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The Penthouse, the Porsche or the Pension : Superannuation and Divorce

Abstract

This article deals with superannuation and divorce and the effect of the *Family Law Legislation Amendment (Superannuation) Act 2001* ('the Act'). The Act which was introduced by the Government in response to problems raised by a Senate Committee Report was passed by Parliament on 18 June 2001 and received Royal Assent on 28 June 2001 (Act No 61 of 2001).

Keywords

superannuation, divorce, family law, legislation

THE PENTHOUSE, THE PORSCHE OR THE PENSION SUPERANNUATION AND DIVORCE

By Thomas Henn* & Jocelyne Boujos**

Bella gerant alii, tu felix Austria, nube!!

Others should start wars, you happy Austria, get married.¹

Or in the Australian context, others get married, unhappy Australians get divorced.²³

Foreword

This article deals with superannuation and divorce and the effect of the *Family Law Legislation Amendment (Superannuation) Act 2001* ('the Act'). The Act which was introduced by the Government in response to problems raised by a Senate

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1 It was a saying at the beginning of the 19th century, that European countries started wars to increase their power and the size of their countries, Austria under the Habsburgs on the other hand, simply married the 'right' connection.

2 In most European countries and America today a substantial tax break may be received, (income splitting with your partner) when you get married, but not in Australia. The only possibility for superannuation benefits is the legislation of superannuation splitting upon divorce. However, in order to prevent this, the Government introduced specific anti-avoidance provisions in s90MP and s90MQ of the *Family Law Legislation Amendment (Superannuation) Act 2001*. This legislation after numerous amendments was introduced by the Government in response to problems raised by the Senate Select Committee on Superannuation was passed by Parliament on 18 June 2001. The Bill received Royal Assent on 28 June 2001 (Act No 61 of 2001).

3 The proposed superannuation splitting between spouses from 1 July 2003 will not apply retrospectively. It applies only to future personal and employer superannuation contributions. (For a summary of the proposal see Thompson – ATP Superannuation Bulletin No 71 August 2002[211]).

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Committee Report was passed by Parliament on 18 June 2001 and received Royal Assent on 28 June 2001 (Act No 61 of 2001).

The legislation required to give effect to the Government's response to the Senate Committee's Recommendations is, in fact, a series of Acts some of which are listed below and referred to collectively as the New Super Splitting Laws. These Acts principally amend the *Family Law Act 1975* and Regulations to provide for the division of superannuation interests on marriage breakdown, including cases where a previously determined property order is set aside, or a previously determined maintenance order is revoked.

- *Family Law Legislation Amendment (Superannuation) Act 2001 (FLA(S)A).*
- *Family Law (Superannuation) Regulations 2001 (FL(S)R).*
- *Superannuation Industry (Supervision) Amendment Regulations 2001 (No 3) (SISAR).*
- *Family Law Legislation Amendment (Superannuation) (Consequential Amendments) Act 2001 (FLA(S)(CA).*

There is a new *Part VIII B* – 'Superannuation Interests', in the *Family Law Act 1975* with that part overriding any other Commonwealth or state and territory laws, or 'anything in a trust deed or other instrument'. The definition of 'matrimonial cause' in section 4(ca) of the FLA is extended such that a superannuation interest is to be treated as property. A payment to which Part VIII B applies is referred to as a 'splittable' payment.

The *Family Law Legislation Amendment (Superannuation) (Consequential Amendments) Act 2001* was passed by the House of Representatives on 23 August 2001. This Act amends relevant tax and superannuation legislation to ensure appropriate tax treatment for superannuation interests which have been split under the new Part VIII B.

The Government has released a new consultation paper containing the new proposal splitting of super contributions between spouses. This proposal has the potential to provide similar super benefits to those couples who remain together as those who divorce! A commendable outcome.

These legislative changes should be considered as significant steps in an evolutionary process to finally ensure meaningful financial security for spouses and co-operation from fund trustees. It is still essential to understand the underlying intrinsic issues in order to fully appreciate the new provisions and the resultant tax treatment of

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superannuation payouts. The changes, when they are come into effect on 29 December 2002, do not effectively address significant perceived flaws in the process of effecting an equitable allocation of superannuation benefits between divorcing spouses.

