Family Law* 11, 13–14.

⁹¹ *Gardner* [2003] FamCA 249 [38]; *BAR & JMR* (2005) FLC ¶93-231, 79,817–19 [5] [19] [26], 79,852 [254].

⁹² Bourke, 'The Fourth Step in Superannuation Orders', above n 90, 14.

Section 81 provides that ‘the court shall, as far as practicable, make such orders as will finally determine the financial relationship between the parties to the marriage and avoid further proceedings between them.’ In the superannuation context, this will require consideration of whether interest splitting is available. If interest splitting is available then the court should also be provided with evidence about what the options for the non-member spouse are if a splitting order is made. If the interest is an uncommutable pension in the payment phase and interest splitting is possible then a splitting order may be contraindicated if the non-member spouse would be entitled to receive a lump sum for the reason that this is not an option for the member-spouse.⁹³ The basis for this is that the non-member spouse would be entitled to a benefit that is not available to the member spouse although the logic underpinning this conclusion is unclear. Specifically if the result is that the member spouse retains a valuable income stream intact and the non-member spouse receives a substantially reduced offset the impact of the requirement to assess the justice and equity of proposed orders is doubtful.

The impact of a splitting order and the availability of interest splitting are significant considerations when making a decision about whether or not a splitting order should be made.⁹⁴ If interest splitting is unavailable and if any splitting order is unlikely to be implemented for a considerable time, then careful consideration may be required of the justice and equity of a splitting order at step four.⁹⁵ Appropriate expert evidence about the dependability of such an order would be pertinent.⁹⁶ The lack of universally available interest splitting is arguably an impediment to the optimum operation of the reforms.

The following factors have been endorsed as relevant to the decision whether or not to make a splitting order:

- whether the entitlement is splittable;⁹⁷
- the importance of the retention of the marital home by the non-member spouse for the family;⁹⁸
- the rehousing costs of the respective parties;⁹⁹
- the roles of the parties to the marriage and the length of the marriage;¹⁰⁰
- the care arrangements for the children;¹⁰¹
- the impact of the marriage upon the acquisition of superannuation;¹⁰²
- any earning capacity of each of the parties and the allied capacity to accumulate superannuation in future;¹⁰³

⁹³ *Edwards* (2009) FLC ¶93-409, 83,574 [112]–[113].

⁹⁴ *Guthrie & Rushton* [2009] FamCA 1144 [104]–[115]; Stephen Bourke, ‘How to Avoid a Negligence Claim When Splitting Superannuation under the *Family Law Act 1975* (The Physiology of a Splitting Order)’ (Paper presented at the 2011 Family Law Intensive, Adelaide, 13 August 2011) 1–3.

⁹⁵ *Ibid.*

⁹⁶ *BAR & JMR* (2005) FLC ¶93-231, 79,849–50 [227]–[237, 79,860 [303].

⁹⁷ *H & H* (2003) FLC ¶93-168, 78,704 [50]; *Trott* (2006) FLC ¶93-263, 80,472–3 [197]–[202].

⁹⁸ See, eg, *Hobbs* [2003] FamCA 1490 [59]–[63]; *Davies* [2003] FamCA 410 [235]; *Gabriel & Counsel* [2003] FamCA 1270 [212] [216]; *OSF & OJK* (2004) FLC ¶93-191, 79,207 [95]; *Weston* [2004] FamCA 453 [144]; *Weir* [2005] FamCA 96 [98]; *Warner* [2008] FamCAFC 156 [12] [22]; *Jasper & Jasper* [2009] FMCAfam 250 [19] [78] [81]–[83] (‘*Jasper*’).

⁹⁹ *Levick* (2006) FLC ¶93-254, 80,320–1 [61]–[66]; *H & H* (2003) FLC ¶93-168, 78,710–11 [83]–[86]; *McCulough* (2006) FLC ¶93-282, 80,830 [74].

¹⁰⁰ *Gabriel & Counsel* [2003] FamCA 1270 [212].

¹⁰¹ *Davies* [2003] FamCA 410 [235]–[237]; *Gabriel & Counsel* [2003] FamCA 1270 [212]; *Weston* [2004] FamCA 453 [126] [144]; *Weir* [2005] FamCA 96 [51] [98]; *McCulough* (2006) FLC ¶93-282, 80,830 [76].

¹⁰² *Gabriel & Counsel* [2003] FamCA 1270 [212].

- the nature, form and characteristics of the entitlement;¹⁰⁴
- whether the entitlement is a non-commutable pension in the payment phase;¹⁰⁵
- whether a splitting order in respect of a non-commutable pension in the payment phase in favour of the non-member spouse would entitle the non-member spouse to receive a lump sum benefit;¹⁰⁶
- whether a pension in the payment phase received for disability has a lump sum value but is also income which may cease upon return to work;¹⁰⁷
- the comparative values of superannuation and s 4(1) assets and whether it is possible for the member spouse to retain their superannuation intact;¹⁰⁸
- the quantum of the superannuation entitlements of the parties and the proportion of their share this represents;¹⁰⁹
- any need for a financial buffer for living costs;¹¹⁰
- any delay before the superannuation is available;¹¹¹
- any risk of the superannuation reducing in value;¹¹²
- the clean break principle;¹¹³
- any need for provision for retirement;¹¹⁴
- any possible future taxation of superannuation and the difficulty of assessing any liability;¹¹⁵
- the concessional treatment of superannuation;¹¹⁶
- the impact of a splitting order;¹¹⁷
- the costs of a splitting order.¹¹⁸

¹⁰³ *Levick* (2006) FLC ¶93-254, 80,321 [65]–[66]; *H & H* (2003) FLC ¶93-168, 78,710–11 [83]–[86]; *Davies* [2003] FamCA 410 [235] [237]; *Gabriel & Counsel* [2003] FamCA 1270 [212]; *Stapleton* [2004] FamCA 401 [113]; *Koskinas & Vasseleu* [2005] FamCA 1207 [175]; *A & A* [2006] FMCAfam 80 [141]–[142] [147]–[149] 163 [167].

¹⁰⁴ *Guthrie & Rushton* [2009] FamCA 1144 [30]–[42]; *Hayton & Bendle* [2010] FamCA 592 [2] [75] [105]–[107] [206].

¹⁰⁵ *Treloar* [2007] FamCA 1127 [269]–[270]; *Edwards* (2009) FLC ¶93-409, 83,571 [87]–[92].

¹⁰⁶ *Edwards* (2009) FLC ¶93-409, 83,574 [112]–[113].

¹⁰⁷ *M & M* (2006) FLC ¶93-281, 80,814 [107]–[108], 80,820 [138].

¹⁰⁸ *Hobbs* [2003] FamCA 1490 [61].

¹⁰⁹ *Hobbs* [2003] FamCA 1490 [60]; *Gabriel & Counsel* [2003] FamCA 1270 [212]; *A & A* [2006] FMCAfam 80 [169] citing *Levick* (2006) FLC ¶93-254.

¹¹⁰ *H & H* (2003) FLC ¶93-168, 78,710 [83] citing *Levick* (2006) FLC ¶93-254; *A & A* [2006] FMCAfam 80 [169] citing *Levick* (2006) FLC ¶93-254.

¹¹¹ *Hobbs* [2003] FamCA 1490 [61]; *Davies* [2003] FamCA 410 [235]; *Gabriel & Counsel* [2003] FamCA 1270 [212]; *OSF & OJK* (2004) FLC ¶93-191, 79,207 [92]; *Stapleton* [2004] FamCA 401 [113]; *Head* [2006] FamCA 551 [47]–[50].

¹¹² *Jamp & Jamp* [2009] FamCA 386 [167] (*‘Jamp’*).

¹¹³ *Hobbs* [2003] FamCA 1490 [63]; *H & H* (2003) FLC ¶93-168, 78,712 [88]–[89]; *Davies* [2003] FamCA 410 [240]. But see, *BAR & JMR* (2005) FLC ¶93-231, 79,860–1 [302]–[305] where a flagging order was used with a splitting order to prevent a clean break to achieve justice and equity.

¹¹⁴ *H & H* (2003) FLC ¶93-168, 78,712 [88]; *Davies* [2003] FamCA 410 [233]–[235]; *Gabriel & Counsel* [2003] FamCA 1270 [212]; *Winwood-Smith & Duffy* [2005] FMCAfam 171 [91]; *Koskinas & Vasseleu* [2005] FamCA 1207 [149]; *Trott* (2006) FLC ¶93-263, 80,478 [250].

¹¹⁵ *Levick* (2006) FLC ¶93-254, 80,321 [65]; *Gardner* [2003] FamCA 249 [87]; *H & H* (2003) FLC ¶93,168, 78,711 [84]; *Gabriel & Counsel* [2003] FamCA 1270 [212].

¹¹⁶ *Jamp* [2009] FamCA 386 [168].

¹¹⁷ *Gardner* [2003] FamCA 249 [87]–[91]; *Davies* [2003] FamCA 410 [193] [238] [240]; *Mahoney* [2005] FMCAfam 439 [83]–[95]. See generally, Bourke, ‘The Fourth Step in Superannuation Orders’, above n 90 emphasises and illustrates the complex factors relevant to making a splitting order.

¹¹⁸ *H & H* (2003) FLC ¶93-168, 78,712 [89]; *Davies* [2003] FamCA 410 [235]; *Gabriel & Counsel* [2003] FamCA 1270 [212].

Accordingly the cases have endorsed a diverse range of factors as relevant to the decision about whether or not a splitting order should be made emphasising both the complexity and the highly discretionary nature of the decision. As a consequence the attainment of social or economic policy objectives is less certain.

Moreover additional guidance is provided by the decided cases about the treatment of superannuation in property settlement proceedings. Where the value of superannuation is significantly greater than the s 4(1) assets and no splitting order is sought the court will be unlikely to make an order requiring the member spouse to provide assets to the non-member spouse in excess of the available s 4(1) assets.¹¹⁹

Although it has not been authoritatively determined, it is probably not possible for a splitting order to be made of limited duration in respect of a pension in the payment phase.¹²⁰ Nor has it been authoritatively determined that an order can be made about a pension in the payment phase that does not comply with pt VIII B although arguably it has been done.¹²¹ Where there are multiple entitlements and a splitting order is to be made, it is important to make the order in relation to as few of the interests as possible to avoid unnecessary complexity for trustees and parties as well as unnecessary administrative costs.¹²² It is essential that a splitting order specify the operative time and, when the court is considering step four, the impact of the proposed operative time is also a relevant consideration.¹²³

While it is not possible for the evaluation of the cases to proceed as a mathematical exercise because of the discretionary nature of the process, nevertheless it is submitted that broad and general guidance can be obtained from these decisions. The cases considered suggest that there is no trend emerging of splitting orders being made as a general rule,¹²⁴ but where they were made they tended to be made in favour of the wife.¹²⁵ A splitting order was made in favour of the wife in 32 of the 62 cases considered.¹²⁶ In three cases a splitting order was made in favour of the husband.¹²⁷ The fact that splitting orders are not the norm in the cases analysed, suggests a failure of the reforms to meet one of the concurrent policy objectives outlined in the REM.¹²⁸

The 2008 *Evaluation* findings demonstrate that 17 per cent of former couples split the superannuation.¹²⁹ This represents a significant increase on the pre-reform rate of 2 per cent.¹³⁰ However, it is clearly not a preferred option for the parties or for the courts which may in part reflect the greater asset base of those couples who have the resources available to be able to take their property dispute to court.

¹¹⁹ *Lopez & Hagarty* [2007] FMCAfam 908 [157]–[163].

¹²⁰ *O’Chee v O’Chee* (2006) FLC ¶93-275, 80,685 [226]. But see *Glover & Glover [No 2]* [2009] FamCA 441 (order 6) (*‘Glover’*).

¹²¹ *Trott* (2006) FLC ¶93-263, 80,481 (order 6); *Glover* [2009] FamCA 441 (order 6).

¹²² *H & H* (2003) FLC ¶93-168, 78,712 [89].

¹²³ See, eg, *A & A* [2006] FMCAfam 80 [123]–[125] [175].

¹²⁴ Appendix Eleven.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ See above 15–16.

¹²⁹ Above n 70, 220.

¹³⁰ *Ibid.*

X STEP FOUR — OVERVIEW

After the amendments, the role of step four is enlarged to include a decision about whether it is just and equitable for a splitting order to be made, which is a complicated process. As well, any decision about the composition of the assets to be retained by the parties epitomises the clash between the retirement incomes policy on the one hand and the discretionary nature of family law property proceedings on the other. Government policy views superannuation as future income that will alleviate financial pressure in respect of retirees. The family law focus is different and views superannuation as an asset of the marriage to be evaluated along with any other assets and divided if demanded by the circumstances of the individual case in the exercise of a broad but circumscribed discretion. Chief Justice Diana Bryant summarised the challenge for the courts thus:

The ‘fourth step’ – consideration of whether the orders are just and equitable in all the circumstances – assumes particular significance in the process of balancing competing claims with respect to the division of superannuation and non-superannuation assets. As Murphy rightly points out, the importance of the ‘fourth step’ was highlighted early in the life of the Family Law Act. It appears that the ‘just and equitable’ consideration has taken on greater importance with the enactment of superannuation splitting laws.¹³¹

Commentators had expressed concern that reduced offsetting and increased splitting of superannuation would diminish the ability of the homemaker to retain the family home. Step four offers flexibility because splitting orders need not reflect the percentage adjustments arrived at after the application of steps two and three to each of the superannuation and s 4(1) property lists. Thus it is possible for the non-member spouse to keep the home and some superannuation and the member spouse to receive some capital and the majority of the superannuation where the homemaker wishes to retain the home for the family. If there is a dispute about whether or not a splitting order should be made then appropriate evidence should be provided. The cases outline certain factors that might be relevant to the decision about whether a splitting order should be made and if so in what proportions. It is also clear that evidence is required in support of the relevant factors not mere assertions. Expert evidence may be required in some cases. An understanding of the impact of a proposed splitting order in relation to the particular type of entitlement as well as the impact of making the different types of splitting orders in the circumstances is important.

The cases considered do not suggest that the homemaker retained the home as a general rule although this happened in a significant number of cases.¹³² Furthermore, splitting orders did not prevail in every case.¹³³ Again, however, there were a significant number of splitting orders made in favour of the wife. The need to share provision for retirement was specifically considered to be a factor in comparatively few cases¹³⁴ and this is consistent with the findings of the *2008 Evaluation*.¹³⁵ Surprisingly this was in contrast to the number of splitting orders made. It appeared to be more likely that the wife retained the home where there was no splitting order in her favour. Splitting orders perhaps affected the capacity of the wife to retain the family home and if so this accords with the concerns of commentators. Ultimately neither

¹³¹ Chief Justice Diana Bryant, ‘Finding the Balance: Women’s Access to Superannuation after Marriage Breakdown’ (Paper presented at the Australian Women’s Lawyers Conference, Sydney, 29 September 2006) 25–6 (citation omitted).

¹³² Above 223–5; Appendix Eleven.

¹³³ Above 225–8; Appendix Eleven.

¹³⁴ See above n 114 and accompanying text.

¹³⁵ Above n 70, 222.

the retirement incomes policy nor the retention of the home by the homemaker is a prevalent factor for the court at step four. Further research may be justified about the relationship between the retention of the home and splitting orders as well as any changes in percentage adjustments post reform.¹³⁶

To conclude, the Full Court in *Doherty* commented on the increased importance of the fourth step after the amendments and considered that Full Court guidance is required about the factors relevant at step four including when splitting orders should be made.¹³⁷ Although the case law has provided guidance about factors that are relevant to a decision about the composition of assets to be retained, there has been no authoritative Full Court decision addressing the preferred approach to step four in property proceedings involving superannuation. Perhaps in the light of the continued retention of the discretionary approach to property settlement disputes this would be unrealistic especially at step four where flexibility about the mix of assets in the light of the circumstances of each case is crucial.

XI JUSTICE AND EQUITY: THE EFFECT OF LAYERED DISADVANTAGE — A CASE EXAMPLE

The effects of the *Coghlan* preferred approach of treating superannuation as another species of asset to be evaluated separately from other forms of family wealth may appear less significant when considering each of the four steps individually. However, the case analysis below highlights layered disadvantage which is not inconsequential in effect. The *2008 Evaluation* noted that the extent of any gains for women depended on the chain of legal reasoning.¹³⁸ There were concerns that the amendments would result in lower overall adjustments to women at step three. The *2008 Evaluation* concluded that the mean share of property received by women had reduced to 50.3 per cent compared to earlier empirical studies.¹³⁹ It is not possible to generate an average figure for settlement outcomes, or to draw broad generalisations, from the present doctrinal analysis.

After *Coghlan* the four steps must be applied in relation to each of the s 4(1) and superannuation lists adding complexity to the assessment of the just and equitable requirement and the overall outcome. The adjustments in favour of the wife of the s 4(1) property tend to be greater than the adjustments in respect of the superannuation.¹⁴⁰ Generally the case study may suggest that the overall adjustments in respect of superannuation dealt with in a separate list are usually no more than 50 per cent to the wife and are frequently less.¹⁴¹ It is unusual for the wife to receive an adjustment of more than 50 per cent of all of the superannuation except in rare circumstances, for example where the wife might have a pre cohabitation pension in the payment phase.¹⁴² After *Coghlan* of the 15 cases considered the wife received an adjustment of superannuation of more than 50 per cent in only two cases.¹⁴³ In one case the wife had a pre cohabitation pension in the payment phase and in the other the overall adjustment was a modest 55 percent.¹⁴⁴ The extent of the overall adjustments in

¹³⁶ Below 281–2.

¹³⁷ (2006) FLC ¶93-256, 80,340–1 [17] [23].

¹³⁸ Above n 70, 223.

¹³⁹ *Ibid.*

¹⁴⁰ Appendix Twelve.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

respect of the s 4(1) lists does not appear to provide the justification. Further specific research in due course about overall outcomes is warranted.

Nevertheless an illustrative example about the effect of the layering of disadvantage upon a just and equitable outcome is provided by the decision of *FM Brown A & A*, a decision which involved a dispute about the valuation of the husband's superannuation and the parties contributions to it.¹⁴⁵

The background circumstances were that the parties had cohabited for over 20 years and had three children aged 16, 14 and 12 years who lived with the wife.¹⁴⁶ The husband aged 48 years¹⁴⁷ was earning \$66 000 and paying child support of \$280 per week¹⁴⁸ and the wife was aged 42 years¹⁴⁹ earned about \$27 976 and received some pension payments of \$159 per week as well as child support.¹⁵⁰

The non superannuation assets comprised the family home, which the wife wished to retain, and other assets with a net total value of \$244 542.¹⁵¹ In addition the parties had superannuation. The husband had a defined benefit superannuation entitlement in the growth phase valued at the date of the hearing at \$329 111 pursuant to the *FL(S)R*.¹⁵² The wife had superannuation valued at \$9082 bringing the total value of superannuation to \$338 193.¹⁵³ The total value of both the superannuation and s 4(1) property was \$583 000. The husband's superannuation therefore constituted the major asset of the parties.

The hearing spanned 4 days. An issue in the proceedings was the impact of the husband's initial contributions to superannuation and also his post separation contributions. There was also an issue about the appropriate valuation of the entitlement. Expert evidence was given of the different values as at the different dates and also comparing the *FL(S)R* values with the resignation values. This evidence highlights the significant impact that the valuation regime can have on the value of this type of interest. The husband had contributed to his entitlement for six years prior to cohabitation and the estimated withdrawal value at that time was minor, namely \$3192, although the value pursuant to the *FL(S)R* was \$10 470.¹⁵⁴ The husband's contributions during the relatively short period of 19 months post separation produced a significant increase in the entitlement.¹⁵⁵ At the date of separation the gross value of the entitlement pursuant to the *FL(S)R* was \$254 286 and the resignation value was \$128 049.¹⁵⁶ As at the hearing the family law value was \$329 111 and the resignation value \$161 171. There were thus significant differences between the value of the entitlement between the date of separation and the date of hearing as well as between the resignation value and the family law value. Also the proceedings involved issues of the treatment of pre cohabitation and post separation contributions to superannuation.

¹⁴⁵ [2006] FMCAfam 80.

¹⁴⁶ *Ibid* [2] [4] [36].

¹⁴⁷ *Ibid* [23].

¹⁴⁸ *Ibid* [37].

¹⁴⁹ *Ibid* [23].

¹⁵⁰ *Ibid* [37]–[38].

¹⁵¹ *Ibid* [101].

¹⁵² *Ibid* [54] [63].

¹⁵³ *Ibid* [101].

¹⁵⁴ *Ibid* [27].

¹⁵⁵ *Ibid* [119].

¹⁵⁶ *Ibid* [63].

The evaluation of these issues was affected by the separate treatment of superannuation. FM Brown evaluated the superannuation and non-superannuation assets separately in accordance with the *Coghlan* preferred approach.¹⁵⁷ In relation to the non superannuation assets the contributions of the parties were assessed to be equal.¹⁵⁸ At step three a further adjustment in respect of the non superannuation assets was made to the wife of 16.88 per cent¹⁵⁹ on account of disparity in earning capacity and her responsibility for the care of the children.¹⁶⁰ The total adjustment to the wife was therefore 66.88 per cent of the non superannuation assets or \$163 856.

In relation to the superannuation the contributions of the parties were regarded as equal as at the date of separation.¹⁶¹ However, as at trial they were not regarded as equal.¹⁶² This is notwithstanding the post separation contributions of the wife to the children and the fact that the post separation growth of the entitlement would not have been due only the contributions of the husband. The pre cohabitation contributions of the husband to his superannuation were dealt with by offsetting it against the wife's contribution to her superannuation entitlement.¹⁶³ No step three adjustment was made in respect of the superannuation because the splitting order 'will leave the parties in a comparable position now regarding retirement preparedness.'¹⁶⁴ This was incorrect. The splitting order was for half of the value of the entitlement as at separation in the sum of \$127 000. The splitting order was given an operative time as at the date of separation.¹⁶⁵ The effect of this is that the wife's entitlement would be adjusted by the rate of interest (which can be positive, negative or nil) for the adjustment period pursuant to the relevant provisions of pt 6 of the *FL(S)R*. This adjustment was therefore from the date of separation rather than the date of the decision or a later date. The division of the superannuation was approximately 40 per cent of the value of all superannuation as at the date of hearing although the wife would also receive the adjustment from separation which if positive would have been modest.¹⁶⁶ The disparity in the ability of the parties to accumulate superannuation in future did not result in a step three adjustment in favour of the wife. The wife retained her own superannuation of \$9000 and a splitting order of \$127000. The total of the superannuation retained by the wife of \$136 000 was approximately 40 per cent of all of the superannuation. Overall the entitlement of the wife in relation to all assets as at the time of the hearing was approximately 51 per cent due to the fact that the superannuation constituted the most valuable family asset.

The judgment is a carefully considered and detailed assessment of all of the issues and circumstances and the comment was made that counsel were skilled and well prepared.¹⁶⁷ If the result were to be compared with the probable outcome prior to the reforms then the wife certainly benefited from the reforms. The husband's superannuation was the major asset and it was taken into account at a significantly greater value than the resignation benefit. She was given the opportunity to retain the home if she could finance a payment to the husband of \$60 000. Although the wife said she had the capacity to borrow only \$50 000 FM Brown

¹⁵⁷ Ibid [100]–[101].

¹⁵⁸ Ibid [134]–[138].

¹⁵⁹ Ibid [166] [170].

¹⁶⁰ Ibid [162].

¹⁶¹ Ibid [127].

¹⁶² Ibid [123].

¹⁶³ Ibid [126].

¹⁶⁴ Ibid [167].

¹⁶⁵ Ibid [124]–[125].

¹⁶⁶ Ibid [79].

¹⁶⁷ Ibid [19].

considered that she could afford to finance \$60 000.¹⁶⁸ The wife also received the benefit of a splitting order of \$127 000.

Nevertheless limitations were apparent. There was inconsistency in the way the superannuation was treated compared to other assets that flowed from the treatment of superannuation as another species of asset. There was uncertainty about the treatment of superannuation at its full value which was one of the elements of the policy objectives specified in the REM. The decision endorsed a readiness to dilute the full value produced by the application of the valuation regime. There was inconsistency in the assessment of steps two and three in relation to superannuation by comparison with the non superannuation assets. The assessment of the post separation contributions to superannuation was given considerable weight notwithstanding the post separation parenting and homemaker contributions of the wife to the children and the effect that the marital contributions to superannuation had on its post separation growth. The same step three factors that were relevant to the adjustment of the s 4(1) property were not also considered relevant to the superannuation because ‘[g]iven the parties’ ages, retirement planning is not a pressing concern for either of them’ despite the fact that FM Brown accepted that the husband’s income and membership of a valuable fund were factors which would result in him having a greater ability to accumulate superannuation in future.¹⁶⁹ Nevertheless FM Brown concluded that the issue of disparity in earning capacity and therefore disparity in the capacity to accumulate superannuation in the future should be given no adjustment at step three because ‘that is not of itself reason to award a greater percentage of the parties’ accumulated superannuation to the wife by reason of s 75(2) factors.’¹⁷⁰

Not only was the final outcome of an adjustment 51 per cent to the wife overall arguably not a fair one for the wife, but also the proceedings were costly and complex for both parties. The separate evaluation of superannuation appeared to allow superannuation to be undervalued and non financial contributions to superannuation to be underrated. It also allowed step three factors to be unrecognised in relation to superannuation, even those with a superannuation focus.

Neither the approach taken nor the outcome of this decision accorded with the expected impact of the reforms.¹⁷¹ The superannuation was not included with the other s 4(1) assets in a single list at step one as had been hypothesised but was evaluated in a separate list. At step two the contributions of the parties to the s 4(1) property were not assessed overall as expected but were assessed separately in respect of each list. The contributions of the parties to the s 4(1) property were assessed to be equal. However the contributions to superannuation differed. Although the contributions of the parties to the superannuation were assessed to be equal on the basis of the value at the time of separation there had been a significant increase in value after that time and prior to the hearing. Given the post separation contributions of the wife to the family and the short period between separation and trial an equal assessment of contributions or an adjustment in favour of the wife in relation to all assets including superannuation would have been the expectation not the actual assessment of 40 per cent. A step three adjustment of 16.88 per cent was made only in relation to the less valuable s 4(1) property instead of all of the assets making a total of about 51 per cent overall. An adjustment of that magnitude in relation to forms of family wealth at step three would have been the

¹⁶⁸ Ibid [171] [174].

¹⁶⁹ Ibid [167].

¹⁷⁰ Ibid [167].

¹⁷¹ Above 12–15.

outcome expected after the reforms. And the wife, having the lesser earning capacity and the major care of the children, was not assured of being able to retain the family home.

CHAPTER 10

SUCCESSSES, SHORTCOMINGS AND FUTURE DIRECTIONS

In 1998 Justice Faulks said '[s]uperannuation has been the troublesome thorn in the paw of the Court since the Court's inception. Judges have turned pained eyes plaintively to the legislature in the hope that it would prove to be the Androcles to remove the thorn.'¹ Post reform the evaluation of superannuation in property settlement proceedings continues to be challenging.

The final chapter presents an overall perspective of the successes and shortcomings of the reforms, as interpreted by the courts, and the potential effect upon the previous disadvantage to women of the pre-reform law.² As discussed there was disadvantage to women in the uneven distribution of superannuation in the public sphere. This disadvantage to women was perpetuated in the private sphere because of the lack of power to treat properly valued superannuation as property and make binding orders to divide or otherwise deal with it. This evaluation views the findings through the lens of the substantive equality approach,³ having regard to the origins of the disadvantage to women and the actual result. The findings are also assessed against the evaluation framework presented in Chapter 1. Specifically, the findings are assessed against the parameters distilled from previous reports and developed further in this thesis. These parameters inform the expectations of the thesis. The findings are also assessed against the goals and policy objectives set out in the REM.⁴

An assessment of the impact of the interpretation of the reforms is undertaken in this chapter in a twofold way. The uncertainty, inconsistency, lack of clarity and unfairness to women of the pre-reform law had been identified in the REM and in other reports and also inform the evaluation parameters of the thesis.⁵ Thus firstly the outcomes of the post-reform doctrinal analysis in relation to these features of the pre-reform law are summarised and reviewed.

Following on from this appraisal, conclusions are drawn about the overall achievements and deficiencies of the post-reform law through the lens of the substantive equality model. In particular the likely effect of the post-reform law upon the direct regulatory function of the law as well as the intermediate function of indirectly influencing negotiating behaviour is considered.

Finally while the reforms have achieved successes, significant shortcomings are also evident. The hallmarks of a substantively equitable regime are compared to the reality of the outcomes revealed by the doctrinal analysis. Then the options for addressing the limitations are considered and critiqued. Three possibilities are considered. The first is the option of major reform. The alternatives are discussed — the form that such reform may take, what is ideal given the theoretical perspective taken in this thesis, and what is realistic. The second is to consider the option of relatively minor changes that may address some of the limitations and

¹ Justice John Faulks, 'The Division of Property under the *Family Law Act 1975*: a Practical Consideration of the Evidence which should be Presented to a Court with Particular Reference to the Question of Superannuation', Family Court of Australia, 1998, 19.

² Above Chapter 3.

³ Above 36–7.

⁴ Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2001 (Cth), 5–7.

⁵ *Ibid* 4.

build upon the present successes of the reforms. Finally areas of future monitoring and research are identified that build on the present analysis and would address its limitations.

I CONTINUING GENDER SUPERANNUATION GAP IN THE PUBLIC SPHERE

As previously discussed, many developments have occurred in the public sphere which benefit both men and women but particularly women, in relation to superannuation.⁶ These developments have endeavoured to encourage employees to provide adequately for their own retirement as far as possible and have improved both the coverage of superannuation and the quantum of entitlements. The introduction of mandatory superannuation, immediate vesting of benefits, tighter preservation requirements and portability of interests are some of the major changes resulting in the improved ownership of superannuation by women.

However, despite the substantial changes in the public sphere women have not yet reached parity with men in relation to the accumulation of superannuation for a number of reasons. Superannuation remains occupationally linked. Optimum superannuation for a comfortable retirement continues to be modelled on the male paradigm of a long uninterrupted history of well remunerated employment. It is recognised that undertaking parenting and domestic responsibilities, whilst a valuable contribution per se, has a significant impact upon earning capacity and therefore upon the acquisition of adequate superannuation. Women predominate in the areas of casual, part time and contract employment that traditionally attract lower pay.⁷ Indeed there is a risk that this type of employment can result in no superannuation coverage at all if the employee has multiple low paid jobs.⁸

Empirical research confirms that there has been an improvement in the public sphere and posits further improvement over time as the superannuation guarantee scheme matures.⁹ Nevertheless, the data confirms that the gender pay gap continues and the gender superannuation gap remains. Average account balances for both men and women continue to increase as do average superannuation balances as at retirement. However the gap between men and women persists.¹⁰ Women continue to be disadvantaged by comparison with men in the public sphere.¹¹

With the passage of time the effects of the historical exclusion of women from employment and superannuation membership are expected to decrease.¹² Even so, this does not detract from the fact that undertaking unpaid parenting and domestic responsibilities has a major impact upon the accumulation of superannuation. The division of labour within a marriage can still result in little or no superannuation at all being accumulated by the homemaker. Evatt contended that:

⁶ Above 27–32.

⁷ Ibid 28.

⁸ Ibid.

⁹ See above 4–5; 32–4.

¹⁰ See generally Ross Clare, 'An Update on the Level and Distribution of Retirement Savings' (Research Paper, ASFA Research and Resource Centre, March 2014).

¹¹ See above 4–5; 32–4. See also Diana Olsberg, 'Women and Superannuation: Still MS...ing Out' (2004) 53 *Journal of Australian Political Economy* 161, 170.

¹² Ibid.

Despite its significance, unpaid work in the household sector is not counted as part of the national economy. If you work for wages in the food industry, peeling onions or making soup, this contributes to the national economy. But if you do the same things at home it does not. In the example well known to economists, the man who marries his housekeeper reduces the value of the national income, while he increases his welfare and his income by saving the wages she would otherwise be paid. He may even qualify for a tax rebate. She, on the other hand has become a dependant, no longer paid for the work she does.¹³

It is acknowledged that a reduction in the gender superannuation gap in the public sphere may reduce the significance of the treatment of superannuation in the private sphere — a fact recognised in other common law jurisdictions around the world examining their own pension splitting regimes and now seeking to improve on modest achievements.¹⁴ In 1993 Millbank said that ‘if women received equal benefits to men in the “public” realm, the need to divide superannuation upon marriage breakdown in the “private” realm would not exist.’¹⁵ However, average superannuation balances and average retirement payouts continue to be less for women than for men and therefore even formal equality has not yet been achieved. Substantive equality, that reflects the additional needs of women in retirement, is not yet a prominent policy goal in the public sphere and may be an unrealistic expectation in the future. And a homemaker may still accumulate no superannuation at all. Upon retirement, this economic loss resulting from the opportunity costs of family life would be politically and practically difficult for government to compensate for retrospectively.

Thus in the absence of further significant change in the public sphere the impact of the implementation of the reforms will continue to be a matter of importance. As Evatt said ‘[t]he law of matrimonial property is not an adequate substitute for policies which give each person a real opportunity to achieve economic independence.’¹⁶ It is, however, possible for disadvantage in the public sphere to be ameliorated after separation rather than increased. This requires that the significant contribution of the parent and homemaker be properly valued in this context and that the resulting depreciation of earning capacity and diminished ability to accumulate superannuation be appropriately evaluated.

II FUTURE PUBLIC SPHERE CHANGE?

The likelihood of imminent significant change in the public sphere to reduce or remove the gender superannuation gap may therefore be relevant to the significance of the reforms. Historically the disparity between men and women in relation to the accumulation of superannuation for retirement had not received much consideration in the past partly because of the presumption that women would benefit in due course from their partner’s interest.¹⁷ This assumption cannot apply in respect of separated, divorced, widowed or otherwise single women. It has been suggested that for single women the most dependable safeguard for

¹³ Elizabeth Evatt, ‘Valuing Women’s Work — The Role of Family Law’ (Paper presented at the Anne Conlon Lecture, Sydney, 19 July 1991), 2 (citations omitted).

¹⁴ See generally Hilary Woodward and Mark Sefton, ‘Pensions on Divorce: An Empirical Study’ (Project Report, Cardiff Law School, 2014).

¹⁵ Jenni Millbank, ‘Hey Girls, Have We Got a Super Deal for You’ (1993) 7 *Australian Journal of Family Law* 104, 105. See also Belinda Fehlberg and Juliet Behrens, *Australia Family Law: The Contemporary Context* (Oxford University Press, 2008) 523 (quoting John Dewar, ‘Property and Superannuation Reform in Australia,’ in Mavis Maclean (ed), *Making Law for Families*, (Hart Publishing, 2000) 56).

¹⁶ Evatt, above n 13, 4.

¹⁷ Cerise et al, ‘Accumulating Poverty? Women’s Experiences of Inequality over the Lifecycle’ (Issues Paper, Australian Human Rights Commission, 2009), 4.

financial security is partnering or repartnering.¹⁸ Such a solution is not necessarily available to or desired by women for a variety of reasons, nor amenable to regulatory or social policy direction. There are a number of other suggestions proposed for future improvements by different commentators of a less extreme nature, including proposals which are designed to remove or reduce the economic dependency status of women rather than continue it. Many options for change in the public sphere have been proposed and include:

- the buy back of entitlements by those who lost superannuation entitlements because of past discriminatory employment practices;¹⁹
- the removal of remaining SDA exemptions;²⁰
- protection for low income earners and unpaid workers for instance by providing superannuation at a flat rate rather than a percentage of earnings or introducing a system of government superannuation contributions for those engaged in unpaid work;²¹
- return to owners of unclaimed interests;
- greater contributions to superannuation on behalf of low income earners by government or employers;
- financial incentives and other support for return to work including greater sharing of unpaid family responsibilities;²²
- quality affordable child care and flexible working conditions;²³
- paid parental leave;²⁴
- continuing entitlement to superannuation guarantee contributions by employers while on maternity leave;²⁵
- superannuation guarantee contributions for carers or credit bonuses for the age pension;²⁶

¹⁸ Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (Prentice-Hall, 1986), 127–30, 149 ('*Settling Up*'); David De Vaus et al, 'The Consequences of Divorce for Financial Living Standards in Later Life' (Research Paper No 38, Australian Institute of Family Studies, February 2007) 32; Linda Rosenman and Wayne Scott 'Financing Old Age: Why is There Still Gender Inequality?' (2009) 62 *Australian Social Work* 287, 292.

¹⁹ Senate Select Committee on Superannuation, Parliament of Australia, *Super and Broken Work Patterns* (1995), 125–32 ('*Super and Broken Work Patterns Report*').

²⁰ See eg Rhonda Sharp and Ray Broomhill, *Short-Changed: Women and Economic Policies* (Allen & Unwin, 1988) 156; *Super and Broken Work Patterns Report*, above n 19, viii, Recommendation 7.2.

²¹ See generally Jenni Millbank, above n 15, 119; Therese MacDermott, 'Linking Gender and Superannuation' (1997) 2 *International Journal of Discrimination and the Law* 271, 290; Cerise et al, above n 17, 25–6.

²² See generally Pru Goward, 'Men, Women, Work and Family — Towards Gender Equality' (Speech delivered at the 48th Session of the Commission on the Status of Women, New York, 8 March 2004); Human Rights and Equal Opportunity Commission, 'Striking the Balance: Women, Men, Work and Family' (Discussion Paper, HREOC, 2005) 5, 25–37, 53; Chief Justice Diana Bryant, 'Finding the Balance: Women's Access to Superannuation after Marriage Breakdown' (Paper presented at the Australian Women's Lawyers Conference, Sydney, 29 September 2006) 52–5; Ibolya Losoncz and Natalie Bortolotto, 'Work–life Balance: The Experiences of Australian Working Mothers' (2009) 15 *Journal of Family Studies* 112, 123.

²³ See generally Olsberg, above n 11, 173–4; HREOC 'Striking the Balance ...', above n 22, 129–30; Australian Bureau of Statistics, *4102.0 — Australian Social Trends, 2007*, 128–9; Cerise et al, above n 17, 25.

²⁴ *Fair Work Act 2009* (Cth), ss 70, 80; Commonwealth, *Australia's Paid Parental Leave Scheme* (2009) <http://www.fahcsia.gov.au/about/publications/articles/corp/BudgetPAES/budget09_10/parentalleave/Pages/AustraliasPaidParentalLeaveScheme.asp>.

²⁵ Olsberg, above n 11, 174.

²⁶ *Ibid.*

- removal of discriminatory gender segregation in employment resulting in women predominating in lower status, lower paid work and earning less than men as well as access to well paid work;²⁷
- integral involvement of women in the superannuation industry;²⁸
- greater education of women about superannuation;²⁹ and
- inclusion of divorced spouses as dependents by superannuation funds.³⁰

Some of these proposals have been implemented to some extent. However, although there have been considerable developments to date which have resulted in superannuation becoming more widespread and valuable, the distribution of superannuation remains uneven in the public sphere. Significant changes that span the areas presented above that collectively might appreciably reduce or remove the continuing gender superannuation gap over time are not imminent. The importance of the treatment of superannuation in family law remains undiminished.³¹

III PRÉCIS — DISADVANTAGE TO WOMEN IN THE PRIVATE SPHERE PRE-REFORM

Prior to the amendments the courts had limited options for dealing with superannuation due to the lack of legislative power to treat superannuation as property, to value it in a consistent way or to make orders about superannuation that were binding upon trustees. The attempts of the courts to make fair orders about superannuation were subject to criticisms that escalated as the value of superannuation increased and eventually led to change. It is well documented that women were disadvantaged in the share of the household wealth they received on relationship breakdown as a result of the inability of the courts to properly deal with superannuation in family law³² despite considerable efforts.³³

As a general rule superannuation could not be treated as s 4(1) property. The inability to treat superannuation, not presently available as a lump sum, as property for the purpose of s 79 proceedings resulted in two broad approaches to its assessment in property proceedings.

One approach was to deal with it in the future when it did become available either by deferring the proceedings about superannuation until that time or by making an order, directed at the member, to take effect at that time.³⁴ A major problem with this type of approach was the risk of other events intervening that might put the superannuation out of the reach of the

²⁷ See generally; Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (1994) [2.12]–[2.20]; *Equal Opportunity for Women in the Workplace Act 1999* (Cth) s 2A; Cerise et al, above n 17, 8–18, 25.

²⁸ See generally *Super and Broken Work Patterns Report*, above n 21, 99–114; Olsberg, above n 17, 175–6; Ross Clare, ‘Why Can’t a Woman be More Like a Man — Gender Differences in Retirement Savings’ (Paper presented at the ASFA 2004 National Conference and Super Expo, Adelaide Convention Centre, 10–12 November 2004) 13–15.

²⁹ See generally *Super and Broken Work Patterns Report*, above n 19, 87–98; Olsberg, above n 17, 169–70, 174–75; Clare, ‘Why Can’t a Woman be More Like a Man ...’, above n 28, 14–15.

³⁰ See generally Law Reform Commission, *Matrimonial Property*, Report No 39 (1987) 209–10 (‘1987 Hamblly Report’); Richard Ingleby, ‘Superannuation and Divorce’ (1990) 64 *Australian Law Journal* 244, 262, 264.

³¹ Millbank, above n 15, 105.

³² Above 53–60.

³³ Above 45–52.

³⁴ Above 51–2.

non-member spouse altogether. Also there was no clean break and the cooperation of the member spouse was required. In the absence of cooperation and compliance women faced difficult choices about whether to undertake expensive risky litigation or whether to forego any entitlement altogether.

The other general approach was to factor superannuation into the orders made about the non-superannuation property in reliance upon the ‘take into account’, the ‘realisable value’, the ‘chose in action’, the ‘needs’ or the ‘mathematical’ approaches.³⁵ All of these approaches were subject to considerable limitations that gave rise to significant criticisms. A major criticism related to uncertainty about the value accorded to the superannuation if it was taken into account. But of greater concern was the fact that non-member spouses commonly reported that superannuation had not been taken into account at all. If superannuation was taken into account it was usually by making a greater adjustment out of the s 4(1) property in favour of the non-member spouse, unhelpful if superannuation was the major or only asset. A corollary of this general approach was that the non-member spouse could be left with little or no superannuation and the member spouse a reduced share of the other assets. As a consequence, especially if the superannuation entitlement was sizeable, the non-member spouse might have the option of retaining the family home although the decision of *Crapp* provided a notable exception.³⁶

The treatment of an uncommutable pension in the payment phase, as demonstrated in *Perrett*, also posed particular difficulties prior to the amendments.³⁷

In summary, the REM recognised the lack of clarity, certainty or consistency that had developed in relation to the treatment of superannuation in family law and that the disadvantage of the pre-reform law impacted mainly upon women.³⁸

There was inconsistency in the way superannuation was treated compared to other assets and in the way different types of superannuation were treated. As a result there was a lack of consistency about how superannuation should be taken into account compared to other family assets.

There was uncertainty in the pre-reform treatment of superannuation because of the lack of legislative guidance about the treatment of superannuation in the exercise of the discretion to alter property interest. There was also uncertainty about the application of the different approaches developed by the courts to the evaluation of superannuation. Furthermore there was uncertainty about the value of superannuation with separating couples having limited knowledge of their entitlements and the value of them.

The lack of consistency and certainty was acknowledged as resulting in a general lack of clarity about the treatment of superannuation in family law. Consequentially in relation to the direct regulatory function there was no clarity for lawyers, clients and courts and this is also detrimental to the intermediate function of indirectly influencing negotiations.

The result of the pre-reform law was that the inability to treat the full value of this increasingly valuable form of family wealth as property and divide it where appropriate could and did produce unfair outcomes.

³⁵ Above 45–52.

³⁶ Above 47–49.

³⁷ Above 46.

³⁸ Above 20–2.

The case law had been unable to rectify the lack of a proper legislative framework for dealing with superannuation. The REM acknowledged the growth of the industry, the limitations under which the courts operated and the considerable disadvantage to women of the existing approach to superannuation.³⁹ It took an extraordinary length of time and considerable analysis, consultation, review, reports and recommendations to produce the final form of the amendments.⁴⁰ The different proposals reflected the prominence of public sphere and private sphere concerns at different times.

IV THE NEW SUPERANNUATION REGIME — SUCCESSES & SHORTCOMINGS

The above outline of the superannuation regime establishes that it is both extensive and comprehensive.⁴¹ The reforms follow comparable recognition of the importance of retirement benefits in family law in many overseas jurisdictions.⁴² Although the constitutionality of the new regime was a matter of controversy at the time of its passage, so far no challenge has eventuated and it is now unlikely. In fact legislative changes and case law about third party matters generally have extended the scope of family law in a way that supports the constitutionality of the new regime.

A *Successes*

The benefits of the regime are considerable and have since become more far reaching after the de facto property amendments extended the changes to de facto couples including same sex couples.

Superannuation can now be dealt with after separation. In property proceedings superannuation must be assessed in almost all circumstances. The effect of this is to introduce greater consistency and clarity about the relevance of superannuation post separation and greater fairness for women who previously may have overlooked it entirely and left it in the hands of their husbands. Full disclosure of superannuation is required and trustees are mandated to provide prescribed information about superannuation in most circumstances introducing fairness and certainty. Consistent valuations are prescribed for the majority of entitlements. For accumulation interests, which constitute the majority of superannuation interests,⁴³ valuation is generally simple, inexpensive and uncontroversial and for these types of interests the amendments introduce certainty and consistency about valuation. The powers of the courts have been increased to enable superannuation to be evaluated and dealt with while the flexibility of offsetting has been retained. Splitting orders and agreements will bind trustees and a clean break is possible in relation to the majority of interests. Again these changes provide consistency and certainty that binding orders or agreements splitting superannuation payments can now be made about most types of superannuation. Furthermore interest splitting is available for accumulation interests as well as for defined benefit interests,

³⁹ Ibid.

⁴⁰ Above 52–60.

⁴¹ Above 73–111.

⁴² See, eg, Commonwealth, ‘Superannuation and Family Law’ (Position Paper, Attorney-General’s Department, 1998) 13–16; Thomas Henn and Jocelyne Boujos, ‘The Penthouse, the Porsche or the Pension: Superannuation and Divorce’ (2003) 13 *Revenue Law Journal* 28, 66–76.

⁴³ Stephen Bourke, *Super Splitting for Family Lawyers* (Certus Law, 2010) 18–19 (citing APRA *Annual Superannuation Bulletin*, 10 February 2010).

where this option has been implemented, thus securing the interest of the non-member spouse. This is in contrast to the pre-reform law that provided little if any security for the interest of the non-member spouse where an order was made about superannuation. It provides the non-member spouse with greater certainty and fairness compared to the pre-reform law.

The case law has clarified that although it is mandatory to consider superannuation, it is not mandatory to make orders about superannuation. The discretion of the courts has been preserved to decide what is fair in all the circumstances and retirement incomes policy does not prevail although it is a factor. Any prescribed valuation methodology must be utilised where a splitting order is to be made although it is not obligatory otherwise. The retention of the discretionary approach provides the courts with the flexibility to take into account all of the circumstances including the nature of particular interests, the availability of interest splitting, relevant taxation issues and the impact of splitting orders upon both the member spouse and the non-member spouse. Furthermore, the parties are able to negotiate a mutually acceptable outcome in the shadow of the amendments and formalise it by way of a complying agreement that will bind the trustee.

The benefits of the amendments are therefore considerable when considered against the background of the pre-reform law. For wealthy couples close to retirement the reforms enable a balance of superannuation and other assets to be retained by each party. Also the reforms are particularly beneficial where superannuation is the main or only asset and facilitate fairness where previously the sharing of superannuation was generally not possible.

However for less wealthy couples with modest or little superannuation it is not suggested that the reforms will enable either party to have a comfortable retirement. Nevertheless even modest transfers of superannuation, made possible by the reforms, have the potential to diminish the disadvantage of the pre-reform law and contribute to an alleviation of post separation poverty. The extent to which it can and will do so remains unknown.

B Shortcomings

However, the reforms, as implemented by the courts, have given rise to shortcomings as well as successes. The process of dealing with superannuation is necessarily complex and technical. Prior to the amendments courts and lawyers were shielded from the complicated nature of many types of superannuation but this is no longer the case.⁴⁴ It is expensive to obtain valuations in relation to the complex types of superannuation and any other expert advice necessary to assess the impact of payment splitting.⁴⁵ The regime is neither inexpensive nor simple to administer. Before considering and reviewing the shortcomings it is of interest to consider how the decision of *Crapp & Crapp*⁴⁶ might be decided at the present time.

1 Crapp Reconsidered

To restate, the husband and wife were married for a period in excess of 16 years and had two children aged 17 and 15 years who lived with the wife in the matrimonial home which had a net equity of about \$76 000. The husband was a pilot aged 44 years and earned about \$550 per week net and the wife was aged 49 years and earned \$125 per week as a clerk. The superannuation of the husband was worth about \$76 500 net but in approximately 9 years was

⁴⁴ Stephen Bourke and Peter Murphy, 'The Place of Part VIII B in the s 79 Process after *Coghlan*' (2006) 12 *Current Family Law* 62, 63, 71–6.

⁴⁵ See above 94–5, 108–9 for a discussion about costs.

⁴⁶ (1979) FLC ¶90-615 ('*Crapp*'). Above 47–8.

expected to be worth about \$300 000. Apart from that the husband had work related entitlements of about \$27 800. He paid child maintenance of \$80 per week and was also responsible for a marital debt of about \$6000.

Firstly, the Full Court in *Crapp* decided that the superannuation was not in the nature of s 4(1) property. After the amendments pt VIII B requires superannuation to be treated as property where a splitting order is sought or to be made. However, where no splitting order is sought or to be made, the Full Court in *Coghlan* concluded that the legislation was unclear. Nevertheless, the *Coghlan* reasoning enables superannuation to be considered as another species of asset and treated as property even if it is not, whether or not a splitting order is sought or made. Thus currently whether superannuation is property or not the four step approach applies.

Secondly, the Full Court in *Crapp* decided that the husband's superannuation should instead be taken into account as a resource at step three. Currently, superannuation would rarely be considered only as a resource. The *Coghlan* preferred approach requires that Mr Crapp's superannuation be considered in a separate list and the four steps applied. If the entitlement is an accumulation interest then the member information statement will generally suffice as a valuation of the entitlement. If it is a defined benefit interest, which is possible in the light of the husband's profession, then the prescribed methodology must be used to value the entitlement if a splitting order is sought or made. It is also prudent to value it even where no splitting order is sought or made although it is not mandatory. Any future taxation payable would probably not be taken into account as the husband was not due to retire. Also if a splitting order is made the liability would be shared.

Currently at step two the contributions of the parties both to the superannuation and to the s 4(1) property must be determined. The adjustment in favour of Mrs Crapp in respect of the superannuation in the separate list is likely to be less than the adjustment of the s 4(1) property and is also unlikely to exceed 50 per cent. If the husband had contributed to the entitlement before and after cohabitation this is likely to result in an adjustment in his favour. Although the mathematical approaches have largely been eschewed, such contributions, especially post separation contributions, have an elevated status. A contributions assessment for the period prior to cohabitation, during cohabitation and after separation may be undertaken. A post separation contribution by the member spouse is unlikely to be matched by any post separation contributions as a homemaker parent. Thus at step two Mrs Crapp is likely to receive an adjustment which is less than 50 per cent in respect of the superannuation. It is also likely to be less than the adjustment in respect of the s 4(1) property, but it would nevertheless be a significant advance on the pre-reform position.

Presently any step three adjustment is likely to be made in respect of the s 4(1) list only and is likely to favour Mrs Crapp. It is likely to be a modest adjustment, unlikely to exceed the range of 10–20 per cent. Such an adjustment would translate into a smaller amount if calculated in relation to both superannuation and s 4(1) property.