These flaws are:

- The continued delay in implementation means the superannuation industry has effectively been exempt from the application of the *Commonwealth Sex Discrimination Act 1984* for nearly 20 years. This continues to leave parties currently in divorce proceedings or who wish to commence such proceedings unable to make a 'clean break' as property orders dealing with superannuation have had to be adjourned until the new provisions commence operation. When they do commence the backlog of cases to be dealt with, will cause significant delays in this process.
- A 'splittable' payment may be subject to flagging or splitting. Either method requires the trustee of the superannuation fund to provide specific information to spouses of members. The inclusion of the option to 'flag' a superannuation entitlement is unfortunate as it requires ongoing reporting and information requirements to be imposed on trustees. Such an entitlement may be 'flagged' for 30 to 40 years. A long time for a fund to keep track of a non-member!
- The taxation consequences of a payment split impact on the calculations of eligible termination payments and reasonable benefits limits, and may affect the application of the superannuation contributions surcharge. These issues will add greater complexity to an already nightmare calculation and are not dealt with in this article.
- Finally, the accurate and equitable valuation of the superannuation interest, particularly that of a defined benefit fund requires costly advice, as the calculation is beyond nearly everybody, excluding experienced actuaries. A better (more economical) option for defined benefit funds may be to offer marriage guidance counselling!

Introduction

*'In a divorce, she gets the house, the kids and the debts, as the story goes, while he gets the girlfriend, the income, and best of all, the super.'*⁴

4 Philippa Coates, 'Science of divorcing super, No longer will women suffer a raw deal in divorce', *The Weekend Australian* July 15-16 2000 35.

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The enactment of legislation to permit the division of superannuation interests on marriage breakdown brings Australia into line with most Western jurisdictions with respect to an equitable distribution of property and assets accumulated by a couple during a marriage. The legislation came into effect on 29 December 2002. The appropriate distribution or splitting of superannuation entitlements on divorce will become more important in Australia in the future for various reasons:

- superannuation coverage for all workers has expanded to around 80% and has doubled for employees since 1984;⁵
- the value of superannuation funds will collectively grow from close to \$519 billion today⁶ to a predicted \$1 trillion by the year 2012;⁷
- more and more people get divorced, today one in three new marriages ends in divorce;⁸

5 The Association of Superannuation Funds of Australia Limited ('ASFA') - *About Super – Super Fact Sheet No 5* mentioned four changes over the years affecting superannuation coverage.

- Superannuation coverage for Australian employees has more than doubled since 1984, rising to around 98 per cent for permanent full-time workers and to 59 per cent for part time and casual employees;
- superannuation coverage for all workers, including the self-employed, is now around 80 per cent;
- superannuation coverage for those who have never been in the workforce is negligible because in the past contributions were only allowed for those participating in paid labour; and
- recent legislation, however, enables contributions to be made on behalf of a low-income spouse, a move that can be expected to lead to some increase in coverage for those outside the paid workforce.

6 APRA Superannuation Trends – June Quarter 2002; *Superannuation Industry at a Glance – June 2002*. The figures for June 2001 were \$527 billion and the figures for June 2000 were \$477 billion.

7 Watson John, *Issues in the Management of Superannuation, Retirement Income Challenges for the 21st Century*, June 2000, UNSW, 5 'At the end of December 1999, the Australian Prudential Regulation Authority (APRA) estimated that total superannuation assets had reached \$439 billion and the number of member accounts had risen to 21 million. Projections by the Retirement Income Modelling Unit of the Treasury estimate that the grand total of all funds (at current prices) could reach \$700 billion by June 2005; \$1,000 million [*sic*] by June 2010 and \$1,700 billion by June 2030.'

8 Australian Bureau of Statistics, *Marriages and Divorces, Australia, 2000*, (Cat No 3310.0) states that in 2000 there were 49,906 divorces granted, compared to 52,566 in 1999 and 51,370 in 1998, up from 41,000 in 1988. The divorce rate in Australia is lower than in the United States of America (4.3 in 1996) and about the same as in Canada and the United Kingdom (2.6 and 2.9 respectively in 1995). Since 1976, when the Family Court of

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- at the same time more and more people, in particular women, recognise superannuation as part of the family assets and acknowledge that there are systemic reasons for the general inequity that exists in the accumulation of super benefits by men and women; and⁹
- women continue to have fragmented work patterns and men are commencing to have a greater involvement in part time work with resultant inconsistent patterns in retirement savings.

For the last two decades, the legislatures and courts in overseas jurisdictions paid and continue to pay increasing attention to the treatment of pensions in divorce proceedings.¹⁰ This attention stems from the realisation that the right to pension benefits can be one of the most valuable assets acquired over the course of a marriage, often second only to the marital home.¹¹

Australia has lagged behind in this development.¹² However the Government and the courts increasingly regarded it as inequitable to allow only one party of the marriage to enjoy retirement benefits after the marriage is dissolved.¹³

Australia was created, the Court has granted around 930,000 applications for dissolution of marriage and has had filed around 350,000 applications for property proceedings; in: *Annual Reports of the Family Court of Australia and the Family Law Council*, for the period 1976 – 1996.