At step four the Full Court in *Crapp* ordered that the matrimonial home be sold and the wife receive 74 per cent or \$56 000 from the proceeds whichever was the greater. This left the husband with the balance of the proceeds expected to be about \$20 000, his superannuation then valued at \$76 500 but potentially much greater and his work related entitlements of about \$27 800. He remained responsible for the \$6000 debt. He also had a significantly greater earning capacity and a longer future working life. Currently the options at step four have increased. One option is that the superannuation entitlement be flagged and a splitting order

made when the true value of it is known. The disadvantage of this approach is that there is no clean break. Furthermore, there is a risk of circumstances intervening that are detrimental to the wife.

A second option is that a splitting order be made either of the base amount type or the percentage type. This order need not reflect the notional adjustment of the superannuation concluded after steps two and three but may be less, the balance being offset by a greater share of the s 4(1) assets. The order may be for a relatively small amount which enables the wife to retain the matrimonial home. However, if the splitting order is for a more significant amount, then it is more likely that the husband will retain the home or that it is sold. The scope for offsetting is thereby reduced. If Mrs Crapp retains a more significant amount of superannuation then the outcome might be that she is left with even less of the s 4(1) property than before the amendments and that her chances of retaining or purchasing a home are reduced as a result with all the disadvantages that this entails.⁴⁷ After the amendments Mrs Crapp should receive a greater capital sum overall. However, the actual mix of assets she will receive is less clear.

The court will now consider the impact of making a splitting order. If the entitlement is an accumulation interest then a clean break can be achieved pursuant to the *SI(S)R*. The wife can therefore access her entitlement when she meets a condition of release. If it is a defined benefit interest then there may be no clean break possible unless the governing rules or legislation have been amended to enable the interest to be split. If not then the wife will have to wait for the husband to satisfy a condition of release despite the fact that the wife will reach retirement first due to her age. She must also hope that the member spouse does not have a child in respect of whom a binding death benefit nomination has been made which may defeat her entitlement. This illustrates how difficult step four can now be.

Since Mr and Mrs Crapp litigated as far as the Full Court previously, then it is possible that arguments about valuation issues, contribution issues, step three issues and step four issues would proceed at great cost. However, Mrs Crapp should receive additional benefits overall as a result of the amendments because the superannuation of Mr Crapp constituted a significant proportion of the overall assets. Nevertheless, if a splitting order is made in her favour her immediate financial position might not change. Indeed Mr Crapp might retain the home if a splitting order of any significance is made in favour of Mrs Crapp as he might receive an even greater share of the s 4(1) property. If this should occur Mrs Crapp would be in the position of losing the family home, retaining more superannuation and being left with a lesser earning capacity and ability to accrue superannuation in the future.

However, it is also possible that Mrs Crapp retains the home and some superannuation and Mr Crapp receives some s 4(1) property and the majority of the superannuation. Due to the uncertainty of the implementation of the amendments in various respects, the impact of the composition of assets she receives and the additional costs could negate the extent of the benefits to some extent. Mrs Crapp might still be left with ‘a real sense of grievance’⁴⁸ if she receives a splitting order instead of more of the s 4(1) property.

The implementation of the amendments has produced complex case law and there are major ongoing areas of difficulty. These areas are presented below. After the shortcomings are

⁴⁷ Grania Sheehan, April Chrzanowski and John Dewar, “Superannuation and Divorce in Australia: An Evaluation of Post Reform Practice and Settlement Outcomes” (200) 22 *International Journal of Law Policy and the Family* 206, 228 (‘2008 Evaluation’) citing Millbank, above n 15, 117.

⁴⁸ *Crapp* (1979) ¶90-615, 79, 185.

reviewed and the policy objectives post reform have been considered this chapter will consider future options.

2 *Transitional Provisions — Limitations*

Because the amendments are not retrospective, where orders had been made pursuant to s 79 prior to the startup time then pt VIII B could not be accessed unless the order was an interim order or was revoked.⁴⁹ The earlier analysis of the cases about the transitional provisions discloses considerable complexity and little evidence of judicial activism to ameliorate the impact of this lack of retrospectivity.⁵⁰ The expectation was that the interpretation of the transitional provisions would be facilitative in order to maximise the reach of the reforms. However the case analysis shows that there has been no facilitative approach to these provisions thus continuing the pre-reform disadvantage to this group of women. This is compounded by the availability of the reforms to subsequent spouses including defacto spouses as previously foreshadowed. Fragmentation and complexity post reform commence with the restricted and inadequate transitional provisions which are difficult to manage by means of judicial activism. The inability to access a pt VIII B order will affect a diminishing, but nevertheless significant, group of women. For them the pre-reform disadvantage continues. The case analysis demonstrates uncertainty about the possible outcome of undertaking proceedings and a lack of clarity and fairness about the transitional provisions as interpreted by the courts.

3 *Legislative Ambiguity — Superannuation Treated as Property*

The treatment of superannuation as property was expected to be the key to greater certainty of outcome, consistency in the treatment of different types of superannuation, fairness in providing women as non-member spouses/partners with greater access to superannuation and clarity of legal principles applied in the treatment of superannuation in property settlement proceedings. The definition of ‘property’ was not changed by the amendments and so the issue of whether superannuation is in fact property remains extant. Also, the ambiguous drafting of the amendments left the application of pt VIII B uncertain where no splitting order is sought or made.

As well a lack of clear statement of principle in the drafting of the legislation has led to disagreement at appellate level causing complexity, uncertainty and added costs in property proceedings. This is disadvantageous to both men and women. The endorsement of an approach of assessing superannuation separately from other assets, which has been the subject of persuasive appellate disagreement, has had a significant impact upon achieving fairness for women in this context.

The decision in *Coghlan* remains the seminal decision about these issues and the effect of pt VIII B upon the discretion to alter interests in property. The decision has had a considerable impact upon the development of the case law about the four step approach. The effect of *Coghlan* is that superannuation is ‘another species of asset which is different from property’ and the four step approach applies regardless of whether superannuation is included in the s 4(1) list or a separate superannuation list or lists and whether or not a splitting order is sought or made. The ‘preferred approach’ is to consider superannuation in a separate list. *Coghlan* purportedly dispensed with the need to decide if superannuation is property and provided a solution to the potential anomaly of the continued application of the previous law where no

⁴⁹ Above 65–70.

⁵⁰ But see *Hodgkin* [2005] FamCA 226; *Greetham* [2010] FamCA 246.

splitting order is sought or made. However, the solution is complex and has caused dissension amongst commentators.⁵¹

The case analysis establishes that the differential status of superannuation has largely been maintained post *Coghlan*. That the expectations of consistent treatment of superannuation as property compared to other assets and consistent treatment of different types of superannuation as property post reform have not been met has been confirmed by the case analysis.⁵² The opportunity to establish greater certainty for separating couples about the treatment of superannuation as property in proceedings has been missed. Although superannuation will now generally be evaluated in property proceedings, the *Coghlan* interpretation of ambiguous legislation has resulted in superannuation being treated differently to s 4(1) property and generally considered in a separate list. In retrospect this is not a purposeful view of the amendments when arguably judicial activism could have rectified the ambiguity. Thus from the start, separating couples are faced with uncertainty and inconsistency in relation to the issue of the treatment of superannuation as property.

The analysis of the cases establishes that this has had an effect upon the subsequent links in the chain of legal reasoning. The *Hickey* approach of considering superannuation in the same way as other property and evaluating any difficulties within the parameters of the four step approach, as is the case with other complicated categories of property, is arguably a preferable remedial approach that is also supported by the legislation. The *Hickey* approach enables complex superannuation to be evaluated in the same way as any other complex property. Similarly the *2008 Evaluation* proceeded on the basis that all forms of superannuation, including valuable interests such as defined benefit interests, would be treated as property. Instead it is arguable after *Coghlan* that superannuation is treated as a less important asset compared to presently available assets, even where it is in the payment phase.

The *Coghlan* approaches have increased the uncertainty, complexity and expense of proceedings about superannuation which may be disproportionate for less wealthy couples. The impact of any deterrent effect may result in unfair outcomes. The expectation that superannuation would be consistently treated as property at step one together with other forms of family wealth has not been met. It had been hypothesised that the consistent treatment of superannuation as property would introduce consistency in the treatment of superannuation compared to other assets as well as consistency in the treatment of different types of superannuation. It was expected that this would result in greater certainty for parties about the outcome of proceedings. However the *Coghlan* approaches have had an impact upon the subsequent links in the chain of legal reasoning and have reduced the capacity for certainty.

4 *Step One — Valuation Issues*

It was predicted that there might be a negative reaction to the valuation regime, in particular in relation to the complex superannuation interests, and that a fragmented approach to valuing superannuation might develop because of the magnitude and impact of this change. It is therefore not surprising that a major issue of contention that has arisen at step one is that the prescribed methods of valuing the complex interests have been perceived to be unfair in certain circumstances.

⁵¹ Above 135–151.

⁵² See, eg, above 146–49 for a detailed discussion of the examples of *Cahill* (2006) FLC ¶93-252; *Clives* (2008) FLC ¶93-385.

For example the valuation of uncommutable pensions in the payment phase results in a lump sum value being prescribed which is not attainable.⁵³ Also the prescribed valuations of defined benefit interests in the growth phase ascribe a value to the unvested portion of these interests. Various efforts have been made to assuage the effects of the prescribed values, including treating pensions as a resource as before, discounting valuations, and considering valuations at different times such as the time of separation.⁵⁴ It is arguable that these approaches treat the prescription of a certain value to superannuation the value of which is largely unknown at the time of valuation as a legal fiction. Indeed there continues to be uncertainty about whether or not the courts may have a discretion in relation to the prescribed valuations. Also if separating couples enter into a splitting agreement or decide against a splitting order then, although imprudent, there may be no obligation to undertake a prescribed valuation. Thus certainty and consistency in relation to the valuation of superannuation post reform has not been attained.

Attempts to diminish the impact of the amendments impede the achievement of fairness. The detailed assessment of the decision in *Edwards*⁵⁵ provides an example showing that the introduction of the regime of prescribed valuation of superannuation has not delivered on the expectation that the full value of superannuation would be taken into account when dividing family assets. It demonstrates the unfairness that can result.

Thus, notwithstanding the prescribed regime of valuation, there is no certainty or clarity about taking into account the full value of superannuation when subsequently assessing steps two, three and four. The expectation that superannuation would no longer be undervalued and that the full value would be assessed in subsequent steps, thereby promoting certainty, consistency and fairness in the treatment of superannuation in family law proceedings, has not been met.

5 Step Two — Contributions to Superannuation Elevated?

It was expected that the non-financial contributions of women to superannuation would no longer be undervalued after the reforms and that the financial contributions of men to superannuation would no longer be overvalued which was the result of the pre-reform law. This was expected to result in fairer distributions to women. However the previous difficulty of assessing contributions of a fundamentally different nature is arguably compounded by the *Coghlan* preferred approach. The analysis of the cases establishes that the implementation of the *Coghlan* preferred approach results in contributions to superannuation being considered ‘special’ or at least more valuable than homemaker contributions, a significant deficiency.⁵⁶

The intersection of the global and asset by asset approaches to contributions and the *Coghlan* preferred approach of considering superannuation in a separate list has given rise to confusion. In effect, the asset by asset approach to assessing contributions to superannuation is favoured. This is contrary to the position in relation to s 4(1) property where generally the global approach prevails unless special contributions to particular assets or groups of assets require evaluation. It results in greater value being accorded to the direct financial contributions to superannuation made by the member spouse than to the indirect non-financial contributions of the non-member spouse. No obvious justification of an authoritative nature has been provided for why contributions to superannuation are accorded greater worth in this way.

⁵³ Above 160–3.

⁵⁴ Above 158–63.

⁵⁵ (2009) FLC ¶93-409. See above 162–3.

⁵⁶ See, eg, *Trott* (2006) FLC ¶93-263. Above 184–6.

In addition pre and, to a greater extent, post relationship contributions to superannuation appear to be given a comparatively elevated status. While the *West & Green* or formulaic approaches to assessing contributions are no longer endorsed, there are nevertheless indications that there may be a role, although a diminished one, for this type of approach as a relevant factor. However, an approach of compartmentalising contributions for different periods is developing which may replace the mathematical approaches for the purpose of addressing pre and post relationship contributions to superannuation.

After *Coghlan* the case analysis shows that the approach of including all of the superannuation in the same list as the s 4(1) property and then assessing contributions in relation to the single list has largely ceased. After *Coghlan* the analysis of the cases as presented in the appendices show that generally different adjustments have resulted from the separate assessment of step two in relation to s 4(1) property and superannuation. The adjustments to the wife on account of contributions to superannuation were generally lower with few exceptions.⁵⁷ There are many factors considered in the exercise of a discretion. There may be circumstances where couples have married or cohabited later in life and where the member spouse has accumulated a significant entitlement pre-cohabitation by way of explanation. However it is also arguable that this apparent trend in the case analysis cannot be explained away solely on the basis of individual circumstances given the consistent differential adjustments of s 4(1) property that cannot be explained by such reasoning.⁵⁸ This issue has not been the subject of authoritative consideration. If the trend continues it will reduce the impact of the amendments when compared with the expectations of what the reforms would deliver for women. While the rhetoric endorses the value of the contributions of the homemaker parent the results do not lend support to this view where superannuation is evaluated in a separate list. Instead there appears to be a bias in favour of the pecuniary contributions of the member spouse.

The expectation that contributions to superannuation would be assessed together with and consistently with contributions to non-superannuation assets, also assumed in the *2008 Evaluation*,⁵⁹ has not been met. On the contrary there is evidence of inconsistency in the separate assessment of step two both in relation to superannuation and non superannuation assets and also in relation to different types of superannuation.⁶⁰ Direct financial contributions to superannuation appear to be treated as more valuable than indirect non-financial contributions to superannuation. It may be that direct financial contributions to defined benefit interests are treated as the most valuable of all and this is an issue that warrants further investigation as the ability to value these types of interests was a significant aspect and purported achievement of the reforms when introduced.

6 *Step Three — A Changed Role*

After the reforms it was expected that step three would no longer have a role to play as the primary means by which superannuation is taken into account in property settlement proceedings. Nevertheless it was hypothesised that, post reform, step three would be evaluated in relation to all forms of family wealth, including superannuation, after step two. Greater fairness was anticipated to result from this approach. However the preceding analysis of the cases demonstrates a variety of approaches to the evaluation of step three that are

⁵⁷ Appendices Four, Five. See, eg, *Trott*, above 184–6.

⁵⁸ Appendix Four (2).

⁵⁹ Above n 47, 211–12; above 193–5.

⁶⁰ See, eg, *Trott*, above p184–6 where the husband’s additional contributions to superannuation were treated as more valuable than his additional contributions to other assets.

inconsistent, and fail to deliver certainty of outcome for the parties in dispute. There has been no authoritative endorsement of a preferred approach to step three and the decisions confirm the need for a thorough analysis of this issue to reduce this uncertainty, inconsistency and complexity. It is difficult to extrapolate guidance from the decisions. The intersection of the *Coghlan* preferred approach of the separate treatment of superannuation and step three remains unclear.⁶¹

The approach that appears to be evolving as the preferred approach is to assess step three only in relation to the s 4(1) property. In some decisions this approach was taken even where no splitting order was made. The approach lends support to the view that superannuation is treated as a different species of asset. However the *Coglan* preferred approach could have resulted in a greater focus upon the depreciation of earning capacity and ability to accrue superannuation sustained by the women at step three. Nevertheless there continues to be no robust application of step three in compensating women for the economic impact of marriage after its breakdown in this context. Perhaps it was to be expected that enlarging the pool of assets would have the opposite effect. Nonetheless, the depreciation of earning capacity resulting from cohabitation which influences the capacity to accrue superannuation in future continues to be a relevant consideration which arguably has not translated into step three adjustments in a significant way. However, making an adjustment at step three only in relation to s 4(1) property for the significant future economic factors of the homemaker constitutes a failure to appreciate the impact of separation upon the depreciation of earning capacity that that role entails and the economic vulnerability of undertaking this role. Even if a splitting order is made this can remain a significant issue. Further Full Court guidance about a preferred approach to step three is required for greater coherence and clarity.

In relation to the issue of the quantum of adjustments at step three the sample of cases is small and the analytic approach qualitative. This limits the extent to which inferences can be drawn about the range of step three adjustments post reform. Also many factors will be relevant. The outcome of an approach of assessing step three only in relation to the s 4(1) list may benefit from further specific research, if it continues to develop into a preferred approach. Similar or reduced step three adjustments made only in relation to the s 4(1) list, which translate into a lower adjustment when considered overall, result in step three being evaluated in relation to superannuation inconsistently with s 4(1) property. This may impede the extent of the success of the reforms.⁶² The *2008 Evaluation* predicted that the implementation of step three would be a significant factor in determining the extent of any overall gains to women post reform.⁶³ The question of whether present or future potential gains made through step three adjustment can address the future economic circumstances of women is however beyond the scope of this doctrinal analysis and beyond the scope of what is currently known.

However, the lack of certainty about the appropriate approach to step three, the lack of clarity about the different approaches and the lack of consistency about the application of step three to superannuation compared to other forms of family wealth continues the layering of disadvantage evident from the study of the cases about the preceding steps. The expectation of the reforms that step three would be assessed in relation to all forms of family wealth including superannuation in a transparent way having regard to s 75(2) as required by s 79(4)(e) has not been met.

⁶¹ Above 213–15.

⁶² See above 209–11 for a discussion of the example of *Jarman & Jarman* (2006) FLC ¶93-289.

⁶³ Above n 47, 222.

7 *Step Four — Justice and Equity: Influence upon Layered Disadvantage*

It was foreseeable that step four would have an expanded more complex and flexible role post reform especially with the addition of the power to make splitting orders. It was expected that if superannuation, properly valued, was included in the list of property at step one; if step two was evaluated in the usual way in relation to this list; if adjustments for step three factors, including future earning capacity and ability to accumulate superannuation, were also made in relation to all assets, then the just and equitable outcome at step four ought to operate consistently with its pre-reform application. The enlargement of the asset pool coupled with consistent, certain adjustments at steps two and three and the addition of the power to make splitting orders were expected to operate in unison to address the pre-reform disadvantage and result in an increase in the amount of household wealth awarded women post reform. Such an application would arguably also be coherent and consistent, sending clear messages to those who settle outside the court.

These expectations have not been met. The complex result of *Coghlan* is that the four steps must be applied separately to each list of superannuation and other forms of family wealth. The analysis of the cases confirms a layering of disadvantage that flows from this fragmented approach which is not rectified at step four.⁶⁴ The cases have endorsed a diverse range of factors that emphasise the complex and highly discretionary nature of decisions about the making of splitting orders. Further although it appears to be accepted that substantive adjustments can be made at step four this has not developed into a common practice and in any event has not favoured women in the cases considered. Thus step four has not been used to redress the effects of steps two and three after *Coghlan*.

The result is what scholars such as Dewar have described as incoherence.⁶⁵ Perhaps messages emanating post reform are limited to the central message covered in the *2008 Evaluation* — namely that superannuation must be taken into account, but exactly how it should be taken into account remains unclear beyond the courts and legal practice.

(a) *The Prevalence of Splitting Orders*

It was anticipated that there might be difficulty predicting whether splitting or offsetting or a combination of both would be preferred in any particular case. The analysis of the cases as presented in the appendices suggests that there is no presumption that a splitting order should be made.⁶⁶ If a general rule had developed of splitting orders being made to effect an equal division of superannuation accumulated during the relationship, this would have broadly accorded with the scheme proposed by the *1998 Position Paper* albeit by a different path. Such an approach would have lent support to a formal equality approach. However, in reality this has not occurred and although splitting orders are commonly made they are not the general rule and may not produce an equal division. The discretion has been maintained. The quantum of splitting orders may differ from the notional adjustment of superannuation which adds flexibility to the decision about the mix of assets to be retained by the parties at step four. Although the courts consistency with the retirement incomes policy objective does not prevail, it is a factor for consideration.

⁶⁴ See, eg, *A & A* [2006] FMCAfam 80 discussed above 231–4.

⁶⁵ See generally John Dewar, 'Regulating Families' in Christine Parker et al, *Regulating Law* (Oxford University Press, 2004) 82; J M Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105.

⁶⁶ Appendix Eleven.

This is consistent with the key finding of the *2008 Evaluation* that although improved consideration of superannuation has resulted from the amendments⁶⁷ splitting orders or agreements were not routinely made.⁶⁸ Nevertheless, the *2008 Evaluation* concluded that there had been an increase in the splitting of superannuation compared to the position prior to the amendments when the options were limited.⁶⁹ Although not prevalent, it was found to be most common where retirement was imminent and there was a significant pool of assets and superannuation.⁷⁰ In these circumstances both the immediate need for housing and future retirement needs could be met. There is authority for this in the study of the cases.⁷¹ However, a critical finding of the *2008 Evaluation* is that where the parties are younger and less wealthy, the splitting of superannuation can be detrimental to women in terms of meeting immediate housing needs.⁷² This significant conclusion had earlier been predicted by commentators⁷³ and were splitting orders to become prevalent then, as discussed, there may be important policy reasons for concern. The prevalence of splitting orders and the retention of the matrimonial home may be connected.

(b) *The Significance of the Matrimonial Home*

Both the case analysis and the *2008 Evaluation* confirm that there is no general rule that the homemaker should retain the matrimonial home.⁷⁴ However, both the findings of the *2008 Evaluation* and the analysis of the cases suggest that the retention of the matrimonial home is linked to whether or not a splitting order is made although the causal direction is unclear. Women may be more likely to retain the home if no splitting order is made. By contrast men appear more likely to retain the home if a splitting order is made.⁷⁵ Splitting orders may thus increase the difficulty of the homemaker retaining the home. As discussed, in that eventuality, the ability of the homemaker to acquire a home thereafter may be reduced which may have policy implications.⁷⁶ The *2008 Evaluation* hypothesised that sharing superannuation and thereby reducing the ability of women to either keep the home, or acquire another one, was not necessarily a positive outcome from a policy perspective.⁷⁷ It should be noted that the *2008 Evaluation* concluded that the sharing of superannuation occurred mainly in cases of wealthy couples where perhaps this issue is less significant.⁷⁸

(c) *The Results Overall*

Lastly, there were concerns that the overall gains made by taking superannuation into account in property settlement proceedings might be counteracted by lower overall adjustments to women compared to the pre-reform law. The issue of whether women now receive a greater

⁶⁷ Above n 47, 217, 219–220, 226.

⁶⁸ Ibid 221 Figure 1, 227.

⁶⁹ Ibid

⁷⁰ Ibid 227–8.

⁷¹ See, eg, *Guthrie & Rushton* [2009] FamCA 1144.

⁷² *2008 Evaluation*, above n 47, 227–8. See, eg, *A & A* [2006] FMCAfam80 discussed above 231–4.

⁷³ See, eg, Millbank, above n 15, 115–117; Tom Altobelli, ‘Children’s Accommodation Needs & the Impact of the New Super Splitting Reforms’ (Paper presented at the Mid North Coast Regional Law Society Seminar, 13 September 2003) 12; Robert Benjamin, ‘Splitting Super: Wither the Family Home?’ [4 July 2003] *Lawyers Weekly* 11; Jacqueline Campbell, ‘Splitting the Super ... and Selling the Home’ (2003) 77(9) *Law Institute Journal* 56, 60.

⁷⁴ *2008 Evaluation*, above n 47, 227–8.

⁷⁵ Ibid.

⁷⁶ See, eg, Millbank, above n 15, 115–117; Altobelli, ‘Children’s Accommodation Needs ...’, above n 73, 12; Robert Benjamin, ‘Splitting Super: Wither the Family Home?’, above n 73; Jacqueline Campbell, ‘Splitting the Super ... and Selling the Home’, above n 73, 60.

⁷⁷ *2008 Evaluation*, above n 47, 227–8.

⁷⁸ Ibid 228.

share of the family wealth compared to pre-reform settlement outcomes is the proper province of empirical studies and secondary analysis of financial data. The findings from the analysis of the case law cannot be used to make general statements as to the overall outcomes of the reforms across what Dewar and Fehlberg and Behrens describe as a highly fragmented system.⁷⁹

Prior to the amendments various reports, empirical research projects and surveys had been undertaken with broadly consistent results.⁸⁰ Bordow and Harrison noted that ‘although the overall pattern of property division tends to favour women, in the fully contested cases the percentage shares of husband and wife are spread reasonably evenly over the full range of percentage divisions although the cluster of 40/60 persists over the years.’⁸¹ Sheehan and Hughes also confirmed that ‘[t]he current discretionary system allows for substantial variation in settlement outcomes’⁸² and a broad range of percentage divisions.⁸³ They concluded that, when resources such as superannuation were excluded, 59 per cent of women received 60 per cent or more of the property but the percentage dropped to 42 per cent when resources were included.⁸⁴

The findings of the *2008 Evaluation* confirmed lower overall adjustments to women post reform.⁸⁵ The *2008 Evaluation* also noted that the ultimate division was dependent upon the application of the four step approach which was beyond the scope of the survey.⁸⁶ The *2008 Evaluation* could not address step two or step three issues because adjustments at steps two and three are contingent upon the assessment of the individual facts of each case. However, it was recognised that the enlargement of the pool might, in certain circumstances, reduce the need for any adjustment to be made at step three a trend that might continue as the value of superannuation continues to grow.⁸⁷ To conclude the *2008 Evaluation* found that in percentage terms the overall share of the wife was down from 55 per cent in the 1990s and 52 per cent in the 1980s to 50.3 per cent, amounting to a roughly equal division of the larger pool.⁸⁸ Ongoing monitoring of this situation was recommended.⁸⁹ It is relevant that the *2008 Evaluation* incorporates outcomes in relation to matters where superannuation was not considered at all, where no expert assistance was obtained by the parties, and where there was no court involvement which might depress the overall adjustment.

The doctrinal analysis cannot draw such precise conclusions about whether the overall percentage adjustments are lower compared to the pre-reform law but may lend support to this finding. The doctrinal analysis indicates that after *Coghlan* superannuation is usually assessed in a separate list. The contributions adjustments of the wife to superannuation evaluated in a

⁷⁹ See further below 259, 268. Dewar, ‘Regulating Families’, above n 65, 82–4; Fehlberg and Behrens, above n 15, 2–6.

⁸⁰ See generally, Sophy Bordow and Margaret Harrison, ‘Outcomes of Matrimonial Property Litigation: An Analysis of Family Court Cases’ [1994] *Australian Journal of Family Law* 264, 264–5.

⁸¹ *Ibid* 271.

⁸² Grania Sheehan and Jody Hughes, ‘Division of Matrimonial Property in Australia’ (Research Paper No 25, Australian Institute of Family Studies, March 2001) 31.

⁸³ *Ibid* 14

⁸⁴ *Ibid*.

⁸⁵ Above n 47, 223–5.

⁸⁶ *Ibid* 223, 226.

⁸⁷ *Ibid* 226–7.

⁸⁸ *Ibid* 223.⁸⁸ See also the cautious subsequent findings of Rae Kaspiew et al, ‘Evaluation of the 2006 Family Law Reforms’ (Report, Australian Institute of Family Studies, December 2009) 9.6.2 223–30 (‘*2009 Parenting Reforms Evaluation*’) that after the 2006 parenting reforms mothers may be receiving a reduced share of property in the vicinity of about five per cent which may provide some support for this outcome.

⁸⁹ *Ibid* 227.

separate list are normally less than the contributions adjustments in relation to the s 4(1) property and generally do not exceed 50 per cent.⁹⁰ The doctrinal analysis also demonstrates that step three is an ongoing area of difficulty as there is no preferred approach. While there have been a number of approaches to the evaluation of step three a trend is developing of assessing step three only in relation to the s 4(1) property. If the homemaker contributions to superannuation in a separate list continue to be underrated compared to the direct financial contributions of the member spouse and if step three continues to be assessed in relation to the s 4(1) list only then this may suggest overall adjustments may be lower, albeit in the context of an expanded pool of property against which contributions are assessed and wealth redistributed. Furthermore the undervaluation of defined benefit interests may mean that the overall pool of family wealth is not as enlarged as expected.

The analysis of the cases as presented in the appendices shows that at the conclusion of step four the overall adjustments in favour of wives of superannuation and s 4(1) property combined were spread across a wide range.⁹¹ The overall adjustments are perhaps not as high as they should be given the breadth of the statutory criteria although they may be higher overall than the *2008 Evaluation* suggests because of court involvement. At best the analysis suggests that after *Coghlan* at the conclusion of step four, where superannuation is considered in a separate list,⁹² the overall adjustment to the homemaker in relation to superannuation is likely to be less than the overall adjustment of the s 4(1) assets. This is a significant issue because in future for many couples superannuation may become increasingly more valuable relative to other s 4(1) assets. Nevertheless the legal principles identified by the doctrinal analysis demonstrated unfair outcomes for women and changes in these outcomes over time. The unknown in the present analysis, and indeed this specific area of research more broadly, is the nature, extent and timing of wealth transfers of this nature that are required to reduce the risk of poverty. Such questions are beyond the discipline of law and doctrinal method to resolve.

8 *Shortcomings — Conclusion*

To sum up inconsistency, uncertainty, lack of clarity and unfairness to women were the characteristics of the pre-reform treatment of superannuation in family law and these parameters have been used to measure the success of the superannuation reforms. The doctrinal analysis demonstrates that these characteristics continue post reform.

Inconsistency remains a characteristic of the post-reform law. There continues to be inconsistency about the way superannuation is treated compared to other assets as well as the way different types of superannuation are treated. The differential status of superannuation has been maintained. There is no consistent evaluation of superannuation together with all other forms of family wealth. There is no consistent application of the prescribed regime of valuation in all cases involving superannuation. Contributions to superannuation are not assessed together with and consistently with contributions to other assets. Nor is step three assessed consistently in relation to both superannuation and other assets. Also there is inconsistency between the requirements of proof of value and procedural fairness for splitting orders compared to agreements which require neither.

Uncertainty also continues to be a hallmark of the post-reform law. For women who are excluded from the benefits of the reforms by the lack of retrospectivity there is uncertainty

⁹⁰ Appendix Four (2). See above 182–6.

⁹¹ Appendix Eleven.

⁹² Appendix Twelve.

about the outcome of undertaking proceedings to access the reforms. Also the doctrinal analysis demonstrates that there is no certainty about how superannuation should be taken into account, in particular the valuable defined benefit interests, in property settlement proceedings. As well there is uncertainty about whether the full value of superannuation should be taken into account at steps two three and four. Moreover there is uncertainty about the appropriate approach to step three in relation to superannuation compared to other assets.

Unfairness continues to be a characteristic of the post-reform law. There is a lack of fairness about the exclusion of some women from the benefits of the reforms which may be beneficial to subsequent partners. There is a lack of fairness about the differential treatment of superannuation and the layering of disadvantage that flows from that. Also there is a lack of fairness in undervaluing superannuation, and undervaluing women's contribution to it. There is unfairness in failing to assess future economic factors in relation to superannuation as well as other assets.

This continuing lack of consistency, certainty and fairness about the assessment of superannuation contributes to ongoing lack of clarity and a failure to make the law comprehensible to lawyers and clients or to promote negotiation and agreement. Instead of coherence there is further fragmentation as understood by scholars.⁹³

The cases considered are a selection of significant cases and although comparatively small in number they are influential and illustrate trends that are constructive notwithstanding that they are decided in the exercise of a broad discretion. Bordow and Harrison noted the difficulties in drawing conclusions from decided cases involving the exercise of a broad discretion dependent upon the individual circumstances of each case, but also noted that nevertheless 'broad patterns' are instructive.⁹⁴ However the evaluation of these cases demonstrates that proceedings about property have become considerably more complicated where the parties have superannuation, particularly after *Coghlan*. The evaluation of the four steps does not necessarily proceed in a fixed sequential manner. The boundaries between the steps can be imprecise and the amendments have had a considerable impact upon all four steps not only steps one and four. While it was to be expected that initially there may be some uncertainty and inconsistency in relation to the interpretation of such major reforms, after nearly ten years a consistent body of jurisprudence should have developed. The case studies provide examples that demonstrate the ongoing complexity, inconsistency and uncertainty about the treatment of superannuation in property settlement proceedings.

In conclusion the doctrinal analysis indicates that the gender superannuation gap which continues in the public sphere has been ameliorated by the amendments but the implementation of the amendments has limited the extent of the improvement in the private sphere. Fairness in family law is important to avoid women sustaining a double disadvantage resulting from continuing disadvantage in the public sphere. The superannuation amendments have reduced the scope for perpetuating this disadvantage in the private sphere of family law. Nonetheless, insufficient recognition continues to be given to the unpaid contributions of the homemaker and to the depreciation of earning capacity and ability to accrue superannuation that results from the traditional division of labour in families.

The evaluation of the case law is significant because it influences the negotiations undertaken by the parties in order to resolve property settlement disputes and provides guidance for matters proceeding to trial.

⁹³ See also above 252, below 259, 268.

⁹⁴ Bordow and Harrison, above n 80, 276.

Family law is now a mass dispute settlement system, and the system must speak to those who may never see the inside of a lawyer's office or a court building. Much of family law has this dual aspect of immediate dispute settlement on the one hand, and the large-scale steering settlement behaviour on the other — the characteristics often associated with doctrinal and regulatory law respectively.⁹⁵

Although a relatively small proportion of cases proceed to trial, nevertheless these cases are important in providing guidance to the parties in the negotiation process. However, the findings of the *2008 Evaluation* may indicate that the extent of the reach of the reforms is limited because separating couples are resolving disputes about property without legal assistance and without regard to the legislation as interpreted by the courts.

V THE POLICY OBJECTIVES OF THE REVISED EXPLANATORY MEMORANDUM ACHIEVED?

A *The Policy Objectives Revisited*

It is relevant to revisit the policy objectives specified in the REM and the elements of the reforms that were identified to be critical in realising these policy objectives post reform when assessing the impact of the superannuation regime and drawing conclusions about its successes and shortcomings.⁹⁶ The principal motivating force behind the regime was the disadvantage to women of the pre-reform law.

Other stated policy objectives included that the reforms should introduce a clear and simple system that would produce consistency and certainty in the treatment of superannuation in property settlement proceedings which in turn would result in greater self regulation and increased settlement of disputes. The policy objectives were to introduce a system that would be administratively convenient and have minimal compliance costs. Finally, consistency with government retirement incomes policy was a significant policy objective. There is some overlap between these objectives. The extent to which the elements stipulated for assessing the policy objectives have been achieved by the reforms is considered next. The doctrinal analysis and the *2008 Evaluation* assist to inform the achievement of different objectives.

B *Consistency with Retirement Incomes Policy*

The REM stipulated that the treatment of superannuation after separation 'should be consistent with the broader goals of retirement incomes policy.'⁹⁷ The introduction of a superannuation splitting regime of itself indicates some degree of consistency with retirement incomes policy. However, splitting orders are neither mandatory nor even the general rule.⁹⁸ The courts have retained their discretion to decide upon fair orders in all the circumstances and sharing superannuation for retirement is one factor but not a prevailing factor.⁹⁹ Even where splitting orders are made they may not effect an equal or significant sharing of superannuation. There is thus a tension between the family law discretion and retirement incomes policy.

⁹⁵ Dewar, 'Regulating Families', above n 65, 83.

⁹⁶ Above n 4, 5–7.

⁹⁷ Ibid 7.

⁹⁸ See, eg, *Hickey* (2003) FLC ¶93-143; *Coghlan* (2005) FLC ¶93-220; Appendix Eleven.

⁹⁹ Above 226–8.

The *2008 Evaluation* confirmed that in certain circumstances the retirement incomes policy will be implemented. That is, where the parties are close to retirement, are wealthy enough for both to be housed and have sufficient entitlements to make adequate retirement provision for each,¹⁰⁰ and this is confirmed in the analysis of the case law. The *2008 Evaluation* confirmed that while there is no presumption of equal splitting of superannuation and provision for retirement is not a prevailing factor, it is now shared to a greater extent than prior to the amendments.¹⁰¹ This is also confirmed by the doctrinal analysis. In future, as superannuation entitlements become more valuable compared to other assets, splitting orders may become more prevalent, thereby realising this element of the policy objectives to a greater extent. However, the impact of this upon the homemaker parent with immediate housing needs is an important consideration.

C *Promote Financial Certainty after Separation*

The REM stipulated that superannuation reform should promote financial certainty for couples negotiating settlements involving superannuation with a view to enabling speedy resolution. In a number of respects increased certainty has been achieved in this context. After the amendments full disclosure of superannuation must be made and specified information can be obtained about interests that can now be properly valued and shared. It is also clear that payment splitting is not compulsory and prescribed valuations, although prudent, are not required if no splitting order is made. Splitting orders bind trustees and for many interests, the availability of interest splitting enables a clean break. This much is uncontroversial and parties involved in court proceedings should be in no doubt that superannuation has been considered, even if no splitting order is ultimately made. Thus this element of the policy objectives has been partially attained. However, the doctrinal analysis establishes that there are issues of uncertainty in relation to the treatment of superannuation in property settlement proceedings at all four steps thereby affording parties less certainty than expected in relation to settlement outcomes.

Furthermore, considerable uncertainty remains for parties with a pre startup time order about superannuation who wish to obtain the certainty of a splitting order and are unable to do so due to the transitional provisions. There are significant risks to the non-member spouse associated with these types of orders especially if the member spouse remarries and separates and the subsequent spouse obtains a splitting order that might be implemented prior to the conclusion of the entitlement of the first spouse. Almost invariably the non-member spouses bearing the burden of these risks are women.¹⁰² The reforms as interpreted by the courts fall short of attaining this element of the policy objectives.

D *Consistent, Transparent and Fair Valuation of Superannuation*

The REM stipulated that the reforms should ensure that the consistent transparent and fair valuation of superannuation, like any other asset, should be taken into account in property settlement proceedings. This element has been met in relation to the most prevalent type of interest, namely the accumulation interest. However, the value of this type of interest was not a significant issue in any event. The member information statement will suffice to value this type of interest with the only caveat being that it may sometimes be necessary to calculate the value of the interest at a time between statements, for example, where international or national economic adversity or prosperity intervenes. Self managed superannuation funds are also

¹⁰⁰ Above n 47, 228.

¹⁰¹ Ibid 217, 226.

¹⁰² Above 65–70.

common and must be valued, not pursuant to the regime, but by reference to the underlying assets. Again the value of these types of interests was probably not an issue. Thus for the greater proportion of interests numerically this element is not an issue.

However the valuation regime impacts most upon the more complex types of interests such as defined benefit interests. The value of these types of interests was a matter of controversy prior to the amendments. The member information statement does not generally provide an accurate valuation of a defined benefit interest. The valuation regime values both the vested and the unvested portion of this type of entitlement and frequently, but not always, this results in a significantly higher lump sum value than the amount in the member information statement. The cases demonstrate that attempts have been made to reduce the amount of the valuation of this type of interest by seeking to have it discounted if it is not due to vest soon or have the valuation undertaken at the date of separation rather than the date of hearing.¹⁰³ Also, in relation to a pension in the payment phase, a valuation pursuant to the *FL(S)R* can produce a very large lump sum value. Ascribing a lump sum value to an uncommutable pension in the payment phase has been considered anomalous in a number of cases.¹⁰⁴ Yet these types of interests are also recognised as being very valuable. This remains a contentious area.

The valuation regime does not always provide a valuation that is appropriate to the particular fund or the particular circumstances of the member. There is a safety valve provided for in the *FL(S)R* and an application can be made for approval of an alternative method of valuation. It is not uncommon for funds to make this type of application. As well, if there are issues about the default method of valuation in particular circumstances, then relevant evidence can be submitted to the court. However, the capacity of the courts to depart from a prescribed valuation in the particular circumstances of an individual case has not been authoritatively determined.¹⁰⁵

The attainment of this element of the policy objectives was particularly important for the complex types of interests. Nevertheless, the valuation of these types of interests remains controversial. There is a tension between giving these valuable interests proper recognition on the one hand and acknowledging that they may be unavailable for some time and also may not be accessible as a lump sum on the other. A number of approaches have been taken which have the effect of reducing the impact of the prescribed valuations. One of the criticisms of the previous position was that undervaluing these complex types of interests was disadvantageous to women. The various attempts to diminish the impact of the valuation regime serve to maintain the disadvantage. The case analysis suggests that the achievement of this element of the policy objectives has not been met in relation to the complex types of superannuation interests and has therefore not been maximised.

E *Guidance for Parties Agreeing on Solutions*

The REM stipulated that the reforms should provide comprehensive guidance to encourage parties to resolve matters and also to facilitate court decisions where necessary, thereby eliminating the uncertainty of the pre-reform law. The doctrinal analysis provides key indicators about the attainment of this element. The three different regulatory roles of legislation in family law have been discussed.¹⁰⁶ The importance of the doctrinal analysis in relation to two of these three roles, namely the direct regulatory function and the intermediate

¹⁰³ Above 158–60.

¹⁰⁴ Above 160–3.

¹⁰⁵ Above 158–60.

¹⁰⁶ Above 2–3.

function of indirectly influencing negotiating behaviour, is central to the present assessment of the success of the reforms.¹⁰⁷

The purpose of the reforms was to have superannuation taken into account in property settlement proceedings and not to be treated as it was previously as a financial resource or not at all. However, although the reforms encourage parties to reach agreement and also facilitate the valuation of and splitting of superannuation, they do not regulate whether and in what proportions superannuation payments should be split. The analysis of the complex case law that has developed about the treatment of superannuation in property settlement proceedings, especially after *Coghlan*, demonstrates that the uncertainty of the pre-reform law has not been eliminated in this regard. This may be unsurprising because both superannuation per se and the new regime are complex and the *Coghlan* approaches add to the complexity.

The findings of the *2008 Evaluation* confirm that in its early stage the reforms changed the way in which negotiation is conducted.¹⁰⁸ However, the findings also suggest that the intermediate function of the post-reform law is not being optimised because a significant proportion of separating couples do not take superannuation into account.¹⁰⁹ The *2008 Evaluation* concluded that there has been a low level of involvement of professional advisers and,¹¹⁰ allied to this, an unexpectedly low proportion of spouses split superannuation after the reforms.¹¹¹

This is significant because as noted in the REM ‘the vast majority of family law cases settle without the need for a hearing before the Family Court.’¹¹² Only a small percentage of contested proceedings proceed to trial.¹¹³ If a significant percentage of separating couples resolve their financial affairs informally then the reach of the reforms may be constrained and the extent to which the reforms as interpreted by the courts provide guidance to separating couples limited. Although couples who reach an informal agreement may resolve their affairs privately, cheaply and perhaps more quickly, informal agreements cannot impose any obligation upon trustees to split superannuation payments, are not enforceable, final or binding and may perpetuate the disadvantage experienced by women pre-reform.

This element of the policy objectives is not likely to have been fully attained. However such an assessment is beyond a doctrinal analysis. The position may improve with the passage of time, more widespread information dissemination¹¹⁴ and greater access to expert services although the latter may be considered unrealistic in the foreseeable future.¹¹⁵ Nonetheless, if the legislation and the cases fail to provide clear guidance then there remains a risk that that the pre-reform disadvantage, acknowledged by the REM,¹¹⁶ will continue for some women at the outer range of the reach of judicial influence. It is an issue that warrants ongoing review

¹⁰⁷ Ibid. See generally *McLay* (1996) FLC ¶92-667, 82,901–2 about the significance of case law to courts, lawyers and litigants.

¹⁰⁸ Above n 47, 221.

¹⁰⁹ Ibid 226.

¹¹⁰ Ibid 219.

¹¹¹ Ibid 220–1.

¹¹² Above n 4, 4.

¹¹³ Family Court of Australia, ‘Annual Report 2010-11’ 49 statistics demonstrate that the significant majority of filings are consent order applications (which include both childrens issues and financial issues).

¹¹⁴ Below 259, 277–8.

¹¹⁵ See, eg, PricewaterhouseCoopers, ‘Legal Aid Funding; Current Challenges and the Opportunities of Cooperative Federalism’ (Final Report, December 2009) 2–3; Carolyn Bond, ‘Legal Aid Cuts a Worrying Sign from the Abbott Team’, *Age* (Melbourne), 19 September 2013, 22.

¹¹⁶ REM, above n 4, 4.

and this is considered further when future options are assessed.¹¹⁷ Dewar described the family law system as one of ‘wide reach and low intensity’ because of the low level of legal assistance sought to resolve family problems and because of the many other interventions designed to encourage agreement.¹¹⁸ Dewar described the threat to a coherent legal system of a fragmented system with a variety of interventions resulting in variable application of law and the importance of law to ensure fairness of outcomes and address inequalities in bargaining power.¹¹⁹ Dewar considered that the clarity of family law and therefore its effectiveness in settling private disputes can be improved by more clearly expressed regulation and that this was an issue that warrants further investigation.¹²⁰

F *Improved Access to Information*

The REM stipulated that, in order to enable informed decisions, superannuation reform should enable parties to have access to full information about superannuation. The technical legislative regime has addressed this element of the policy objectives. Nevertheless the *2008 Evaluation* concluded that, despite an improvement in the knowledge of men and women about their superannuation, women continue to be less well informed.¹²¹ Therefore the recommendation was made that information be disseminated at the earliest stage after separation.¹²² On the basis of the improvements since the reforms it might be reasonable to expect that information dissemination will continue to improve in future.¹²³ Since the results of the *2008 Evaluation* suggest that there are still a number of separating couples who do not take superannuation into account when resolving property issues they will benefit from greater availability of information.¹²⁴ Improved access to information is particularly necessary for women who continue to be less informed. It is an issue that should be monitored in future because the significant advances introduced by the regime are of no assistance to parties who do not consider superannuation because of a lack of knowledge. However, the complexity and uncertainty of the reforms as interpreted by the courts may not be easily addressed by improving access to information. This matter is discussed further when considering future options.¹²⁵

G *A Clean Break*

The REM stipulated that superannuation reform should avoid further proceedings between the parties and provide a clean break. The amendments provide the power to make payment splitting orders not interest splitting orders.¹²⁶ The clean break results from interest splitting not payment splitting. Interest splitting occurs pursuant to the *SI(S)R*, the *RSAR* or the trust deed, rules or legislation governing the particular fund. For accumulation interests, interest splitting can occur once the splitting order is made. However, this is not so for defined benefit interests unless the necessary changes have been made for this to occur. Since the startup time many defined benefit funds have introduced interest splitting. Without the availability of interest splitting there can be no clean break. Nor is there a clean break where a flagging order is made. Finally, the transitional provisions make it difficult for pre startup time orders about

¹¹⁷ See below 277–81.

¹¹⁸ Dewar, ‘Regulating Families’, above n 65, 83–4.

¹¹⁹ *Ibid* 95–100.

¹²⁰ *Ibid*.

¹²¹ Above n 47, 217–18.

¹²² *Ibid* 226.

¹²³ Below 277–8.

¹²⁴ Above n 47, 226.

¹²⁵ Below 277–8.

¹²⁶ Above 73.

superannuation to be set aside and replaced with a pt VIII B order in respect of an interest capable of interest splitting. Pre startup time orders about the division of superannuation when it vests do not provide the parties with a clean break.

Thus, for the most prevalent types of superannuation, interest splitting is available and a clean break is possible and the achievement of this element of the policy objectives is maximised. However, for the complex types of superannuation, interest splitting may not be available and therefore a clean break may not be possible. The risks associated with a splitting order where a clean break is not possible may result in women instead favouring an offsetting approach if possible. Otherwise, where superannuation is the principle asset, this element is not met and there will be risks associated with a splitting order where interest splitting is not available.

For pre-startup time orders about superannuation there can be no clean break and the entitlement of the non-member spouse may be jeopardised by the entitlement of a subsequent spouse who has access to pt VIII B. The case analysis about the transitional provisions suggests that this element of the policy objectives has not been fully achieved and the pre-reform disadvantage continues. The cases considered about this issue all related to orders in favour of women.¹²⁷

There are constitutional and other difficulties with ensuring that interest splitting is uniformly available¹²⁸ and at present this element of the policy objectives, although possible for the most prevalent types of interests, has not yet been fully attained, a limitation that will almost invariably impact upon women.

H *Simple and Inexpensive to Administer*

The REM stipulated that superannuation reform should provide ease of administration for superannuation funds and limit cost due to litigation and settlement. This was unlikely to be accomplished by a regime of this nature. The overview of the legislation discloses that it is a very complex regime which has resulted in costs to all participants. The REM stated that the costs of the preparation of the actuarial tables for valuing defined benefit interests and the costs of educating the family law community and superannuation industry about the amendments were to be met from existing resources.¹²⁹ The superannuation industry was expected to bear the costs of setting up the administration and information technology systems required for them to implement the changes.¹³⁰ However, in addition to these costs, there are ongoing costs. Funds are increasingly using the services of legal advisers to evaluate proposed orders about superannuation that are submitted by way of procedural fairness prior to being made by the courts. The funds do not automatically endorse proposed orders in which case there are additional costs to the parties to comply with their requirements. Also, if a splitting order is made in relation to a defined benefit interest for which interest splitting is unavailable, there will be ongoing costs to the fund of maintaining the interest until such time as it vests.

Trustees may charge the parties reasonable fees in respect of any payment split.¹³¹ The charges may range from negligible to considerable. As well, the parties may require legal and other expert advice even if they are resolving their financial issues by agreement.¹³² It would

¹²⁷ Above 66–71.

¹²⁸ Above 65.

¹²⁹ REM, above n 4, 3.

¹³⁰ Ibid.

¹³¹ *FLA* s 90MY; *FL(S)R* reg 59.

¹³² Henn and Boujos, above n 42, 30.

be almost impossible for parties to obtain a splitting order and certainly impossible to conclude a splitting agreement without incurring legal fees. The costs of obtaining valuations from actuaries or other experts are substantial as are their costs of appearing as expert witnesses at trial. Proceedings involving complex superannuation arguments are costly. Consider the nature of the proceedings in *BAR & JMR*,¹³³ *Coghlan*,¹³⁴ *A & A*¹³⁵ and *Trott & Trott*¹³⁶ to name a few examples. It cannot be concluded that the amendments have been inexpensive to administer. Indeed the additional costs to parties may in part explain the finding of the *2008 Evaluation* that 20 per cent of participants did not consider superannuation and resolved any financial issues after separation informally. Such costs have to be met from present resources and for women with pressing immediate needs this could make an informal offsetting approach, albeit imprecise, a more attractive option.

In short, the amendments have not been simple and inexpensive to administer and this element of superannuation reform has not been accomplished.

I *Conclusion — Policy Objectives*

In summary the key policy objectives examined in this thesis have not been fully realised and the previous disadvantage redressed. As discussed elements of the policy objectives have been successfully attained at least in part. Access is provided to separating couples to relevant information about their respective superannuation entitlements. Transparent, consistent, clear, valuation of the most prevalent accumulation interests is undisputed. When splitting orders are made there is consistency with retirement incomes policy and for accumulation interests and many defined benefit interests a clean break is possible. However the optimum achievement of the policy objectives has been defeated by the breadth of the discretion and impeded by the complexity of the regime and the uncertainty and inconsistency in the treatment of superannuation after the reforms. The reforms may have addressed the technical problems and reduced the pre-reform disadvantage to women but they have not achieved or promoted substantive equality.

J *Tension: Retirement Incomes Policy and Family Law Objectives*

There is a tension between the broader policy goal of improving provision for retirement and the discretionary system of property settlement.¹³⁷ In the past, developments in the public sphere proceeded independently of developments in the private sphere and the REM noted that there are some tensions between the differing policy objectives.¹³⁸ The REM noted that any reform should provide a reasonable balance between conflicting aims.¹³⁹ Chief Justice Diana Bryant more clearly and concisely summarised the dilemma thus:

It is recognised that the objectives of the superannuation splitting laws — to encourage private arrangements, to achieve greater ‘fairness’, and to encourage financial self-sufficiency in retirement — are not necessarily clear or complementary. If however it is assumed that the reforms are intended, at least in part, to alleviate post-separation poverty for women while enhancing their access to adequate post-retirement income, it could be argued that some of the Governments’s significant policy changes will militate against the achievement of both goals...¹⁴⁰

¹³³ (2005) FLC ¶93-231.