- 9 *Taylor and Taylor* (unreported AD 4761 of 1999, July 2001, Justice Strickland); *Van Essen and Van Essen* [2000] FamCA 775; *Carson v Carson* [1999] Fam CA 53; Coates, above n 3.
- 10 *Brooks v Brooks* (1995) 3 All ER 257, where the House of Lords permitted a spouse to take an interest in the employee spouse's pension under s 24(1)(c) of the *Matrimonial Causes Act 1973* (UK). In *re Marriage of Brown*, 544 P. 2d 561, 566 (Cal 1976) the Supreme Court of California held that pensions are contingent interest in property and therefore divisible, whether vested or nonvested; *Ward v Ward*, 476 NYS 2d 712, 712 (1984); § 1587 Bürgerliches Gesetzbuch ('BGB') Civil Code, equal pension rights division at divorce. Further see R Ingleby, 'Superannuation and Divorce', (1990) *The Australian Law Journal*, 244, 252-258.
- 11 J Dewar, G Sheehan and J Hughes *Superannuation and divorce in Australia*, Australian Family Briefing No 6 April 1999; Judy Hogg, *Splitting up* (1996) 108 *The Association of Superannuation Funds of Australia Limited ('ASFA') - About Super – Super Fact Sheet No 4* <http://www.asfa.asn.au/super/rpm.cfm?page=facts4>; Sophy Bordow and Margaret Harrison, 'Outcomes of Matrimonial Property Litigation: an Analysis of Family Court Cases' (1994) 8 *Australian Journal of Family Law* 264 at 265. For the US, C Calhoun and G Needles, *The division of Pensions Across Borders*.
- 12 For Australia: *Crapp and Crapp* (1979) FLC 90-460. There are different reasons for this. The *Family Law Act* (Commonwealth) was only introduced in 1974 and Superannuation Guarantee Charge was introduced in the mid 80s. In 1983, less than 25 per cent of blue-collar employees and working women had superannuation coverage, and far fewer

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In an international context superannuation is an entitlement to a pension, ie Australia is the only jurisdiction that permits lump sums.¹⁴

This article is written in two Parts. Part I explains the shortcomings of the pre-existing legal framework, and outlines the background and problems of the new legislation recently passed by Parliament. Part II of the article focuses on the international context and explains and compares the situation in Australia to that of the US and UK, both common law countries, with that of Germany, a civil law country.

The article considers the various problems which Australia has had to address when attempting to obtain a 'world class' regime for the equitable division of superannuation interests and identifies potential problems with the new regime.¹⁵

A detailed review of the operations of the *Family Law Act*,¹⁶ the superannuation legislation in general and the interesting and highly political point of women and superannuation¹⁷ is beyond the scope and aim of the article.¹⁸

qualified for a benefit because of the lengthy service qualifications which typically applied; Maurice Dunlevy 'Superman Industry super is booming, but change is afoot', *The Australian*, 25 August, 2000, 38. Therefore, the amount in the superannuation fund was not such a large amount to fight about in divorce proceedings and the Family Court did not have precise power to deal with it.

13 Ingleby, above n 10, 258 after quoting s 36 of the *Equal Opportunity Act 1984 Vic* which states: 'This Act does not affect discriminatory provisions relating to pensions or superannuation' stated that it is becoming increasingly difficult to justify such discrimination. The consultation paper is available on the Treasury website at <http://www.treasury.gov.au/documents/367>.

14 See development regarding splitting contributions for spouses and the comments by the court in *Evans and the Public Trustee for the State of Western Australia* (1991) FLC ¶92-223.

15 However this aim is questioned in part of the feminist debate - where it is stated that the proposal and the Bill do more for promoting the Government priorities in relation to pensions, than promoting the economic interests of women in the post-separation stage see Kristie Dunn, 'Splitting the Difference: Superannuation, Equality and Family Law' (1998) 12 *Australian Journal of Family Law* 214, 216.

16 See John Faulks, Judge of the Family Court of Australia, *The division of property and superannuation under the Family Law Act 1995, A practical consideration of the evidence which should be presented to a court with particular reference to the question of superannuation*, <http://www.familycourt.gov.au/papers/html/faulks3.html>, 14 November 1998. For a discussion of the new legislation in relation to Family Law, see M Foster (ed) *Superannuation in Family Law: A New Era - Handbook* (2001).