¹³⁴ (2005) FLC ¶93-220.

¹³⁵ [2006] FMCAfam 80.

¹³⁶ (2006) FLC ¶93-263 (*‘Trott’*).

¹³⁷ Millbank, above n 15.

¹³⁸ REM, above n 4, 5–6.

¹³⁹ Ibid.

¹⁴⁰ Chief Justice Diana Bryant, above n 33, 46.

The Government's retirement income policy objective requires that superannuation be retained for retirement purposes and not be available for other purposes.¹⁴¹ The amendments are not inconsistent with this goal. Superannuation entitlements, including most entitlements acquired by the non-member spouse as a result of a payment split, cannot be accessed at will and must abide by industry requirements. However, the amendments have retained the discretion of the courts to determine whether and how superannuation should be shared. Consistency with retirement incomes policy would require that, in the private sphere, payment splitting would prevail. The doctrinal analysis confirms that the courts endorse the discretionary treatment of superannuation. Provision for retirement is one relevant factor but not an overriding factor in property settlement disputes. Nevertheless it was foreseeable that the reforms would result in a balance between the two in certain circumstances. It is likely that, as the value of superannuation entitlements increases compared to other assets, the sharing of superannuation after separation will also escalate and there will be a greater degree of confluence as a result. Further if the gender superannuation gap is significantly reduced or disappears then the significance of the reforms may diminish and the tension will also reduce. Currently although retirement incomes policy and the need to provide for retirement is not specifically discussed as a factor in many cases, nevertheless splitting orders are made in a significant number of cases¹⁴² and it can therefore be assumed that it is a factor.

In due course splitting orders may become the general rule if the public sphere gender superannuation gap persists and the value of entitlements continues to increase compared to the value of other assets. On the other hand, if the entitlements of women become as significant as those of men, then splitting orders may become redundant. However, this is not expected to occur in the near future.

As to the question whether a reasonable balance between conflicting aims has been achieved, while splitting orders are not made in every case they are commonly made. To date there has been no covert implementation of the *A-G's 1998 Position Paper*¹⁴³ notwithstanding that the *Coghlan* preferred approach appears to have invited it. Although the need for consistency with government retirement incomes policy has not received prominent specific consideration, the fact of making these orders suggests it is a significant factor. On the other hand the treatment of the matrimonial home, and the asset and liability profile of each of the parties, are other significant but conflicting considerations.

In summary, there is a greater convergence of focus in the public and private spheres after the amendments and neither prevails to the exclusion of the other.

¹⁴¹ REM, above n 4, 7.

¹⁴² Appendix Eleven.

¹⁴³ Above 57–59.

VI 'A FAIR AND EQUAL LAW'?¹⁴⁴

The amendments operate against a background of equality debates and a substantive equality approach has been adopted as a standard against which to critique the impact of the reforms on settlement outcomes for women. At the heart of the debates in relation to superannuation in both the public and private spheres lies the impact of the valuable but unpaid work that women undertake in the family. In this context it impacts negatively upon the accumulation of superannuation by women in the public sphere while providing support for men to do so. It is also treated as a less valuable contribution in the private sphere despite case law to the contrary. This contribution results in future economic vulnerability in the event of separation. The resulting depreciated earning capacity of the homemaker and the diminished ability to accrue superannuation in the future likewise receive inadequate attention with a less robust approach being taken compared to our United Kingdom counterparts.¹⁴⁵

Family law cannot provide a panacea for public sphere disadvantage although in the past it effectively perpetuated the unfairness. As well it is acknowledged that when relationships break down, individual male partners cannot be held responsible for the failure of work place reforms to address public sphere disadvantage. However, legislation that enables superannuation to be properly evaluated upon separation should contribute towards correcting such disadvantage.

Evatt considered the concept of a fair and equal law in the broader context of a just matrimonial property regime and considered the characteristics of such a law.¹⁴⁶ The characteristics described by Evatt of a fair and equal law in this broader context are considered and assessed against the post-reform law about superannuation and are assessed against the substantive equality standard.

Firstly, Evatt considered that a fair and equal law must give proper recognition to the value of women's work and must recognise that a marriage is a partnership of equals.¹⁴⁷ The findings resulting from the analysis of cases as presented in the appendices suggest that the contributions of the homemaker to superannuation after *Coghlan* are considered to be less valuable than the contributions of the member spouse as a general rule.¹⁴⁸

Secondly, Evatt considered that a hallmark of a fair and equal law is that when a marriage breaks down the economic impact, which is borne by the homemaker, should be compensated for.¹⁴⁹ Despite the fact that earning capacity and the associated ability to accrue superannuation are purportedly important step three factors, in reality the adjustments are not significant. Also after *Coghlan* the trend appears to be that any adjustment at step three is only made in relation to the s 4(1) list and not in relation to any separate superannuation lists even if no splitting order is made.¹⁵⁰ Although a splitting order is considered an appropriate justification it will usually only negate a step three adjustment in very limited circumstances. The Australian courts have not endorsed a vigorous approach of compensating the homemaker for the economic impact of marriage.

¹⁴⁴ Evatt, above n 13, 5.

¹⁴⁵ Chief Justice Diana Bryant, above n 22, 41–5.

¹⁴⁶ Evatt, above n 13, 5.

¹⁴⁷ Ibid.

¹⁴⁸ Appendix Four.

¹⁴⁹ Evatt, above n 13, 5.

¹⁵⁰ Appendix Nine.

The third hallmark of a fair and equal law was that superannuation should be equally shared.¹⁵¹ This result is not the general rule if the *Coghlan* preferred approach is undertaken. The case analysis as presented in the appendices suggests that a common result within the context of this analysis is that superannuation is not equally shared, arguably achieving neither substantive equality nor formal equality as an outcome.¹⁵²

Not all of the characteristics of a fair and equal law described by Evatt equate to the substantive equality approach herein. A substantive equality standard will not overvalue the financial contribution to superannuation but will recognise women's non-financial contribution to the full value of superannuation as an asset and will also recognise women's needs in relation to it. The inconsistency lies with the third hallmark. Firstly it may support a differential formal equality approach to the evaluation of superannuation and secondly it may suggest that women's needs should not be assessed in relation to superannuation. Post reform the substantive equality standard has not been met and arguably nor has the formal equality approach to superannuation been endorsed.

In conclusion Evatt considered that a hallmark of a fair and equal law is that the rights and obligations of the parties should be clear.¹⁵³ As noted, the findings suggest that in many respects this characteristic of a fair and equal law has not been attained.

The retention of the discretionary approach to the treatment of superannuation in property proceedings has been endorsed as preferable to a presumptively equal division of marital superannuation because such 'rule equality' fails to take account of the fact that:

[t]he economic consequences of divorce are not shared equally between men and women and the imposition of [a] model that presumptively splits marital assets equally between the parties will perpetuate gender-based financial disadvantage (which can otherwise be described as women's poverty).¹⁵⁴

But there are limitations with a discretionary approach. The current discretion of the courts to alter the interests of separating couples in property cannot be limited by the development of binding guidelines which arguably expands the discretion¹⁵⁵ and the greater the discretion the greater the potential for uncertainty and unfair outcomes. Furthermore this may result in increased costs and be a disincentive to financially disadvantaged couples to litigate about superannuation. Homemakers in particular may choose instead the certainty of a lesser outcome. Finally cases decided in the exercise of a wide discretion may discourage appeal.

Nevertheless notwithstanding the inadequacies of the discretionary approach it provides greater scope for substantive equality¹⁵⁶ because the individual circumstances of each case can be taken into account.¹⁵⁷ However, the analysis of cases as presented in the appendices suggests that gender based financial disadvantage continues, albeit to a lesser extent, after the amendments.¹⁵⁸ The *Coghlan* decision has generated a variety of approaches which allow

¹⁵¹ Evatt, above n 13, 5.

¹⁵² Appendix Twelve.

¹⁵³ Evatt, above n 13, 5, 12.

¹⁵⁴ Chief Justice Diana Bryant, above n 22, 17.

¹⁵⁵ Fehlberg and Behrens, above n 15, 468 also quoting Richard Ingleby, 'Introduction: Lambert and Lampposts: The End of Equality in Anglo-Australian Matrimonial Property Law?' (2005) 19 *International Journal of Law, Policy and the Family* 137, 140.

¹⁵⁶ Chief Justice Diana Bryant, above n 22, 25.

¹⁵⁷ Ibid.

¹⁵⁸ Appendix Twelve.

superannuation to be devalued as an asset; enable women's non financial contribution to superannuation to be devalued; overvalue men's financial contributions particularly before and after cohabitation and do not address women's needs in relation to it. Arguably the effect has been to broaden the discretion rather than produce 'coherence of principle, predictability of result and fairness of outcome'¹⁵⁹ in the treatment of superannuation.

The REM noted that the intention of the reforms was to 'bring about greater fairness and certainty into the treatment of superannuation' after separation.¹⁶⁰ While the reforms have resulted in a reduction in the previous disadvantage, there has been no active pursuit of substantive equality, a different concept. Ingleby distinguished between the concept of reducing or removing inequality and positively promoting equality.¹⁶¹ The latter approach is closer to the substantive equality standard. Ingleby considered that the endorsement of a non discrimination standard may result in the active promotion of equality.¹⁶²

VII FUTURE DIRECTIONS

A simple approach to the treatment of superannuation was always improbable because, unlike other assets, superannuation is not generally a readily available asset.¹⁶³ Superannuation had been treated differently to other types of property prior to the amendments and generally this position continues. However, as Millbank commented 'Solutions are, of course, harder to devise than problems are to fathom.'¹⁶⁴

The reforms should have enhanced the exercise of the discretion to alter interests in property, including superannuation. The reforms as implemented by the courts should have simplified the pre-reform law and practice about the treatment of superannuation after separation and created greater certainty for couples coming before the courts about how this form of family wealth would be dealt with. As a result women would benefit from increased consideration of and access to superannuation and, coupled with the development of coherent principles, predictable results and fairness would result.¹⁶⁵ Women have benefitted from the reforms and some of the policy objectives have been met to some extent. However complexity, inconsistency, uncertainty are the outcomes of the post-reform law about the treatment of this valuable form of family wealth and in significant respects the policy objectives have not been met.

In 2003 Altobelli considered that the initial benefits provided by the amendments were offset by 'confusion and uncertainty' and the doctrinal analysis shows that this continues to be the case.¹⁶⁶ Altobelli commented on the effect of the new regime and proffered three views.¹⁶⁷ The first narrow view is that the regime assists to value and split superannuation and binds trustees but the effect is no more radical than that and he found some support for that view in

¹⁵⁹ Patrick Parkinson, 'Diminishing Significance of Initial Contributions to Property' (1999) 13 *Australian Family Law Journal* 1, 30 in the context of the case law about s 79 generally.

¹⁶⁰ REM, above n 4, 3

¹⁶¹ Ingleby 'Lambert and Lampposts', above n 155, 139.

¹⁶² Ibid 139.

¹⁶³ Justice Ian Coleman, 'A Distinction Without a Difference?' *Coghlan & Coghlan* (2005) FLC ¶93-220' (Paper presented at the Central Queensland Law Conference, Rockhampton, 26 August 2005) 12.

¹⁶⁴ Millbank, above n 15, 119.

¹⁶⁵ Parkinson, above n 148, 30.

¹⁶⁶ Altobelli, 'Children's Accommodation Needs ...', above n 73, 1.

¹⁶⁷ Ibid 9-10.

Hickey. Post *Coghlan* the analysis of the case law lends support to a narrow view of the reforms.

The second view is that the new regime is reformist in nature. That is, the regime operates against the background of the need to provide for an aging population and steps two and three are used to further this social change. This reformist view is based on retirement incomes policy not family policy. Both the doctrinal analysis and the *2008 Evaluation* demonstrate that the implementation of the regime in practice has not resulted in a radical interpretation of the amendments in order to further social change and provide for an aging population.

The third view is that the implementation of the regime can progress moderate change with the just and equitable requirement being used to create appropriate orders in all the circumstances. Altobelli also found support for this third view in *Hickey*.¹⁶⁸ However after *Coghlan* the study of the cases demonstrates a layering of disadvantage that can potentially accumulate over steps one, two and three and that step four has not been used to address this. Moderate change of this nature has not been the effect of the post-reform law.

The findings of the doctrinal analysis are relevant to any agenda for legislative reform or for review of government subsidised legal services. The amendments have initiated considerable progress but further improvements are possible, if the discretion is to be retained, despite the fact that there will always be an element of uncertainty resulting from the exercise of a broad discretion. The option of a rule based approach will also be considered. Also ancillary changes will be canvassed and ongoing monitoring and review recommended. Clearer legislative statements of policy may lead to greater clarity and certainty that will assist separating couples to know and understand their rights and obligations.

A A Future Direction — Major Reform?

The question of whether a discretionary approach or a rule-based approach is the best means of achieving greater fairness for women in property distribution has been the subject of much debate not only in Australia¹⁶⁹ but also overseas.¹⁷⁰ Garrison summarised the arguments thus:

[d]iscretion can impede settlement, increase costs, and enhance the likelihood of litigation. Instead of the finely nuanced, individualized outcomes that discretionary standards aim to produce, discretion may produce results that are arbitrary and inconsistent.

Rules, of course, also entail risks. The most obvious of these is inflexibility. Hard and fast rules work well where there is broad consensus on the right results in easily definable case categories. But, where consensus is lacking or where the boundaries between case categories are blurred, the price of certainty may well be inequity.¹⁷¹

Patrick Parkinson observed that there are two reasons for the the extent of the breadth of the discretion conferred by s 79 to alter the interests of parties in property.¹⁷² The first is that the courts have jurisdiction over all of the property of the parties however and whenever acquired and the second is that there is an absence of legislative guidance about the interpretation and

¹⁶⁸ Ibid 9–10. See above 125–31.

¹⁶⁹ See, eg, the *1987 Hamby Report*, above n 30; Joint Select Committee, Parliament of Australia, *The Family Law Act 1975: Aspects of its Operation and Interpretation* (1992).

¹⁷⁰ Marsha Garrison, ‘What’s Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence’ (2011) 72 *Louisiana Law Review* 57, 58.

¹⁷¹ Ibid 73.

¹⁷² Patrick Parkinson, ‘Quantifying the Homemaker Contribution in Family Property Law’ (2003) 31 *Federal Law Review* 1, 5.

application of the discretion. Parkinson cited the Full Court decision in *McLay* in support of the importance of principles and guidelines to the discretionary process ‘so that the task under s.79 is seen to be a disciplined exercise against the background of principles, concepts and guidance provided by the Full Court in aid of the exercise of that discretion in individual cases’ rather than ‘a wilderness of single instances’.¹⁷³

Ideally the discretionary approach enhanced by the reforms implemented in a clear and coherent way offers a system that is flexible and enables the individual circumstances of each case to be assessed to achieve an outcome consistent with a standard of substantive equality. The paradigm outcome is that superannuation, properly valued, is included in the list of property at step one; step two is evaluated in the usual way in relation to this list; adjustments for step three factors, including future earning capacity and ability to accumulate superannuation, are also made in relation to all assets and the just and equitable outcome at step four operates consistently with its pre-reform application. The enlargement of the asset pool coupled with consistent, certain adjustments at steps two and three and the addition of the power to make splitting orders can address the pre-reform disadvantage and go a long way towards achieving substantively equitable outcomes as well as coherent clear law to guide separating couples.

However the case analysis about the treatment of superannuation post reform confirms the increase in an already fragmented approach to property settlement proceedings. Fehlberg and Behrens considered that fragmentation in family law was due to a number of factors including the breadth of the discretion as well as individual factual variations, differing judicial values and multiplicity of stakeholders post reform.¹⁷⁴ Dewar also considered the causes and effects of fragmentation in the family law system and concluded that ‘this has led to the same law being given different interpretations, or different tactical weight, at different points within it.’¹⁷⁵ Dewar considered that the ‘diversity of interpretive fora’ was likely to continue.¹⁷⁶ The consequence of fragmentation is a lack of coherence and that ‘legislators and drafters should emphasize clarity and purpose of legislation to maximize compliance and correct interpretation’.¹⁷⁷

Therefore broad-based property law reform, including superannuation, is reconsidered as well as the option of further reform specifically in relation to the treatment of superannuation. Finally the option of ancillary improvements being implemented as an alternative to major reform is also assessed.

1 *Broad-Based Property Law Reform?*

There have been some examples of a more rule-based approach to reform in recent years in relation to parenting orders and child support but past proposals for a rule-based approach to broad-based property law reform have thus far been unsuccessful.¹⁷⁸ The *A-G’s 1999 Discussion Paper* proposed two rule-based possibilities for broad-based reform of property

¹⁷³ (1996) FLC ¶92-667, 82,901.

¹⁷⁴ See generally, Fehlberg and Behrens, above n 15, 2–3. See also Dewar, ‘Regulating Families’, above n 65, 95. Above 252, 259.

¹⁷⁵ Dewar, ‘Regulating Families’, above n 65, 96–8.

¹⁷⁶ *Ibid* 97.

¹⁷⁷ *Ibid* 94–5.

¹⁷⁸ See, eg, the 1987 *Hambly Report*, above n 30; the 1992 *Joint Select Committee Report*, above n 169; Commonwealth, ‘Property and Family Law: Options for Change’ (Discussion Paper, Attorney-General’s Department, 1999) (*A-G’s 1999 Discussion Paper*). See generally Fehlberg and Behrens, above 15, 572–77.

law including superannuation in certain circumstances. One option canvassed was a separate property regime with a starting point of equal division of all property subject to a discretion to depart from equal sharing in certain circumstances.¹⁷⁹ A second option canvassed in the *A-G's 1999 Discussion Paper* was a community of property regime under which only the property acquired during the relationship was subject to a presumption of equal sharing subject to a discretion to depart from equal shares in certain circumstances.¹⁸⁰ Although reform of this nature has not been implemented there is a view that the extent of the current discretion and the manner of its implementation do not provide guidance to separating couples in relation to resolving their financial affairs and there is an ongoing need for reform.¹⁸¹

However there are arguments for and against such an approach. An argument against introducing a rule-based approach is that such an approach could not achieve justice without very complex rules given the wide variety of circumstances that come into play.¹⁸² Furthermore an approach of equal sharing subject to exceptions may result in an outcome of equal sharing as a general rule rather than equal sharing as a starting point.¹⁸³ On the other hand a rule-based approach may decrease legal and other costs and provide certainty in negotiation provided the rules are not complex and provided the issue to be regulated is 'simple, stable and does not involve huge economic interests'.¹⁸⁴

However Fehlberg and Behrens advocate a guided judicial discretion 'via the introduction of legislative starting points or principles' to provide greater clarity and consistency.¹⁸⁵ For instance it was suggested that there might be guidance provided by way of principles in relation to the equal status of the parties; the extent of the assets addressed; the length of cohabitation and, in relation to s 75(2) factors, consideration of both a needs and compensation approach.¹⁸⁶

There is little evidence of political or other activism in relation to major reform of family property law at present.

2 *Specific Superannuation Reform?*

Alternatively, rather than broad-based property law reform, specific reform about the treatment of superannuation in family law proceedings is an option. Because of the complexity, uncertainty and cost of considering superannuation in property proceedings an option is to adopt an approach of a presumptive equal split of superannuation. The amendments rejected the recommendation of the *1998 Position Paper* that superannuation be considered separately from but in tandem with the matrimonial property regime and that there be equal sharing of the marital portion of superannuation as a general rule subject to exceptions. Nevertheless, it has been suggested that a separate equal division of superannuation accrued during cohabitation would be simpler, cheaper and consistent with retirement incomes policy.¹⁸⁷ Arguably such an approach may be subject to the same

¹⁷⁹ *A-G's 1999 Discussion Paper*, above n 178, 4.

¹⁸⁰ *Ibid.*

¹⁸¹ See Fehlberg and Behrens, above n 15, 573.

¹⁸² *Ibid* 575 citing Family Law Council, 'Submission on the Discussion Paper of the Attorney-General's Department on Property and Family Law: Options for Change, 1999'.

¹⁸³ Fehlberg and Behrens, above n 15, 574.

¹⁸⁴ See generally Braithwaite, John, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 75.

¹⁸⁵ Fehlberg and Behrens, above n 15, 575.

¹⁸⁶ *Ibid* 576–7.

¹⁸⁷ Henn and Boujos, above n 42, 65.

limitations as the pre-reform mathematical or formulaic approaches if there is an assumption of even accrual throughout and be disadvantageous to women. Such an approach over values direct financial contributions to superannuation, especially those made before and after cohabitation, and disregards the indirect contributions of the non-member spouse including the care of children after separation. It also fails to take into account step three factors in relation to superannuation. However it is possible that an approach of equal division would be beneficial¹⁸⁸ and preferable to the current position, especially if coupled with a discretion to trade off the entitlement, if the analysis of cases as presented in the appendices suggests that women commonly receive less than an actual or notional 50 per cent share of superannuation.

The *Coghlan* preferred approach has perhaps resulted in the de facto adoption of this type of approach to the extent that it endorses the separate evaluation of superannuation although it has not endorsed an equal actual division of superannuation accrued during cohabitation. Also a trend is developing post *Coghlan* of not assessing step three in relation to the separate superannuation list.

It is unlikely that amendments will be made in the foreseeable future to implement such an approach in the light of the extensive consideration given to this option previously notwithstanding that the findings may suggest that this option would be beneficial.

In any event such an approach will not benefit the homemaker spouse in the majority of cases where there are not enough assets and superannuation to provide both adequate accommodation and sufficient provision for retirement for each party. Although splitting orders are common they may not precisely reflect the notional division of superannuation. This provides the flexibility to consider the issue of the retention of the family home which is frequently of greater immediate importance to women caring for children. The *2008 Evaluation* rejected an approach of a presumptive equal split of superannuation for the reason that it would result in the loss of this flexibility unless separated couples could be authorised to have early access to the entitlement on the ground of hardship for the purpose of housing.¹⁸⁹ The current grounds enabling early access to superannuation are limited to extreme circumstances in keeping with a strict approach to retirement incomes policy.¹⁹⁰ Furthermore, early access on the ground of hardship is currently limited to modest amounts. Given the high incidence of relationship breakdown and the cost of any change involving early access to superannuation, this type of recommendation is on balance unlikely and in any event does not promote optimum fairness for women.

It is concluded that the discretionary approach is the preferable option for achieving fairness in the distribution of property including superannuation because it enables fairness to be assessed on an individualised basis. However the case law requires rationalisation and reassessing *Coghlan* would be a useful starting point. Given that the decision was made by a five member court this is only likely to occur with the assistance of the High Court or by creative judicial activism. The option of legislative amendment which clearly states the policy intention of pt VIIB and addresses the existing legislative ambiguity is considered further below when considering ancillary changes.¹⁹¹

¹⁸⁸ Fehlberg and Behrens, above n 15, 532, 575.

¹⁸⁹ Above n 47, 228.

¹⁹⁰ REM, above n 4, 7.

¹⁹¹ Below 271–2.

B *A Future Direction — Ancillary Improvements?*

In the absence of major reform to achieve greater clarity consistency certainty and fairness in the treatment of superannuation after separation there may be other options for improving the impact of the post-reform law.

1 *Amend the Transitional Provisions*

The amendments are not retrospective and where orders had been made pursuant to s 79 prior to the startup time then pt VIIIIB could not be accessed unless the order was an interim order or was revoked.¹⁹² As noted, difficulties have arisen in two respects.¹⁹³

If proceedings had been deferred pursuant to s 79(5) prior to the startup time to enable superannuation to be dealt with in due course and orders had been made about other property that could not be construed as interim orders, then the transitional provisions excluded the application of pt VIIIIB. While the case law has taken a utilitarian approach and examined the real nature of the order notwithstanding any label, it may be preferable in the interests of certainty and to avoid the stress and cost of legal proceedings to amend the legislation. For example, the definition of ‘*section 79 order*’ in s 4 of the *FLLA(S)A* could be amended to clarify that only final pre startup time s 79 orders are excluded from the operation of pt VIIIIB.

Secondly, pt VIIIIB does not apply where a final s 79 order had been made prior to the startup time about property including superannuation. The superannuation order may have been drafted to take effect either when the superannuation vests or when the amendments commence or each in the alternative. The case law invariably involved women attempting to access pt VIIIIB who would potentially otherwise be at a disadvantage. If the member spouse subsequently remarries or cohabits and the subsequent spouse or partner obtains a pt VIIIIB order about the same entitlement, there is a potential risk to the wife who has an order about superannuation which predates the start up time. Her order does not bind the trustee and there is no clean break. The trustee may have no knowledge of the order. The first wife must wait for the husband to satisfy a condition of release and hope that there are no intervening circumstances that will frustrate the satisfaction of the order. An amendment to s 5(3) of the *FLLA(S)A* to enable parties to set aside the prior order by consent pursuant to s 79A(1A) would enable pt VIIIIB to be accessed without cost to the courts or the parties. The procedural fairness requirements would protect the trustee. In the cases considered, the parties were generally in agreement about accessing pt VIIIIB.¹⁹⁴ This type of amendment might provide another option for addressing the first issue as well.

Although the cases dealing with the transitional provisions are relatively few the costs to the parties are considerable. The transitional provisions impact negatively upon the very women that the legislation is designed to assist. Amendments would introduce certainty and fairness in the majority of these cases. Amendments of this nature may not provide the complete answer to the issues of the transitional provisions but should be relatively simple, safe and cost effective to implement. Importantly, the women in these circumstances will be able to access some much needed protection. Since the transitional provisions affect a diminishing group of women the necessary amendments may not be realistic. Greater judicial activism is a more likely avenue for change although it is submitted that this is a problematical option.

¹⁹² Above 65–70.

¹⁹³ *Ibid.*

¹⁹⁴ *Hodgkin* [2005] FamCA 226 [1]; *Hackett* [2007] FamCA 1618 [4] [15]; *Lehear* [2009] FamCA 645 [8]; *Greetham* [2010] FamCA 246 [6].

2 *Amend the Family Law Act*

One of the major obstacles in the way of superannuation being properly considered in property proceedings prior to the amendments was that it was not generally considered to be in the nature of s 4(1) property.¹⁹⁵ It would have been possible for the legislation to amend the definition of property to include contingent interests such as superannuation as suggested by Fogarty J in *Crapp*.¹⁹⁶ However, this did not occur. Instead s 90MC provides that, for the purpose of the definition of ‘matrimonial cause’ in s 4(1), superannuation is to be ‘treated as’ property and s 90MS enables the court in property proceedings to ‘also’ make orders about superannuation. This drafting led the Full Court in *Coghlan* to endorse the view that superannuation is ‘another species of asset’.¹⁹⁷ The Full Court acknowledged that, if not for the terms of s 90MS, superannuation might be treated as property even though it is not and whether or not a splitting order is sought or made in accordance with the *Hickey* approach.¹⁹⁸ However, the Full Court stated that, because of the drafting of s 90MS, the position where no splitting order was sought was unclear. The complex *Coghlan* approaches ultimately avoided the predicament of the previous law continuing to apply where no splitting order is sought or made and the new regime applying only where a splitting order is sought or made. Nevertheless, the *Coghlan* approaches constitute a guideline rather than binding rule of law. Although this has been considered sufficient from a practical perspective for the reason that trial judges would be unlikely to ignore such guidance,¹⁹⁹ it is not ideal and should be rectified by legislative change. The importance of legislation in providing conceptual certainty was noted by Ingleby.²⁰⁰

The complexity of the *Coghlan* approaches adds to the cost and uncertainty of proceedings. Also the *Coghlan* preferred approach has resulted in women receiving a lesser share of superannuation compared to s 4(1) property thus diluting the impact of the amendments. These reasons provide significant impetus for change.

One option is to amend the s 4(1) definition of property to clarify that property includes contingent interests as suggested by Fogarty J in *Crapp*. This might leave the way open for the return of the *Hickey* approach. It has been suggested that the many changes in the public sphere have arguably resulted in superannuation being more like s 4(1) property than previously²⁰¹ and therefore such a change should be less objectionable than previously. There is room for judicial activism in relation to the question of whether superannuation in its various forms is indeed property.

Another option is to amend pt VIIIB to include an overarching framework of principle about the purpose of pt VIIIB which also unambiguously addresses the relationship between pt VIIIB and s 79.²⁰² A good example of this is to be found in div 1 of pt VII. It would assist judicial consensus and provide guidance to separating couples negotiating property settlement disputes.²⁰³

¹⁹⁵ Above 43–5.

¹⁹⁶ (1979) FLC ¶90-615, 78,181.

¹⁹⁷ Above 135–51.

¹⁹⁸ (2005) FLC ¶93-220, 79,641–2 [37] [40], 79,644 [54].

¹⁹⁹ Justice Ian Coleman, above n 163, [18].

²⁰⁰ ‘Lambert and Lampposts’, above n 155, 145

²⁰¹ Stephen Bourke, *Super Splitting for Family Lawyers*, above n 43, 179, 188.

²⁰² See generally, Dewar, ‘Is Law Good for Families?’ (Paper presented at the Family Centre Annual Conference, Brisbane, February 2002) 6. See also Braithwaite, above n 184, 75.

²⁰³ *Ibid.*

Allied to this an amendment to s 90MS is warranted. The Full Court in *Coghlan* stated that s 90MS could have been drafted to remove any ambiguity as follows:

in proceedings under section 79 with respect to the property of spouses (and it might say ‘which includes superannuation interests’) if the court intends to make orders in relation to superannuation interests it must do so in accordance with this division.²⁰⁴

and this type of change is also an option.

Amendments of this type would provide clarity and certainty about the fundamental and contentious issue of the relationship between s 79 and pt VIII B. This was an issue identified in the REM²⁰⁵ and despite Note 1 to s 90MS it clearly remains an issue after the amendments. Amendments may remove the reason for the *Coghlan* preferred approach and lead to the reinstatement of the *Hickey* approach and appropriate adjustments being made to the superannuation and s 4(1) property as a whole. Amendment should be a comparatively inexpensive process. However, the possibility of the *Coghlan* preferred approach continuing by different means must also be considered. For example, if the asset by asset approach to the assessment of contributions to superannuation were to be undertaken as a general rule and the step three adjustment were to be made only in relation to s 4(1) property, the result may be no different. Nevertheless if the courts are guided by a clear statement of principle then this less likely.

3 *Mandate the Valuation of Superannuation*

The treatment of defined benefits generally and pensions in the payment phase in particular remains contentious at step one. Imposing a requirement that a prescribed valuation be obtained, whether or not a splitting order is sought or made, could prevent the circular decision that a splitting order will not be made about a pension in the payment phase or other defined benefit interest, thereby dispensing with the requirement of obtaining or considering a prescribed valuation of the entitlement. It would ensure that the complex interests are considered at their full value at step one, not merely the vested portion. In turn this should maximise the value of the property and superannuation to be considered at step one and ensure that women do not miss out as had previously been the case. For reasons that have already been discussed valuation should also be mandated where couples choose to formalise their financial affairs by way of financial agreement. The fact of the statutory regime of valuation provides support for mandating the valuation of superannuation. For the majority of interests, namely the accumulation interests, the costs would be negligible.²⁰⁶

Potential disadvantages must be considered. The greater the value of superannuation the more likely it might be that the homemaker receives less of the immediately available assets. Mandating the valuation of superannuation would impact most upon the complex interests and impose additional costs upon the parties. The costs must be met from present assets and in many cases where the parties are of modest financial means this will be an important consideration at a time of considerable financial stress. Also the effectiveness of mandating valuations for the purpose of proceedings may be limited in respect of the significant number of couples who resolve their property settlement disputes without legal assistance or the involvement of courts. Finally, mandating valuation will not necessarily address all of the issues that have been identified in relation to the treatment of complex interests.

²⁰⁴ (2005) FLC ¶93-220, 79,642, [42] (emphasis in original).

²⁰⁵ Above n 4, 29 [157].

²⁰⁶ See generally about costs and valuations above 94–5, 99, 108–09.

Furthermore, the Full Court in both *Hickey* and *Coghlan* agreed that a prescribed valuation is not required where no splitting order is sought and in this respect superannuation is no different to other assets. However, Murphy considered that a valuation should be required in every contested case having regard to the statutory regime of valuation.²⁰⁷ Since numerically accumulation interests constitute the majority of interests, any disadvantages that flow from mandating the valuation of superannuation will be limited. Consequently it is recommended that valuations be mandated, including in relation to financial agreements, in order to provide a solution to the uncertainty about the relevance and application of the valuation regime.

4 Additional Regulation of Financial Agreements

In relation to financial agreements the lack of a requirement for superannuation to be valued, even if an agreement incorporates a payment split, promotes uncertainty in relation to the application of the valuation regime and inconsistency compared to court orders.

As well the absence of judicial oversight of financial agreements is relevant to the attainment of fairness for separating couples in relation to treatment of superannuation. The lack of judicial oversight, the lack of a requirement to value superannuation and the absence of a requirement that trustees be accorded procedural fairness where a payment split is agreed in relation to financial agreements all demonstrate a clear softening of the potential of the reforms to deliver fairness and yet another source of fragmentation.

These shortcomings could be addressed by reintroducing judicial oversight of financial agreements in the manner previously required by s 87 agreements.²⁰⁸ Also a requirement that superannuation is valued in every case and that procedural fairness is accorded to trustees in relation to splitting agreements prior to judicial oversight would strengthen the protection of vulnerable parties.

Fehlberg and Behrens considered safeguards in addition to the requirement of parties to obtain legal advice in relation to child support agreements that are no less relevant to agreements about property including superannuation.²⁰⁹ These recommendations included the provision of a cooling off period. A strict requirement of full financial disclosure subject to heavy sanctions for non compliance was also recommended.

5 Address Diminished Adjustments

As discussed the 2008 Evaluation found that the mean share of property including superannuation received by the wife has reduced to 50.3 per cent.²¹⁰ The principles evident from the case analysis may also suggest reduced overall adjustments post reform. However there are many factors and circumstances that influence the extent of adjustments in property settlement proceedings and a critical analysis is beyond the scope of this thesis.²¹¹ Nevertheless, flattened adjustments at step two may demonstrate that despite statements to the contrary the contributions of the homemaker continue to be undervalued.

Also at step three there has been no forceful approach to the depreciation of earning capacity that results from undertaking this valuable role and which crystallises upon separation despite

²⁰⁷ Peter Murphy, 'Superannuation — Recent Unreported Decisions' (Paper presented at the 11th National Family Law Conference, Gold Coast, September 2004) 154.

²⁰⁸ Above 84–5.

²⁰⁹ Above n 15, 427.

²¹⁰ Above n 47, 223

²¹¹ Chief Justice Diana Bryant, above n 22, 45–55.

the fact that the importance of this issue is recognised by ss 75(2)(k) and 90SF(3)(k). These provisions require the courts to consider the extent to which cohabitation has impacted upon the earning capacity of a party. A similar provision should be included to require the extent to which the marriage has affected the ability of a party to accumulate superannuation to be taken into account as a relevant factor although this would not address the issue of the failure to accord these factors sufficient weight.

Altobelli suggested that the legislation could be amended to clarify that the needs of the family, including the children, are relevant factors in property proceedings not merely the needs of the parties and this could encompass the need for accommodation.²¹² Benjamin also agreed that the needs of the children should be relevant.²¹³ Bailey-Harris suggested a more vigorous application of step three and said '[t]here is scope for a much clearer statement on the face of the statute, of the objective of the prospective component in s 79, embodying the essence of principles articulated in reported case law ... on adjustment for disparity in the parties' respective financial positions stemming from the role divisions in marriage.'²¹⁴ An amendment to address these issues has much to recommend it but at this stage appears to be unlikely. It is possible that amendments, perhaps at the start of pt VIIB, to declare the equal significance of the indirect homemaker contribution and the direct financial contribution to superannuation and also to affirm the relevance of and necessity to assess future earning capacity and therefore ability to accumulate superannuation in the future even post splitting order may have unpredictable consequences when variously interpreted across the family law system. Arguably these factors can already be evaluated pursuant to s 75(2) and s 90SF(3) and yet there is arguably insufficient consideration given to non-financial homemaker contributions generally and no robust consideration of future economic factors resulting from undertaking the homemaker role.

Another option is to require the courts to give reasons if step three evaluated in relation to superannuation in a separate list in the event that the adjustment differs from the step three adjustment for non superannuation assets.

6 *Mandate Interest Splitting*

Once a payment splitting order is made, then for many interests, the process of interest splitting is also available which, when implemented, provides a clean break and protects the non-member spouse from risks that may otherwise intervene. However, as previously discussed, interest splitting does not occur pursuant to the family law legislation and it is not available in every case.²¹⁵ Although legislative change to compel interest splitting has been recommended²¹⁶ there are constitutional difficulties. Bourke points out that the marriage, divorce and matrimonial causes powers²¹⁷ do not provide a basis for this type of change which must be implemented under the superannuation regulatory regime.²¹⁸

However, Skinner criticised the fact that not all splitting orders can be implemented by means of interest splitting and pointed out that 'it is women who are most disadvantaged by this

²¹² Altobelli, 'Children's Accommodation Needs ...', above n 73, 12.

²¹³ Benjamin, above n 73, 11.

²¹⁴ Rebecca Bailey-Harris, 'The Role of Maintenance and Property Orders in Redressing Inequality: Reopening the Debate' (1998) 12 *Australian Journal of Family Law* 3, 7–8 (citations omitted).

²¹⁵ Above 73.

²¹⁶ Peter Skinner, 'Superannuation and Family Law — The Forgotten Reforms' (2006) 18(4) *Australian Family Lawyer* 26, 26.

²¹⁷ *Australian Constitution* s 51 (xxi), (xxii).

²¹⁸ Bourke, 'The Fourth Step in Superannuation Orders' (2004) 10 *Current Family Law* 11, 15, 21–2.

failure in policy.²¹⁹ Interest splitting leaves the member spouse and non-member spouse each with their separate interests.²²⁰ These interests can be contributed to and dealt with independently.²²¹ The release of the interest will abide the circumstances of the owner.²²² Hence the importance of actively pursuing change to mandate interest splitting has been stressed.²²³ Skinner recommended that interest splitting be mandated and, although he did not specifically address the constitutional issues and other difficulties, he recommended that legislators and funds be lobbied to achieve this.²²⁴ He also recommended that the Commonwealth and State governments should lead the way by example as well as exert influence.²²⁵

Uniform availability of interest splitting is a desirable goal in the interests of fairness. Otherwise, there can be no clean break and if the member spouse chooses to work for as long as possible then the non-member spouse may be disadvantaged especially if the non-member spouse is older than the member spouse. It is not now compulsory to retire.²²⁶ Also early release of benefits on grounds of hardship or of a compassionate nature is denied to the non-member spouse in this position.²²⁷

However, while many funds are implementing interest splitting changes, others have rejected this course.²²⁸ Others are yet to decide. Skinner noted that '[t]he Policy of allowing trustees to chose whether they create a separate interest has been an abject failure, and has resulted in substantial inequities to the non-member spouse.'²²⁹ It is an issue that should be monitored but is not necessarily straightforward to resolve.

A further difficulty is that at present it is left to lawyers to ascertain whether interest splitting is an option in each particular case, which can be a challenge.²³⁰ Currently the *FL(S)R* require the trustee to advise if interest splitting is an option when a request for information is made.²³¹ However, the Superannuation Information Form does not reflect this requirement and change is recommended.²³² The availability of interest splitting is an important relevant matter when a decision is being made about whether there should be a splitting order or agreement.

7 *Importance of Clear Reasons*

The court is required to give proper and adequate reasons for the exercise of the s 79 discretion which would enable an appellate court to ascertain how the court reached its conclusion.²³³ In the superannuation context, it is arguable that, in particular where the *Coghlan* preferred approach is undertaken, this has become more significant. The Full Court

²¹⁹ Skinner, '... the Forgotten Reforms' above n 216, 26.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid 29.

²²⁶ Commonwealth, 'Simplified Superannuation — Final Decisions' (Outcomes of Consultation, Treasury, 5 September 2006) 4–5. The compulsory payment of benefits to members over the age of 65 years not meeting the work test and compulsory payment to members from age 75 in any event was abolished with effect from 10 May 2006.

²²⁷ Skinner, '... the Forgotten Reforms', above n 216, 29.

²²⁸ Ibid 27.

²²⁹ Ibid 26.

²³⁰ Ibid 27.

²³¹ *FL(S)R* regs 63(2)(aa), 64(2)(aa), 66(2)(aa), 67(2)(aa).

²³² Skinner, '... the Forgotten Reforms' above n 216, 27–8.

²³³ See, eg, *Bennett & Bennett* (1991) FLC ¶92-191, 78,267.

in *Van Ballekom & Kelly*²³⁴ specifically addressed this issue in circumstances where a splitting order was sought but not made and concluded that the court must provide reasons for this course, although extensive reasons are not required.

Because of the additional complexity that the amendments and the case law add to the property settlement process, it is contended that there is a greater need for clear reasons. Indeed the Full Court in *Baxter & Baxter*²³⁵ acknowledged the need for clarity. The degree of uncertainty that has resulted from the treatment of superannuation post reform may increase the width of the discretion and deter appeal. Parkinson, in the context of considering contributions to property, emphasised the importance of clear transparent reasoning in the decisions of the courts and conceptual coherence in the exercise of discretion.²³⁶ Parkinson considered the importance of clear principles when altering property interests ‘based upon a readily ascertainable rationale’.²³⁷ This highlights the importance of clear reasons and which are significant in advancing the intermediate function of the law in indirectly influencing negotiating behaviour.²³⁸

8 *Improve Information Dissemination*

Pre-reform the *1999 Working Paper* highlighted the significance of the low levels of awareness of separating couples about the relevance of superannuation and suggested that both parties and advisors needed to be better informed.²³⁹ The REM considered that the achievement of this element of the policy objectives was one measure of the success of the reforms. The doctrinal analysis does not directly inform this issue. However it is nevertheless an issue which is important to the success and reach of the reforms. Post reform the *2008 Evaluation* predicted that the respondents would have an increased knowledge of their own and their spouse’s superannuation entitlements. The findings confirmed that substantial progress has been made but also suggested that women are still less knowledgeable than men.²⁴⁰ The *2008 Evaluation* concluded that the legislation as well as the obligations it imposes upon trustees to provide information may have contributed to this improvement. Nevertheless, the *2008 Evaluation* concluded that the main reason why a significant number of respondents, namely 20 per cent, had not taken superannuation into account was because they did not know it was relevant.²⁴¹ Thus a significant number of women could be in the same position as before the amendments due to lack of information. Since the commencement of the amendments there has been interagency cooperation in aid of education about superannuation generally and the amendments in particular.²⁴²

The *2008 Evaluation* recommended extending information dissemination to services that might be accessed by separating couples soon after separation for example, via agencies that might have early involvement after the breakdown of a relationship such as the Child Support

²³⁴ (2005) FLC ¶93-233, 79,874 [39].

²³⁵ [2010] FamCAFC 183 [28]–[29] [35] [41]. See, eg, *Clives* (2008) FLC ¶93-385, 82,941 [75].

²³⁶ Parkinson, ‘The Diminishing Significance of Initial Contributions to Property’, above n 159, 30; Parkinson, ‘Quantifying the Homemaker Contribution in Family Property Law’, above n 172, 54–5.

²³⁷ Parkinson, ‘Quantifying the Homemaker Contribution in Family Property Law’, above n 172, 6.

²³⁸ Parkinson, ‘The Diminishing Significance of Initial Contributions to Property’, above n 159, 26.

²³⁹ John Dewar, Grania Sheehan and Jody Hughes, ‘Superannuation and Divorce in Australia (Working Paper No 18, Australian Institute of Family Studies, 1999) 28.

²⁴⁰ *2008 Evaluation*, above n 47, 218.

²⁴¹ *Ibid* 220–1.

²⁴² See, eg, Attorney-General’s Department, Australian Government, *Superannuation Splitting Laws* <http://www.ag.gov.au/FamiliesAndMarriage/Families/SuperSplitting/Pages/default.aspx>. Also the Family Law Courts, Australian Government <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family...>

Agency and Family Relationship Centres.²⁴³ Dissemination of information by Centrelink to assist separating couples is another early intervention option. The importance of the ‘first to know’ agency in ensuring appropriate information dissemination at an early stage has been acknowledged.²⁴⁴ The *2008 Evaluation* recommendation has considerable merit but has not been fully utilised to date.²⁴⁵ Current initiatives, while useful, may not be optimal in providing information at the earliest possible stage. Nevertheless, this is an important issue that warrants ongoing monitoring in order to assess if further intervention is required because as superannuation interests increase in value the ongoing disadvantage to women resulting from this issue could also increase. Knowledge about the respective superannuation entitlements of separating couples specifically as well as the treatment of superannuation generally in family law is critical to aiding negotiating behaviour.

There have been significant developments since the startup time but it might be unrealistic to expect that there will be continued improvement in the prevailing economic environment. Nevertheless facilitating early adequate dissemination of information for the benefit of both men and women to address this significant shortcoming should be comparatively simple and inexpensive. It is particularly important that women do not continue to lag behind in this respect because of the potential for compounding the disadvantage of the gender superannuation gap in the public sphere. The significance of this issue is emphasised in the *2008 Evaluation* thus:

[t]he provision of information to parties about their own and, more importantly, their partner’s superannuation entitlements, is the first step in ensuring that superannuation is properly taken into account on separation and divorce.²⁴⁶

9 *Increased Legal and Related Services*

In addition to greater dissemination of information, increased access to legal and related services could also assist separating couples to properly take superannuation into account when negotiating property settlements and assist in the attainment of the policy objectives of improving access of separating couples to information about superannuation and providing guidance to them about the evaluation of superannuation when negotiating agreements.

(a) *Continuing Neglect of Superannuation?*

The *2008 Evaluation* predicted an improvement upon the previous position that superannuation had frequently not been taken into account at all in financial disputes.²⁴⁷ The *2008 Evaluation* concluded that superannuation is taken into account to a much greater extent than previously, thus enlarging the asset pool.²⁴⁸ This is supported by the case law. Very few entitlements now escape consideration in family law proceedings. But the finding that 20 per cent of respondents did not consider superannuation at all,²⁴⁹ while a significant improvement upon the 1986 *Settling Up* report conclusion that ‘in the majority of cases superannuation

²⁴³ Ibid 226.

²⁴⁴ Fehlberg and Behrens, above n 15, 3, citing Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation: Report of the Family Law Advisory Group* (Commonwealth of Australia, Canberra, 2001).

²⁴⁵ Although links to relevant sites may be available. See, eg, Attorney-General’s Department, Australian Government, <<http://www.familyrelationships.gov.au/SearchPages/SearchPage.aspx?KEYWORD=se...>>.

²⁴⁶ *2008 Evaluation*, above n 47, 225.

²⁴⁷ Ibid 219.

²⁴⁸ Ibid 220–1.

²⁴⁹ Ibid Figure 1.

played no part in the property division',²⁵⁰ is still a significant figure and the *2008 Evaluation* concluded that involvement in the legal system was an important relevant factor.²⁵¹ Ten years on the law has settled and empirical research is needed to assess whether it is now the norm to take superannuation into account.

(b) Adequate Access to Expert Advice?

Furthermore the *2008 Evaluation* concluded that expert valuation advice was not obtained to the extent expected²⁵² and that this result was probably unsurprising because of the low level of court involvement and splitting orders. Parties who are legally represented will generally obtain relevant expert advice in relation to complex entitlements.²⁵³ Since the *2008 Evaluation* concluded that about two thirds of the respondents resolved matters without court order²⁵⁴ failure to obtain proper expert advice, including legal advice, could result in superannuation not being evaluated in an appropriate way if at all.

Moreover the only way to obtain a splitting order or agreement is by complying with pt VIII B. Payment splitting is not possible by informal agreement. Informal written or oral agreements can only deal with superannuation in the previous way, by offsetting it against other assets or waiting until it vests and then sharing it, with all the pre-reform problems and risks that that entails. Therefore it is not surprising that since two thirds of respondents resolved matters without court order, the *2008 Evaluation* found that there was an unexpectedly low level of involvement of the courts, lawyers and other financial experts in the valuation process.²⁵⁵ This may suggest that women are missing out on the benefits of the amendments in a significant number of cases.

Greater information dissemination at an early stage post separation, together with improved access to legal and other expert services, could improve the fair evaluation of superannuation in negotiations about the division of family wealth. The importance of skilled professionals 'who are well attuned to the varying needs of their clients, who are skilled at dispute management, who offer a map through a complex system, who can adjust client expectations to realistic levels and who have a network of referrals to other agencies and services as necessary' has been acknowledged.²⁵⁶

Given the importance of superannuation to Government retirement incomes policy this may not be out of the question. However, although this may be ideal, it is more likely that the cost of greater access to legal and other expert services in the prevailing economic climate may be unaffordable. There have been major budget cuts in recent years which have impacted upon the services that can be offered, for example, by the family law courts²⁵⁷ and have resulted in reduced conciliation services, undertaken by registrars who are family lawyers, in relation to property settlement disputes. It is unlikely that additional funding will be provided to the

²⁵⁰ *Settling Up*, above n 18, 199.

²⁵¹ *2008 Evaluation*, above n 47, 221–2.

²⁵² *Ibid* 219.

²⁵³ See, eg, *BAR & JMR* (2005) FLC ¶93-231; *A & A* [2006] FMCAfam 80; *Trott* (2006) FLC ¶93-263.

²⁵⁴ *2008 Evaluation*, above n 47, 219.

²⁵⁵ *Ibid*.

²⁵⁶ Dewar, 'Is Law Good for Families?', above n 202, 3. See generally Dewar, 'Regulating Families', above n 65, 97.

²⁵⁷ See, eg, Family Court of Australia, 'Annual Report' 2010–11, 14. See generally Fehlberg and Behrens, above n 15, 13–14.

family law courts to extend the current diminished conciliation services to provide pre-filing conciliation services or to increase the existing post-filing services.²⁵⁸

The fiscal constraints have also affected legal aid funding for less wealthy couples. There is limited legal aid funding available for family law matters which is generally reserved for certain disputes about children and is rarely granted for property settlement disputes.²⁵⁹ Legal aid funding shows no sign of increasing.²⁶⁰

Nevertheless there is a view that the involvement of lawyers in disputes after separation will result in quicker, cheaper, safer, more durable agreements in many cases.²⁶¹

(c) *Dispute Resolution?*

Instead, it is perhaps more realistic that the push towards private ordering of family disputes will increase. It is more likely that parties may be required to undertake dispute resolution prior to initiating proceedings about property settlement, as is the case in parenting disputes, a possibility that has been under consideration for some time. For wealthy couples external dispute resolution prior to the commencement of proceedings could be self funded.²⁶² For less wealthy couples it is possible that this could be provided by Family Relationship Centres at the time when separating couples seek assistance in relation to parenting disputes.²⁶³ However funding would be required and Family Relationship Services Australia has also suffered funding cuts for the Family Relationship Centres and other post separation services.²⁶⁴ In any event Fehlberg and Behrens considered that '[i]t is doubtful, however, that Family Relationship Centres will have the capacity and the expertise to provide assistance with financial disputes.'²⁶⁵

There are a variety of different external dispute resolution services available which may or may not involve the provision of legal advice.²⁶⁶ The necessity or otherwise of legal advice has been a contentious issue in relation to dispute resolution about property.²⁶⁷ The requirement of expertise is amplified in relation to formalising property settlements involving superannuation especially where payment splitting orders are sought. The complexity of the treatment of superannuation in family law after separation makes legal advice advisable.