17 See The Association of Superannuation Funds of Australia Limited ('ASFA') - *About Super - Super Fact Sheet No 6 - Women 8 - Do Women get as much out of superannuation as men?*;

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Deficiencies

There were serious deficiencies in the pre-existing law¹⁹ that had to be addressed in order to achieve some semblance of equity in the allocation of superannuation as a result of a marriage breakdown. The Attorney-General, Mr Williams in his second reading speech, when introducing the *Family Law Amendment (Superannuation) Bill*

See further J Dewar, G Sheehan and J Hughes, *Superannuation and divorce in Australia*, Australian Institute of Family Studies, Working Paper No 18, 31 'Is there a case for more than half?'; Dunn, above n 14; Therese MacDermott, 'Linking Gender and Superannuation' (1997) 2 *International Journal of Discrimination and the Law* 271; Jenni Millbank, 'Hey Girls, have we got a super deal for you!' (1993) 7 *AJFL* 104; Regina Graycar 'If it ain't broke, don't fix it: matrimonial property law reform and the forgotten majority', address to a NSW Bar Association public forum (20 May 1999).

- 18 Superannuation (Entitlements of Same Sex Couples) Bill 1998; Further for constitutional reasons 'De facto and same sex relations are not covered by the proposed legislation'. See Media Releases from the Australian Democrats 15 February 2000 'Bill on same-sex superannuation gets quick Committee Inquiry'. Further, on 1 November 2000, the *Superannuation Legislation Amendment (Same Sex Partners) Bill 2000* (NSW) was introduced into the NSW Legislative Assembly, see *Weekly Tax Bulletin*, 6 November 2000, Issue 46, 2000, para 1954. Name of Bill: *Superannuation (Entitlements of Same Sex Couples) Bill 2000 [Private Member's Bill]* Topics covered: Seeks to remove discrimination against same sex couples re superannuation benefits: see 2000 WTb 7 [205]. Status: Introduced in Senate by Senator Conroy on 15 Feb 2000. Bill still in Senate. Report of Senate Select Committee on Superannuation and Financial Services tabled on 6 April 2000: see 2000 WTb 14 [521]. A 2001 Bill of the same name was introduced in the House of Reps by Mr Albanese on 25 June 2001 (see 2001 WTb 28 [1151]) - that Bill is still in the Reps and now lapsed. The *Superannuation (Entitlements of Same Sex Couples) Bill 2001* [a Private Member's Bill] was reintroduced into Parliament by Labor MP Anthony Albanese on 25 June 2001. According to Mr Albanese, this is the fourth time the Bill has been presented and not allowed time for debate. The Bill seeks to remove discrimination against same sex couples in respect of superannuation benefits.
- 19 See Executive Summary, 'Problems with the current situation' in *Property and Family Law – options for change, A discussion paper*, Attorney-General's Department (1999); Although Nicholson CJ in 'Proposed changes to property matters under the Family Law Act', address to the Bar Association of NSW (20 May 1999) admits there are deficiencies, but that does not justify 'a dangerous program of reform'. That is in general the opinion of the Justices of the Family Court, see *Response of the Family Court of Australia to the discussion paper 'Property and Family Law: Options for Change'* (July 1999) in particular para 53 in response to Option 2 – Deferred Community of Property. A similar opinion was formed by the Family Law Committee of Law Society of NSW in 'A Response to the discussion paper: *Property and Family Law – Options for Change'* (8 August 1999).

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2000, on 13 April 2000,²⁰ said even today many couples 'do not consider superannuation among their assets when they arrange their property settlement'.

Although this was not a deficiency in the law in the strict sense, it was more a lack of awareness in the community, among financial advisers and also among lawyers.