²⁵⁸ Dewar, 'Regulating Families' above n 65, 96 citing Family Court of Australia, *Response of the Family Court of Australia to the Attorney-General's Department Paper on Primary Dispute Resolution Services in Family Law* (Canberra: Family Court of Australia, 1997) xvii about the success of methods of dispute resolution in the Family Court.

²⁵⁹ Legal Services Commission of South Australia, 'Annual Report 2010–11', 8.

²⁶⁰ PricewaterhouseCoopers, 'Legal Aid Funding; Current Challenges and the Opportunities of Cooperative Federalism', above n 115, 2–3.

²⁶¹ Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156, 175–6.

²⁶² See, eg, Federal Magistrates Court of Australia, 'Annual Report 2010–11' 5 about the Brisbane private mediation pilot where parties may be ordered, post filing, to attend external mediation in appropriate cases.

²⁶³ *Family Law Act 1975* (Cth) s 60I generally requires pre-filing dispute resolution to be undertaken in relation to disputes about children.

²⁶⁴ Family Relationship Services Australia, 'Annual Report 2011', 6.

²⁶⁵ Fehlberg and Behrens, above n 15, 556.

²⁶⁶ See generally, Donna Cooper, 'The Family Law Dispute Resolution Spectrum' (2007) 18 *Australian Dispute Resolution Journal* 234.

²⁶⁷ Fehlberg and Behrens, above n 15, 555–64. See generally John Wade, 'Forever Bargaining in the Shadow of the Law —Who Sells Solid Shadows? (Who Advises What, How and When?)' (1998) 12 *Australian Journal of Family Law* 256 for a discussion of the many factors that come into play in the process of resolving family disputes after separation.

Although an informal agreement provides the advantages of privacy and reduced legal costs the disadvantages include lack of finality and enforceability.²⁶⁸ Also in the absence of legal advice an informal agreement that undervalues and underrates superannuation may result in unfair outcomes. It has been observed that separating couples may rely on some forms of superannuation formulae, ‘folk law’ or settlement law which may make marginal reference to legislation and case law.²⁶⁹ Indeed opinions have been expressed about whether there is any value at all in the role of family law courts and lawyers when relationships breakdown.²⁷⁰ On this view non-adversarial alternatives provide the less costly preferable option.²⁷¹

However there is also research which concludes that generally family lawyers’ work is considered to be positive²⁷² and settlement outcomes for women are better when agreements are formalised with the assistance of lawyers and the courts.²⁷³ Although the decided cases represent a very small proportion of financial disputes finalised in the family law system and an even smaller percentage when including informal agreements ‘they nevertheless have disproportionate importance as they provide sign posts for those many thousands of couples who negotiate to the best of their – or their lawyer’s – ability.’²⁷⁴ Nonetheless *Coghlan* arguably fails, in relation to the intermediate function of the law, to provide clear guidance to separated couples negotiating agreement about their property settlement disputes.

10 Summary — Ancillary Improvements

The implementation of the range of ancillary improvements outlined would promote the realisation of the direct regulatory function of the superannuation reform and consequentially the intermediate function of indirectly influencing negotiating behaviour. These improvements would also assist the fulfilment of the elements of the policy objectives outlined in the REM.

C Future Monitoring and Review

The reforms have introduced a radical and complex legislative regime in relation to the treatment of superannuation in property settlement proceedings. The doctrinal analysis focusses on the interpretation of this major reform by the courts and demonstrates uncertainty and inconsistency in the developing jurisprudence which arguably impedes the extent of the impact upon the direct regulatory function and the intermediate function of the law. Since a very small proportion of disputes about property proceed to trial, and they may not be representative of the average separating couple, it may assist the assessment of future options for reform that optimise fair outcomes to consider the treatment of superannuation in property settlements in the broader empirical context post reform.²⁷⁵

The *1999 Working Paper* considered that after the superannuation reforms there should be monitoring of the operation of the reforms and the outcomes for women ‘at a variety of levels

²⁶⁸ Fehlberg and Behrens, above n 15, 556–7.

²⁶⁹ See generally Wade, above n 267, 256–65 about the different forms of guidance that inform negotiation or dispute resolution.

²⁷⁰ Dewar, *Regulating Families*, above n 65, 90, 93–4; See generally Wade, above n 267.

²⁷¹ Dewar, *Regulating Families*, above n 65, 94.

²⁷² *Ibid*, 90, citing M McLean, J Eekelaar and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Oxford:Hart, 2000); R Hunter, *Legal Services in Family Law* (Sydney:Law Foundation of NSW, 2000). See also Hunter, above n 261, 175–6.

²⁷³ McDonald, *Settling Up*, above n 18, 242–5; Dewar, Sheehan and Hughes, *1999 Working Paper*, above n 239, 20–5.

²⁷⁴ Bordow and Harrison, above n 80, 276; John Dewar, ‘Is Law Good for Families?’ above n 202.

²⁷⁵ Fehlberg and Behrens, above n 15, 458–9.

within the family law ‘system’: of judicial practice, of professional advice giving and of private agreements.²⁷⁶ The REM stated that a review of the operation of the regime after three years should be undertaken to determine whether changes are required.²⁷⁷ The *2008 Evaluation* also recommended certain ongoing monitoring and review.²⁷⁸ Such a review must necessarily go beyond the doctrinal approach, be empirical and preferably longitudinal in approach. There are a number of specific issues that will benefit from ongoing monitoring and review of this nature namely:

- whether women continue to have less superannuation than men;²⁷⁹
- whether a significant proportion of couples continue to overlook superannuation when resolving their financial issues informally after separation;²⁸⁰
- the impact of information dissemination and access to specialist advice upon whether or not, and how, superannuation is taken into account;²⁸¹
- the growth of superannuation as an asset and the impact that this growth has upon the four step approach;²⁸²
- the treatment of the matrimonial home as superannuation increases in value and the effect of this growth, if any, upon the adjustments made in favour of women;
- the impact of the implementation of the reforms upon adjustment levels at steps two and three and overall;²⁸³
- the development of academic scholarship about the regime and case law in relation to valuation;
- the extent of availability of interest splitting in relation to defined benefit interests;
- the relationship between the retention of the home and splitting orders;
- the extent to which separating couples, whose property settlement disputes are not decided by the courts, employ a formulaic approach to the evaluation of superannuation and the reasons why;
- the quantum and nature of adjustments made that enable the mitigation of poverty or other adverse financial events for separated and divorced women and men over time.

A study about the economic consequences of separation, comparable to the study by the Institute of Family Studies which resulted in the reports *Settling Up* and *Settling Down* based upon a national representative survey of separated and divorced couples,²⁸⁴ is recommended. This type of review of the economic and social consequences of separation, including a current statistical analysis of poverty after separation as well as the effect of the legal processes, will assist decisions about future change. It could aid an understanding of the impact of the reforms on post separation poverty generally as well as on provision for retirement specifically. It could determine whether there are patterns identifiable across different settlement pathways. Longitudinal data could help to determine the extent to which adjustments mitigate financial disadvantage for men and women post separation. Also the

²⁷⁶ Above n 239, 32–3.

²⁷⁷ REM, above n 4, 13.

²⁷⁸ Above n 47, 228.

²⁷⁹ Ibid, 217.

²⁸⁰ Ibid 220, 225.

²⁸¹ Ibid 218–19, 225.

²⁸² Ibid 227.

²⁸³ Ibid.

²⁸⁴ *Settling Up*, above n 18; Kathleen Funder, Margaret Harrison and Ruth Weston, ‘Settling Down: Pathways of Parents After Divorce’ (Monograph No 13, Australian Institute of Family Studies, 1993) (*‘Settling Down’*).

extent of the impact of the valuation regime in relation to formal and informal settlements could be evaluated.

Such a study would overcome the limitation of the present doctrinal analysis, which concentrates on settlements resulting from contested proceedings, and samples both informal settlements and settlements reached with differing degrees of involvement with the legal system. Further, the findings from such empirical research could generalise to patterns evident in the population.

VIII PARTING COMMENTS

The REM described the three main factors leading to the reforms as being the growth in coverage and increase in value of superannuation; the absence of legislative guidance about the treatment of superannuation in the exercise of the discretion to alter interests in property and the limited ability to make orders about superannuation.²⁸⁵ The REM noted that the impact of these difficulties fell mainly upon the non-member spouse especially women out of the workforce in the home maker parent role.

In relation to the first factor recent studies confirm that superannuation continues to extend in coverage and increase in value but that the gender wage gap and gender superannuation gap also continue. Consequently women continue to accumulate less superannuation than men underscoring the importance of its treatment after separation.

In relation to the third factor the discretionary approach has been retained and a rule based approach rejected both in relation to property law generally and in relation to superannuation specifically. The complex suite of reforms introduces a regime enabling binding orders about superannuation to be made including orders splitting superannuation.

However the success of the reforms as implemented by the courts has been impeded by a failure to address the second factor, namely, the absence of legislative guidance about the treatment of superannuation in the exercise of the discretion to alter interests in property, which continues. Legislative ambiguity about the relevance of pt VIII B where no splitting order is sought has lead to complex decision making. The doctrinal analysis demonstrates that the developing principles result in 'continuing relative disadvantage'²⁸⁶ to women.

In 1994 Bordow and Harrison concluded that the inconsistent treatment of superannuation compared to other assets results in an unfair distribution of marital assets upon separation to the detriment of principally women.²⁸⁷ While the superannuation regime cannot provide a panacea for the poverty of women after relationship breakdown and in retirement, the changes do constitute a significant improvement on the previous law although not to the extent anticipated. Post reform superannuation is still treated differently to other assets.

It has been contended that the discretionary approach remains the ideal approach to the evaluation of superannuation in family law and would facilitate a result of substantive equality. However the doctrinal analysis demonstrates outcomes that fall short of these

²⁸⁵ Above n 4, 4.

²⁸⁶ Danny Sandor, 'To Have and to Hold Till the Super Do We Part — Women and Marital Separation: Superannuation Implications' (Paper presented at the Economic Policy Summit on Women & Retirement Savings, University of New South Wales, 7 September 2001) 15.

²⁸⁷ Bordow and Harrison, above n 80, 269–70.

expectations. Moreover it may be arguable that not only has there been a failure to achieve substantive equality but also formal equality in the treatment of superannuation post reform.

Government policy changes in relation to shared parenting, return to work, child support and generally requiring people to, as far as possible, make their own arrangements for self support prior to and after retirement as well as provide support for their children with reduced reliance on the public purse cannot alter one important fact. It is women who bear children. Families continue to choose to have working fathers who generally have better income earning capacities for many reasons and mothers who undertake the bulk of the domestic and child rearing duties and supplement the family income with part time, casual or lower paid work, the type of work that can be accommodated within the parental and homemaker role. This does impact upon income earning capacity and the ability to accumulate sufficient superannuation for retirement.²⁸⁸ Furthermore, the past conduct of a relationship in this way impacts significantly upon the ability of each of the parties to recover from separation and is detrimental in the case of the homemaker. The depreciation of earning capacity that results from such an arrangement is problematical upon separation²⁸⁹ and is unlikely to change in the foreseeable future. Thus it remains important that this is not an undervalued role in the context of the breakdown of a relationship.

At the time of separation the three main sources of wealth are generally the family home, earning capacity and superannuation none of which should be undervalued and two of which are prospective in nature. There is a strong justification in the interests of fairness for endorsing the retention of the family home by the homemaker with a diminished capacity to recover from separation and a reduced ability to accrue superannuation in the future. This would leave the other party with a superior earning capacity, more superannuation and a greater capacity both to acquire current assets and accrue further superannuation in the future. However, the active promotion of substantive equality in this way thereby redistributing the economic hardship that crystallises upon separation has yet to occur.

Belatedly the amendments have instigated substantial advances but the ongoing disadvantage in the public sphere coupled with the disparate treatment of superannuation in the private sphere maintains a 'continuing relative disadvantage'. As noted in 1986, in the seminal study compiled by the Australian Institute of Family Studies *Settling Up* it was noted that '[t]he best financial adjustment which most women can make once their marriages end is to find a new partner.'²⁹⁰ In the context of superannuation, the best way forward for women after relationship breakdown may still be repartnering despite the improvements in both the public and private spheres²⁹¹ which may not be desirable or feasible.²⁹² However the removal of the superannuation gap in the public sphere in the future remains an uncertainty and may never eventuate. As a consequence the current 'continuing relative disadvantage' in the private sphere remains a matter of significant importance and it has been contended that fairness is best achieved by the retention of the discretionary approach together with a range of improvements.

²⁸⁸ Above 236–7.

²⁸⁹ Bruce Smyth and Ruth Weston, 'Financial Living Standards after Divorce: a Recent Snapshot' (Research Paper No 23, Australian Institute of Family Studies, December 2000), 2–4, 19.

²⁹⁰ *Settling Up*, above n 18, 149.

²⁹¹ *Settling Down*, above n 284, 237–8; Smyth and Weston, above n 289, 19; De Vaus et al, above n 18, 32; Rosenman and Scott, above n 18, 292.

²⁹² *Settling Up*, above n 18, 149.

In response to the question ‘Is law good for families?’ Dewar recognised that current policy favours legal resolution of disputes as secondary to alternative forms of dispute resolution²⁹³ and the REM clearly acknowledged this in relation to the superannuation reforms.²⁹⁴ Notwithstanding contrary views and the lack of an empirical basis the view of Dewar that clear law also has an important role to play in facilitating agreement while at the same time providing a level playing field and protection for the vulnerable is preferred.²⁹⁵ The fact that improvement needed is difficult to achieve through reform is not a reason to abstain from the challenge.²⁹⁶ After all fairness is the universally accepted aim of laws about the distribution of property after separation.²⁹⁷

²⁹³ Dewar, ‘Is Law Good for Families?’, above n 202, 2.

²⁹⁴ Above n 4, 6.

²⁹⁵ See generally Dewar, ‘Is Law Good for Families?’, above n 202.

²⁹⁶ *Ibid* 9.

²⁹⁷ Garrison, ‘What’s Fair in Divorce Property Distribution: Cross-national Perspectives from Survey Evidence’, above 170, 58.

APPENDICES

APPENDIX ONE

CONTRIBUTIONS ADJUSTMENTS TO THE HUSBAND PRIOR TO COGHLAN — SUPERANNUATION IN A SEPARATE LIST

CASE CITATION	S 4(1) ADJUSTMENTS	SUPERANNUATION ADJUSTMENTS
<i>Levick & Levick</i> (2006) FLC ¶93-254, 80,318 [38] [46]	51 per cent	51 per cent
<i>Cahill & Cahill</i> (2006) FLC ¶93-253, 80,302–4 [62] [68], 80,303 [72]–[74], 80,304 [81]–[87]	50 per cent marital s 4(1) assets; 90 per cent post separation s 4(1) assets	60 per cent husband's Comsuper (CSS); 100 per cent husband's DFRDB pension; 90 per cent post separation superannuation

APPENDIX TWO

**CONTRIBUTIONS ADJUSTMENTS PRIOR TO COGHLAN: SUPERANNUATION
IN THE S 4(1) LIST**

(1) EQUAL CONTRIBUTIONS

CASE CITATION
<i>Spagnardi & Spagnardi</i> [2003] FamCA 162 (27 February 2003) [57]
<i>H & H</i> (2003) FLC ¶93-168, 78,707 [66]
<i>Gabriel & Counsel</i> [2003] FamCA 1270 (28 July 2003) [181]
<i>McCheyne & McCheyne</i> [2003] FMCAfam 19 (29 August 2003) [22]
<i>McGrath & McGrath</i> [2003] FamCA 1061 [107] [125]
<i>OSF & OJK</i> (2004) FLC ¶93-191, 79,202 [55], 79,204 [69]
<i>Weston & Weston</i> [2004] FamCA 453 (27 May 2004) [27] [89]
<i>Hezemans & Hezemans</i> [2004] FamCA 453 (10 September 2004) [32]
<i>Ranasinghe & Jones</i> [2005] FamCA 213 (30 March 2005) [56]

**(2) EQUAL CONTRIBUTIONS (SOME SUPERANNUATION EXCLUDED & CONSIDERED AT
STEP THREE)**

CASE CITATION	OWNERSHIP OF EXCLUDED SUPERANNUATION
<i>Gardner & Gardner</i> [2003] FamCA 249 (28 March 2003) [27] [36] [37] [100] [102] [120]	Husband’s small superannuation was dealt with in the s 4(1) list; husband’s Comsuper was dealt with in a separate list and contributions assessed as equal; husband’s superannuation wholly acquired post separation only considered at step three
<i>Ennis & Ennis</i> [2003] FamCA 1565 (19 December 2003) [44] [92] [94] [106]	Husband’s pension in the payment phase only considered at step three; parties’ other superannuation in the s 4(1) list
<i>Radhakrishnan & Radhakrishnan</i> [2003] FamCA 1360 (19 December 2003) [68]–[70] [74] [133] [139]	Wife’s pension in the payment phase only considered at step three; parties’ other superannuation in the s 4(1) list

(3) ADJUSTMENTS IN FAVOUR OF THE HUSBAND

CASE CITATION	ADJUSTMENT
<i>Hobbs & Hobbs</i> [2003] FamCA 1490 (19 March 2003) [32]–[34] [48]	57.5 per cent
<i>Davies & Davies</i> [2003] FamCA 410 (28 May 2003) [186] [212]	60 per cent
<i>Lambrinidis & Koulakis</i> [2004] FMCAfam 3 (6 February 2004) [93] [103]	70 per cent
<i>Harling & Lever</i> [2004] FamCA 361 (28 April 2004) [10] [43]–[46] [56]	75 per cent
<i>Stapleton & Stapleton</i> [2004] FamCA 401 (11 May 2004) [26] [64]	62.5 per cent
<i>Winwood-Smith & Duffy</i> [2005] FMCAfam 171 (21 February 2005) [30] [75]	52 per cent

(4) ADJUSTMENTS IN FAVOUR OF THE WIFE

CASE CITATION	ADJUSTMENT
<i>Cameron & Cameron</i> [2004] FamCA FamCA 819 (3 September 2004) [67] [69]	52 per cent
<i>Weir & Weir</i> [2005] Fam CA 96 (28 February 2005) [36] [62]	55 per cent

APPENDIX THREE

CONTRIBUTIONS ADJUSTMENTS AFTER COGHLAN: SUPERANNUATION IN
THE S 4(1) LIST

CASE CITATION	ADJUSTMENT TO THE WIFE
<i>Ilett & Ilett</i> (2005) FLC ¶93-221, 79,666 [26] [39] (appeal from a decision of Bell J)	35 per cent
<i>HRDW & HSJL</i> [2005] FamCA 676 (11 July 2005) [2] [15] [49] (appeal from a decision of FM Baumann)	55 per cent
<i>Hobbins & Hobbins</i> [2005] FamCA 745 (5 August 2005) [20] [25] [60] (appeal from a decision of Stevenson J)	Equal
<i>Aktova & Aktov</i> [2005] FamCA 735 (8 August 2005) [35] [54]	55 per cent
<i>Mahoney & Mahoney</i> [2005] FMCAfam 439 (25 August 2005) [19] [106]	42.5 per cent

APPENDIX FOUR

CONTRIBUTIONS ADJUSTMENTS AFTER *COGHLAN*: SUPERANNUATION IN A SEPARATE LIST OR LISTS

(1) SIMILAR ADJUSTMENTS IN RESPECT OF EACH LIST

CASE CITATION	ADJUSTMENT
<i>McCulough & McCulough</i> (2006) FLC ¶93-282, 80,822 [1] [11]–[12], 80,825–6 [30] [32], 80,829 [67]–[69]	Wife — 45 per cent of each list
<i>Mowbray & Mowbray</i> [2007] FamCA 167 (9 March 2007) [1]–[4] [5] [29]	Wife — 45 per cent of each list
<i>Warner & Warner</i> [2008] FamCAFC 156 (23 October 2008) [13]–[15]	Equal in respect of each list

(2) COMPARATIVE ADJUSTMENTS TO THE WIFE IN RESPECT OF EACH LIST

CASE CITATION	S 4(1) ADJUSTMENTS	SUPERANNUATION ADJUSTMENTS
<i>Postans & Postans</i> [2005] FMCAfam 576 (11 November 2005) [75] [111]–[114]	50 per cent	35 per cent
<i>Tran & Havier</i> [2005] FamCA 1121 (25 November 2005) [92]–[95] [107]	47.5 per cent	26 per cent husband’s and wife’s superannuation (although not without ambiguity)
<i>Koskinas & Vasseleu</i> [2005] FamCA 1207 (16 December 2005) [109]–[110] [138] [145]	50 per cent	45 per cent of husband’s and wife’s superannuation
<i>C & C [No 2]</i> [2005] FamCA 1223 (19 December 2005) [19] [38] [43]	75 per cent	25 per cent of husband’s and wife’s superannuation
<i>McKinnon & McKinnon</i> (2005) FLC ¶93-242, 79,998 [4], 79,999 [7] [15], 80,000 [20]–[21], 80,001 [24]	15.5 per cent (including significant superannuation)	Nil — husband’s pre-cohabitation pension in the payment phase

<i>M & M</i> (2006) FLC ¶93-281, 80,819–20 [131]–[137]	52.5 per cent	14.6 per cent of the husband’s pension in the payment phase (although equal contribution to the date of separation acknowledged)
<i>Jarman & Jarman</i> (2006) FLC ¶93-289, 80,945 [13], 80,946 [17] [19] [21], 80,948 [27] [31], 80,950–2 [51]–[57]	59 per cent	40 per cent of husband’s and wife’s superannuation
<i>Cleary & Cleary</i> [2007] FamCA 999 (31 August 2007) [27] [29] [63]–[67] [96]–[100]	25 per cent former matrimonial home; 75 per cent wife’s motor vehicle; equal contributions other personalty	approximately 15 per cent of husband’s and wife’s superannuation including husband’s pension
<i>Steele & Stanley</i> [2008] FamCA 83 (8 February 2008) [100] [167] [176]–[177] [188]	75 per cent (including some superannuation)	33 per cent of husband’s pension in the payment phase
<i>Jasper & Jasper</i> [2009] FMCAfam 250 (6 February 2009) [47] [57] [63]	60 per cent	50 per cent husband’s and wife’s superannuation
<i>Guthrie & Rushton</i> [2009] FamCA 1144 (27 November 2009) [136]–[137] [153]	42.5 per cent (including some superannuation)	30 per cent husband’s pension in the growth phase
<i>Hayton & Bendle</i> [2010] FamCA 592 (16 July 2010) [156] [170]	50 per cent (including some superannuation)	15 per cent husband’s pension in the growth phase

(3) EXCEPTIONS TO THE GENERALLY LESSER CONTRIBUTIONS ADJUSTMENTS TO THE WIFE TO SUPERANNUATION COMPARED TO S 4(1) PROPERTY

CASE CITATION	S 4(1) ADJUSTMENTS	SUPERANNUATION ADJUSTMENTS
<i>B & B</i> [2005] FamCA 624 (15 July 2005) [41] [46] [60]	52 per cent	100 per cent wife’s pre cohabitation pension in the payment phase; 45 per cent husband’s superannuation
<i>Reichstein & Reichstein</i> [2006] FamCA 1422 (29 November 2006) [139] [148]	20 per cent	40 per cent husband’s and wife’s superannuation

(4) ADDED COMPLEXITY: MULTIPLE LISTS —ADJUSTMENTS TO WIFE

CASE CITATION	S 4(1) ADJUSTMENTS	SUPERANNUATION ADJUSTMENTS
<i>Trott & Trott</i> (2006) FLC ¶93-263, 80,460 [90], 80,466 [148], 80,469 [172]	37.5 per cent	15 per cent husband’s category one interest; 40 per cent husband’s category two interest
<i>Treloar & Treloar</i> [2007] FamCA 1127 (16 August 2007) [234] [235]–[236] [242]	47.5 per cent	15 per cent husband’s pension in the payment phase; 50 per cent husband’s and wife’s superannuation
<i>Cleary & Cleary</i> [2007] FamCA 999 (31 August 2007) [65]–[67] [100]	75 per cent wife’s car; equal other personalty; 25 per cent balance of s 4(1) property	15 per cent
<i>Clives & Clives</i> (2008) FLC ¶93-385, 82,944–5 [98] [105] [109]	40 per cent	50 per cent of the wife’s superannuation; 38 per cent of the husband’s superannuation

(5) ADDED COMPLEXITY: EXAMPLES — CONTRIBUTIONS ASSESSED FOR DIFFERENT PERIODS

CASE CITATION	ADJUSTMENTS FOR DIFFERENT PERIODS
<i>Ilett & Ilett</i> (2005) FLC ¶93-221, 79,666 [39]	Equal contributions single list at date of separation; 65 per cent to husband at trial
<i>A & A</i> [2006] FMCAfam 80 (28 February 2006) [63] [101] [120] [123] [127] 138]	Equal contributions to s 4(1) list; equal contributions to superannuation at separation; 60 per cent contributions adjustment to husband as at trial
<i>O’Reilly & Renoir</i> [2007] FamCA (20 July 2007) [54] [56] [75] [77] [102]–[105]	Endorsed contributions assessed for different periods.

APPENDIX FIVE

PENSIONS IN THE PAYMENT PHASE: CONTRIBUTIONS ADJUSTMENT TO THE NON-MEMBER SPOUSE AFTER *COGHLAN*

CASE CITATION	ADJUSTMENTS
<i>B & B</i> [2005] FamCA 624 (15 July 2005) [41]	Husband — Nil (pre cohabitation pension in the payment phase of the wife)
<i>McKinnon & McKinnon</i> (2005) FLC ¶93-242, 79,998–9 [6] [7]	Wife — Nil (pre cohabitation pension in the payment phase of the husband)
<i>C & C [No 2]</i> [2005] FamCA 1223 (19 December 2005) [19] [43]	Wife — 25 per cent (of all superannuation including husband’s pension in the payment phase, husband’s lump sum and wife’s interest in the growth phase)
<i>Trott & Trott</i> (2006) FLC ¶93-263, 80,466 [148], 80,469 [172]	Wife — 15 per cent (compared to 40 per cent of the husband’s interest in the growth phase)
<i>M & M</i> (2006) FLC ¶93-281, 80,820 [134]–[139]	Wife — 14.6 per cent (although equal contribution acknowledged)
<i>Jarman & Jarman</i> (2006) FLC ¶93-289, 80,951 [17] [57]	Wife — 40 per cent of all husband’s and wife’s superannuation mainly comprising the husband’s pension in the payment phase
<i>Mowbray & Mowbray</i> [2007] FamCA 167 (9 March 2007) [2] [3] [4] [29]	Wife — 45 per cent
<i>Treloar & Treloar</i> [2007] FamCA 1127 (16 August 2007) [235]–[236] [242]	Wife —15 per cent (compared to 50 per cent of the combined accumulation interests of the husband and wife)
<i>Cohen & Cohen</i> [2008] FamCAFC 54 (5 May 2008) [47]	Wife — Nil (pre cohabitation pension in the payment phase of the husband)
<i>Edwards & Edwards</i> (2009) FLC ¶93-409, 83,570 [78] [80], 83,572–5 [94]–[129]	Wife — equal contribution to husband’s pension in the payment phase acknowledged as at separation but ultimately 12.6 per cent adjustment at first instance upheld

APPENDIX SIX

STEP THREE AFTER THE AMENDMENTS AND PRIOR TO *COGHLAN*:

(1) STEP THREE ADJUSTMENTS MADE IN RESPECT OF S 4(1) PROPERTY AND SUPERANNUATION COMBINED

CASE CITATION	ADJUSTMENT
<i>Spagnardi & Spagnardi</i> [2003] FamCA 162 (27 February 2003) [65]	Nil
<i>Hobbs & Hobbs</i> [2003] FamCA 1490 (19 March 2003) [58]	Wife — 7.5 per cent
<i>H & H</i> (2003) FLC ¶93-168, 78,710 [81]	Wife — 15 per cent
<i>Davies & Davies</i> [2003] FamCA 410 (28 May 2003) [229]	Wife — 5 per cent
<i>McCheyne & McCheyne</i> [2003] FMCAfam 19 (29 August 2003) [27]	Wife — 5 per cent
<i>McGrath & McGrath</i> [2003] FamCA 1061 (23 October 2003) [132]	Husband — 5 per cent
<i>Lambrinidis & Koulakis</i> [2004] FMCAfam 3 (6 February 2004) [111]	Wife — 25 per cent
<i>OSF & OJK</i> (2004) FLC ¶93-191, 79,206 [88]	Wife — 10 per cent
<i>Harling & Lever</i> [2004] FamCA 36 (28 April 2004) [57]	Wife — 15 per cent
<i>Stapleton & Stapleton</i> [2004] FamCA 401 (11 May 2004) [106]	Wife — approximately 21 per cent
<i>Weston & Weston</i> [2004] FamCA 453 (27 May 2004) [130]	Wife — 15 per cent
<i>Cameron & Cameron</i> [2004] FamCA 819 (3 September 2004) [73]	Wife — 10 per cent
<i>Winwood-Smith & Duffy</i> [2005] FMCAfam 171 (21 February 2005) [88]	Wife — 17 per cent
<i>Weir & Weir</i> [2005] FamCA 96 (28 February 2005) [88]	Wife — 20 per cent
<i>Ranasinghe & Jones</i> [2005] FamCA 213 (30 March 2005) [67]	Wife — 10 per cent

(2) STEP THREE ADJUSTMENTS MADE IN RESPECT OF S 4(1) PROPERTY ONLY

CASE CITATION	ADJUSTMENT
<i>Levick & Levick</i> (2006) FLC ¶93-254, 80, 320 [54]	Wife — 10 per cent
<i>Hickson & Hickson</i> [2003] FamCA 1091 (27 February 2003) [116]	Wife — 20 per cent
<i>Gardner & Gardner</i> [2003] FamCA 249 (28 March 2003) [118]	Wife — 20 per cent
<i>Gabriel & Counsel</i> [2003] FamCA 1270 (28 July 2003) [208]	Wife — 10 per cent
<i>Radhakrishnan & Radhakrishnan</i> [2003] FamCA 1360 (19 December 2003) [144]	Husband — 12.5 per cent
<i>Ennis & Ennis</i> [2003] FamCA 1565 (19 December 2003) [106]	Wife — 10 per cent

APPENDIX SEVEN

STEP THREE ADJUSTMENTS AFTER *COGHLAN*: SUPERANNUATION IN THE S 4(1) LIST

CASE CITATION	ADJUSTMENT	NET VALUE ASSET POOL
<i>Ilett & Ilett</i> (2005) FLC ¶93-221 79,665-6 [26] [40]	Wife — 10 per cent	\$778 500
<i>HRDW & HSJL</i> [2005] FamCA 676 (11 July 2005) [20]-[22] [49]-[50] [54]	Husband — 22.5 per cent	\$439 719
<i>Hobbins & Hobbins</i> [2005] FamCA 734 (5 August 2005) [20] [79]-[81]	Wife — four to five per cent	\$94 600
<i>Aktova & Aktov</i> [2005] FamCA 735 (8 August 2005) [35] [54] [60]	Wife — 11 per cent	\$414 165
<i>Mahoney & Mahoney</i> [2005] FMCAfam 439 (25 August 2005) [19] [138]-[140]	Wife — 12.5 per cent	\$491 100

APPENDIX EIGHT

**STEP THREE AND THE COGHLAN PREFERRED APPROACH:
SUPERANNUATION IN A SEPARATE LIST — SEPARATE ADJUSTMENTS IN
RELATION TO EACH LIST**

CASE CITATION	S 4(1) ADJUSTMENT	SUPERANNUATION ADJUSTMENT	SPLITTING ORDER?
<i>B & B</i> [2005] FamCA 624 (15 July 2005) [46] [50] [60] [71] [72]	Wife — 5 per cent	Husband — 25 per cent of his superannuation; nil adjustment in respect of the wife’s pre marital pension	Nil splitting order
<i>Treloar & Treloar</i> [2007] FamCA 1127 (16 August 2007) [262] [263]	Husband — 2.5 per cent	Husband — 2.5 per cent of the husband’s pension; nil adjustment of husband’s and wife’s accumulation interests	Splitting order of 12.5 per cent of the pension to the wife
<i>Jasper & Jasper</i> [2009] FMCAfam 250 (6 February 2009) [74]	Wife — 5 per cent	Wife — 5 per cent adjustment of all superannuation	Splitting order to the husband

APPENDIX NINE

**STEP THREE AND THE COGHLAN PREFERRED APPROACH:
SUPERANNUATION IN A SEPARATE LIST — STEP THREE ADJUSTMENT
ONLY IN RELATION TO THE S 4(1) LIST**

CASE CITATION	S 4(1) ADJUSTMENT	SPLITTING ORDER?
<i>Tran & Havier</i> [2005] FamCA 1121 (25 November 2005) [72] [94] [109]	Wife — 12.5 per cent	Nil splitting order
<i>Koskinas & Vasseleu</i> [2005] FamCA 1207 (16 December 2005) [149] [173] [177]	Wife — 2.5 per cent	Splitting order to wife based on contributions to superannuation
<i>McKinnon & McKinnon</i> (2005) ¶93-242, 80,001 [29]	Wife — 10 per cent	Nil splitting order
<i>A & A</i> [2006] FMCAfam 80 (28 February 2006) [127] [166]–[167] [170]	Wife — 17 per cent	Splitting order to wife based on contributions to superannuation
<i>Head & Head</i> [2006] FamCA 551 (20 June 2006) [50] [53] [64] [65]	Wife — 10 per cent	Splitting order to wife based on equal division of superannuation
<i>McCulough & McCulough</i> (2006) FLC ¶93-282, 80,829–31 [70] [74] [77] [78]	Wife — 22.5 per cent	Splitting order — wife receives approximately 23.5 per cent of all superannuation
<i>Jarman & Jarman</i> (2006) FLC ¶93-289, 80,948–9 [27] [37] [40] [44]	Wife — 23 per cent	Nil splitting order
<i>Cleary & Cleary</i> [2007] FamCA 999 (31 August 2007) [108]	Wife — 10 per cent	Spitting order — wife receives approximately 15 per cent of all superannuation
<i>Steele & Stanley</i> [2008] FamCA 83 (8 February 2008) Order 2 [176] [188] [212]–[213]	Wife — 2 per cent	Splitting order to wife on based on contributions to superannuation

<i>Warner & Warner</i> [2008] FamCAFC 156 (23 October 2008) [18]	Wife — 15 per cent	Nil splitting order
<i>Clives & Clives</i> (2008) FLC ¶93-385, 82,844-6[100] [108] [110]	Wife — 15 per cent	Splitting order — wife receives approximately 40 per cent of all superannuation

APPENDIX TEN

**STEP THREE AND THE COGHLAN PREFERRED APPROACH:
SUPERANNUATION IN A SEPARATE LIST — STEP THREE ASSESSED
OVERALL AND ANY ADJUSTMENT FOR VALUE ONLY**

CASE CITATION	OVERALL ADJUSTMENT
<i>Postans & Postans</i> [2005] FMCAfam 576 (11 November 2005) [115]–[150]	Step three assessed overall; nil adjustment
<i>Trott & Trott</i> (2006) FLC ¶93-263, 80,474–8	Adjustment to the wife of \$94 354 — approximately 4 per cent of the total of s 4(1) property and superannuation
<i>Guthrie & Rushton</i> [2009] FamCA 1144 (27 November 2009) [165] [193]	Adjustment to the wife of \$200 000 — approximately 5 per cent of the total of s 4(1) property and superannuation
<i>Hayton & Bendle</i> [2010] FamCA 592 (16 July 2010) [198]–[200]	Adjustment to the wife of \$300 000 — approximately 7 percent of the total of s 4(1) property and superannuation

APPENDIX ELEVEN

IMPACT OF STEP FOUR ORDERS: APPROXIMATE OVERALL ADJUSTMENTS TO THE WIFE

(1) 0–10 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
POST COGHLAN				
<i>Cohen & Cohen</i> [2008] FamCAFC 54 (5 May 2008) Order 1 [6]	2.7 per cent (7.5 per cent if husband’s pre cohabitation pension in the payment phase excluded)	Husband had a pre cohabitation pension in the payment phase	Nil splitting order	Husband retained pre cohabitation matrimonial home

(2) 11–20 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
POST COGHLAN				
<i>McKinnon & McKinnon</i> (2005) FLC ¶93-242, 79,998 [4], 80,002 [31]–[32]	18 per cent (25–26 per cent if husband’s pre cohabitation pension in the payment phase excluded)	Husband had a pre cohabitation pension in the payment phase	Nil splitting order	Husband retained the matrimonial home
<i>Cleary & Cleary</i> [2007] FamCA 999 (31 August 2007)	17–18 per cent	Husband about to receive a pension in the payment phase	Splitting order to the wife of non pension superannuation	Husband retained the matrimonial home

(3) 21–30 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
PRE COGHLAN				
<i>Jarman & Jarman</i> (2006) FLC ¶93-289 (judgment delivered 20 June 2005)	29 per cent	Husband had a pension in the payment phase	Nil splitting order	Wife retained the matrimonial home
POST COGHLAN				
<i>Trott & Trott</i> (2006) FLC ¶93-263, 80,478 [252]	28–29 per cent	Husband had a pension in the payment phase	Splitting order to the wife of pension	All real estate (no matrimonial home) sold or to be sold
<i>M & M</i> (2006) FLC ¶93-281	26–27 per cent	Husband had a pension in the payment phase	Nil splitting order	Wife retained matrimonial home
<i>Reichstein & Reichstein</i> [2006] FamCA 1422 (29 November 2006)	30 per cent	Nil pension in the payment phase	Splitting order to the wife	Husband retained the matrimonial home; wife retained other real estate
<i>Treloar & Treloar</i> [2007] FamCA 1127 (16 August 2007) orders 14, 19, 20 [206.2]	26 per cent	Husband had a pension in the payment phase	Splitting order to the wife of pension	Husband retained the matrimonial home
<i>Lopez & Hagarty</i> [2007] FMCAfam 908 (6 November 2007) [126]–[127] [158] [164]	23–24 per cent	Nil pension in the payment phase	Nil splitting order (declined by wife)	Husband retained the matrimonial home

(4) 31–40 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
PRE COGHLAN				
<i>Cahill & Cahill</i> (2006) FLC ¶93-253, 80,301 [55];80,304 [80], 80,306–7 [100] [110] (judgment delivered 7 March 2003) [110]	38 per cent	Husband had a pension in the payment phase	Nil splitting order made	Husband retained the matrimonial home and other real estate
<i>Harling & Lever</i> [2004] FamCA 361 (28 April 2004) [58]–[59]	40 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home; husband retained other real estate
<i>Graf & Graf</i> [2005] FamCA 240 (23 March 2005) [34] [123]–[124] [130]–[131]	40 per cent	Husband had a pension in the payment phase	Splitting order to the wife of pension	No matrimonial home; husband retained real estate; wife retained post separation real estate
<i>HRDW & HSJL</i> [2005] FamCA 676 (11 July 2005) [23] [61]	32.5 per cent	Husband had a pension in the payment phase	Splitting order to the husband of accumulation interest of the wife	Husband retained matrimonial home
<i>BAR & JMR</i> (2005) FLC ¶93-231, 79,860 [301]	38 per cent	Nil pension in the payment phase	Splitting order to the wife	Wife retained the matrimonial home; husband retained other real estate

POST COGHLAN				
<i>Laporte & Penfold</i> [2008] FMCAfam 1093 (23 October 2008) Order 1, [212] [289]–[293] [297]	38 per cent	Husband had a pension in the payment phase	Splitting order to the wife of pension	Matrimonial home to be sold
<i>Edwards & Edwards</i> (2009) FLC ¶93-409, 83,564 [18]–[20] 83,575 [130]	40 per cent	Husband had a pension in the payment phase	Splitting order to the wife of accumulation interest	Wife retained the matrimonial home; husband retained other real estate

(5) 41–50 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
PRE COGHLAN				
<i>Spagnardi & Spagnardi</i> [2003] famCA 162 (27 February 2003) [65]–[67]	50 per cent	Nil pension in the payment phase	Nil splitting order	Husband retained the matrimonial home
<i>Hickson & Hickson</i> [2003] FamCA 1091 (27 February 2003) [85] [117]–[118]	50.5 per cent (including husband’s superannuation)	Nil pension in the payment phase	Nil splitting order	Matrimonial home to be sold
<i>Hobbs & Hobbs</i> [2003] FamCA 1490 (19 March 2003) [58]	50 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home

<i>Davies & Davies</i> [2003] FamCA 410 (28 May 2003) [210] [229] [245]–[246] [267]	45 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home to be sold
<i>McGrath & McGrath</i> [2003] FamCA 1061 (23 October 2003) [134]	45 per cent	Husband had a pension in the payment phase	Nil splitting order	Wife retained the matrimonial home and other real estate; husband retained other real estate
<i>Ennis & Ennis</i> [2003] FamCA 1565 (19 December 2003)	41–2 per cent (including husband’s pension in the payment phase)	Husband had a pension in the payment phase	Nil splitting order	Wife retained the matrimonial home and other real estate; husband retained other real estate
POST COGHLAN				
<i>Ilett & Ilett</i> (2005) FLC ¶93-221	45 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home; husband retained post separation real estate
<i>Postans & Postans</i> [2005] FMCAfam 576 (11 November 2005)	41–2 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home and other real estate sold
<i>Mowbray & Mowbray</i> [2007] FamCA 167 (9 March 2007) [2]–[5] [10]–[11] [34]	45 per cent	Husband had a pension in the payment phase	Nil splitting order	Wife retained the matrimonial home
<i>Callen & Callen</i> [2008] FMCA fam 957 (11 September 2008) [7] [48] [53] [55]	48 per cent	Husband had a pension in the payment phase	Splitting order to the wife of accumulation interest and pension in the payment phase	Matrimonial home to be sold or ownership agreed

<i>Guthrie & Rushton</i> [2009] FamCA 1144 (27 November 2009) [42] [194]	43.62 per cent	Husband had a non-commutable pension in the growth phase	Splitting order to the wife of pension	Wife retained the matrimonial home; husband retained other real estate
<i>Hayton & Bendle</i> [2010] FamCA 592 (16 July 2010) [135] [200] [204]	41 per cent	Husband had a non-commutable pension in the growth phase	Splitting order to the wife of accumulation interests	Matrimonial home to be sold
<i>Clives & Clives</i> (2008) FLC ¶93-385, 82,946 [112]–[113]	50 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home sold

(6) 51–60 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
PRE COGHLAN				
<i>Levick & Levick</i> (2006) FLC ¶93-254 (judgment delivered 7 March 2003) [55]–[69]	55 per cent (reduced from 59 per cent at step four)	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home to be sold
<i>Gardner & Gardner</i> [2003] FamCA 249 (28 March 2003)	59 per cent (including the husband’s Comsuper entitlement)	Nil pension in the payment phase	Splitting order to the wife	Wife retained the matrimonial home; husband retained other real estate
<i>Gabriel & Counsel</i> [2003] FamCA 1270 (28 July 2003) [168] [215] [218] [244]	58 per cent	Nil pension in the payment phase	Splitting order to the wife	Wife retained the matrimonial home; husband retained other real estate

<i>McCheyne & McCheyne</i> [2003] FMCA Fam 19 (29 August 2003) Orders, [21] [28] [31]	55 per cent	Nil pension in the payment phase	Splitting order to the wife	Wife to retain the matrimonial home
<i>Radhakrishnan & Radhakrishnan</i> [2003] FamCA 1360 (19 December 2003) [74] [139] [145]	51–52 per cent (including wife's pension in the payment phase)	Wife had a pension in the payment phase	Splitting order to the husband of accumulation interest	Husband retained the matrimonial home; wife retained other real estate
<i>Lambrinidis & Koulakis</i> [2004] FMCAfam 3 (6 February 2004) [122]	55 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home sold. Husband retained other real estate
<i>OSF & OJK</i> (2004) FLC ¶93-191, 79,206–7 [89]–[96]	60 per cent	Nil pension in the payment phase	Splitting order to the wife recommended	Wife to retain the matrimonial home
<i>Stapleton & Stapleton</i> [2004] FamCA 401 (11 May 2004)	58.5 per cent	Nil pension in the payment phase	Nil splitting order	Matrimonial home to be sold
<i>Ranasinghe & Jones</i> [2005] FamCA 213 (30 March 2005) [68]	60 per cent	Nil pension in the payment phase	Splitting order to the wife	Husband retained the matrimonial home; other real estate to be sold; wife retained post separation real estate
POST COGHLAN				
<i>Hobbins & Hobbins</i> [2005] FamCA 734 (5 August 2005) [25] [60] [79] [81]	54–5 per cent	Nil pension in the payment phase	Nil splitting order	Husband to retain the matrimonial home or to be sold

<i>Mahoney & Mahoney</i> [2005] FMCAfam 439 (25 August 2005) [19] [106] [140]	55 per cent	Nil pension in the payment phase	Splitting order to the wife	No real estate
<i>Tran & Havier</i> [2005] FamCA 1121 (25 November 2005) [94] [95] [107] [109]–[110]	57.5 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home; husband retained other real estate
<i>Koskinas & Vasseleu</i> [2005] FamCA 1207 (16 December 2005) [180]–[183]	51 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial to be sold home
<i>C & C</i> [2005] FamCA 1223 (19 December 2005) [49]–[50]	57 per cent	Husband had a pension in the payment phase	Nil splitting order	Wife retained the matrimonial home
<i>A & A</i> [2006] FMCAfam 80 (28 February 2006) [101] [170]–[174]	51 per cent	Nil pension in the payment phase	Splitting order to the wife	Wife retained the matrimonial home
<i>Doherty & Doherty</i> (2006) FLC ¶93-256, 80,337 [1], 80,343 [37]	55 per cent	Nil pension in the payment phase	Nil splitting order	Wife to retain the matrimonial home
<i>McCulough & McCulough</i> (2006) FLC ¶93-282	60 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home sold
<i>Rushton & Rushton</i> [2006] FamCA 894 (14 September 2006) [1] [6]–[7] [97]	57.5 per cent	Nil pension in the payment phase	Splitting order to the wife	Wife retained the matrimonial home; husband retained other post separation real estate

<i>Gibbons & Gibbons</i> [2007] FamCA 26 (31 January 2007) [1]–[2] [111]	52.5 per cent	Wife had a pension in the payment phase	Nil splitting order	Husband retained the matrimonial home; wife retained other real estate; real estate to be sold
<i>Warner & Warner</i> [2008] FamCAFC 156 (23 October 2008) Orders 4,6 [1] [18] [24]	60 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home; husband retained other real estate
<i>Jasper & Jasper</i> [2009] FMCAfam 250 (6 February 2009) Orders 1–3 [47] [57] [63] [74] [80]	60 per cent	Nil pension in the payment phase	Splitting order to the husband	Wife to retain the matrimonial home; other real estate to be sold

(7) 61–70 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
PRE COGHLAN				
<i>H & H</i> (2003) FLC ¶93-168, 78,703 [49], 78,707 [66], 78,710 [81]–[82], 78,717	65 per cent	Nil pension in the payment phase	Splitting order to the wife	Husband retained the matrimonial home
<i>Weston & Weston</i> [2004] FamCA 453 (27 May 2004) [131]	65 per cent	Nil pension in the payment phase	Nil splitting order	Matrimonial home to be sold
<i>Cameron & Cameron</i> [2004] FamCA 819 (3 September 2004) [74]	62 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home

<i>Hezemans & Hezemans</i> [2004] FamCA 865 (10 September 2004) [25] [32] [47] [53]–[60]	66 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home to be sold
<i>Winwood-Smith & Duffy</i> [2005] FMCAfam 171 (21 February 2005) [90]	65 per cent	Nil pension in the payment phase	Splitting order to the wife	Husband retained the matrimonial home
<i>B & B</i> [2005] FamCA 624 (15 July 2005) [71]–[74]	62–63 per cent (38 per cent if wife’s pre cohabitation pension in the payment phase excluded)	Wife had a pension in the payment phase	Nil splitting order	Wife retained the matrimonial home
POST COGLAN				
<i>Aktova & Aktov</i> [2005] FamCA 735 (8 August 2005) [35] [60]–[61]	66 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home; husband retained other real estate
<i>Stevens & Stevens</i> (2005) FLC ¶93-246, 80,036–7, [18] [21] [24] [26] 80,043 [75]	67.5 per cent	Nil pension in the payment phase	Splitting order to the wife	Wife retained the matrimonial home; husband retained an equitable interest in other real estate
<i>Head & Head</i> [2006] FamCA 551 (20 June 2006) [25] [65]–[66]	63.5 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home sold
<i>Lesbirel & Lesbirel</i> (2006) FLC 93-301, 81,083 [9], 81,086 [32] 81,088 [52]–[53]	67.5 per cent (60 per cent if the wife’s pre cohabitation superannuation excluded)	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home

<i>Steele & Stanley</i> [2008] FamCA 83 (8 February 2008) Order 2 [213]–[219]	68 per cent	Nil pension in the payment phase	Splitting order to the wife	Matrimonial home sold; wife retained other real estate
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(8) 71–80 PER CENT

CITATION	APPROXIMATE ADJUSTMENT	PENSION — PAYMENT PHASE	SPLITTING ORDER	RETENTION — MATRIMONIAL HOME
PRE COGHLAN				
<i>Weir & Weir</i> [2005] FamCA 96 (28 February 2005) [95]	75 per cent	Nil pension in the payment phase	Nil splitting order	Wife retained the matrimonial home

APPENDIX TWELVE

IMPACT OF STEP FOUR AFTER *COGHLAN*: APPROXIMATE ADJUSTMENTS TO THE WIFE OF S 4(1) PROPERTY & SUPERANNUATION IN SEPARATE LISTS

CASE CITATION	APPROXIMATE OVERALL ADJUSTMENT — S 4(1)	APPROXIMATE OVERALL ADJUSTMENT — SUPERANNUATION
<i>B & B</i> [2005] FamCA 624 (15 July 2005) [70] [72] [74]	57 per cent	65 per cent including wife's pre cohabitation pension in the payment phase
<i>Tran & Havier</i> [2005] FamCA 1121 (25 November 2005) [95] [107] [109]–[110]	60 per cent	26 per cent
<i>Koskinas & Vasseleu</i> [2005] FamCA 1207 (16 December 2005) [179]–[184]	52.5 per cent	45 per cent
<i>McKinnon & McKinnon</i> (2005) FLC ¶93-242, 79,998 [4], 80,001–2 [30]–[31]	25–6 per cent	Nil in respect of husband's pre cohabitation pension in the payment phase
<i>A & A</i> [2006] FMCAfam 80 (28 February 2006) [101] [170] [175]	67.5 per cent	40 per cent
<i>Head & Head</i> [2006] FamCA 551 (20 June 2006)	66 per cent	50 per cent
<i>M & M</i> (2006) FLC ¶93-281	85.5 per cent	14.6 per cent
<i>McCulough & McCulough</i> (2006) FLC 93-282	67.5 per cent	23.5 per cent
<i>Jarman & Jarman</i> (2006) FLC ¶93-289, 80,945 [13]–[14], 80,947 [24]–[25]	82 per cent	4.9 per cent

<i>Treloar & Treloar</i> [2007] FamCA 1127 (16 August 2007) [267]	45 per cent	18–19 per cent
<i>Cleary & Cleary</i> [2007] FamCA 999 (31 August 2007)	40 per cent	14.5 per cent including husband's pension in the payment phase
<i>Steele & Stanley</i> [2008] FamCA 83 (8 February 2008) [176] [213]	77 per cent	33 per cent of husband's pension in the payment phase (value at the time of hearing)
<i>Warner & Warner</i> [2008] FamCAFC 156 (23 October 2008) [15] [18] [23]–[28]	65 per cent	50 per cent
<i>Clives & Clives</i> (2008) FLC ¶93-385, 82,946 [113]	55 per cent	40 per cent
<i>Jasper & Jasper</i> [2009] FMCAfam 250 (6 February 2009) [47] [57] [63] [74] [80]	65 per cent	55 per cent

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