The deficiencies were that even if divorcing couples considered superannuation as an asset, there was (until 29 December 2002) no formal mechanism in place for a division or transfer of superannuation entitlements. Further the Family Court did not have the power to order a third party, such as a superannuation fund trustee, to provide benefits to a former spouse at some future time.²¹

The Attorney-General's statement was supported by a report from the Australian Institute of Family Studies. A 1999 Briefing Paper,²² titled *Superannuation and Divorce in Australia* expressed the findings of a survey of 650 divorced Australians was conducted in late 1997. Key findings included:

- in 82% of couples, at least one member has superannuation, up from 55% in the 1980s;
- the median value of women's superannuation was \$5,590 compared with \$26,152 for men;²³

20 See Joint Press Release (Appendix 1).

21 In *Grace and Grace* (1998) FLC 92-792, Nicholson CJ, Kay and Coleman JJ at 84, 888 stated in regard to property settlement under s 79: 'The Act draws a distinction between 'property' and 'financial resources'. The Court is able to make orders that settle the property of the parties but not their financial resources. Thus, in making orders that settle property, the Court is required to have regard to each party's financial resources but can only settle the property of the parties, which is in existence. Further, it is limited in its powers to make orders in respect of third parties', *Ascot Investments v Harper and Harper* (1981) FLC 91-000; (1980-1981) 148 CLR 337.

22 Dewar et al, above n 12. Further see Watts, Bourke, Taussig, 'Super splitting on marriage breakdown', (2002) *CCH Journal of Australian Taxation* 2, 39.

23 These figures are from: Dewar et al, above n 12, 27. In *ASFA - About Super* - Fact Sheet 6 'Women and Super' the figures are different. ASFA comments that 'as at June 1994 the average superannuation entitlement for women was around \$17,000 compared to \$42,000 for men'. The difference in number is explained by the fact that the AIFS statistics looked at only 650 cases, whereas ASFA compared all the members in all superannuation funds. ASFA also commented that 'the proportion of all superannuation assets held by women was 23 per cent. [...] Government projections show women catching up in the future, with a projected real average superannuation balance for women of \$77,000 in the year 2019, and \$121,000 for men. The proportion of super assets held by women is projected to

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- superannuation accounts for 25% of the parties' total asset wealth, up from 14% in the 1980s;²⁴
- superannuation is taken into account in less than half (46%) of property settlements; and
- men and women are generally ill-informed about their spouse's superannuation entitlements, with women less informed than men.

The article concludes that because there are so many variables at play, it is hard to make predictions, on the basis of the data, of the effects of such a broad change to the treatment of superannuation in divorce.

All the research²⁵ consistently supported three propositions that needed to be considered in the process of a reform:

- An equal split of superannuation may be an improvement for some women on the current position, because superannuation is often ignored; however,
- There is a risk that a reduction in the share of immediately enjoyable assets that might flow from an equal split of superannuation, or an equal split of all property including superannuation, would leave other women in a worse financial position immediately after divorce than is currently the case; and
- An equal split of superannuation fails to recognise that men and women are not equally able to provide for their own retirements, a fact that may justify giving women more than a half share of superannuation assets.²⁶

The New Super Splitting Laws provide that the share of superannuation entitlements may be determined between the parties. Only when the parties cannot agree does the Family Court impose a split with the valuation method prescribed in the New Super Splitting Laws. Accordingly, divorcing couples are still able to maintain existing super entitlements by agreement.

rise to 33 per cent in that year.' I cannot see how the women are catching up. In real terms, in 20 years time there is still a difference of \$44,000 between women and men in superannuation. However I must concede that women are catching up in terms of percentage in superannuation funds at all, from 23 per cent in 1994 to 33 per cent in 2019. However when we consider that women represent more than 50 per cent of the population, and have access to only 1/3 of the value of the superannuation funds, there is a discrepancy which should be addressed by Government - if not, the widely expected 'living poor in retirement for women' will become a reality; see Dunn, above n 15.

24 Watson, above n 7, 5.

25 Refer above n 8.

26 Above n 17, 31.

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However because of the perceived imbalance in accounts and limited understanding of superannuation by most people:

- A superannuation interest should be recognised as an asset and be taken into account automatically in property settlements;
- there should be an equal 'split' of the value of all superannuation interests accrued during a marriage; and
- the split should be done 'ex officio', ie there should be no choice for the partners involved to trade off superannuation entitlements with other property rights (or only in exceptional cases).

Initial treatment of superannuation assets

The right to receive a portion of property legally owned by a spouse was enacted when the *Family Law Act 1975* was introduced. This right is embedded in s 79 of the FLA. However only four years after the introduction of the FLA, in the landmark decision in *Crapp and Crapp*²⁷ the court dealt with the problem of whether superannuation or an entitlement to superannuation was within the definition of property, for the first time.

Fogarty J, on appeal,²⁸ pointed out that in the event of a marriage breakdown, the FLA was imperfectly designed to do justice in respect of such financial devices.²⁹ Fogarty J compared the interest in a superannuation scheme with the interest under a discretionary trust and came to the conclusion that neither amounted to property. His Honour said:³⁰

It is normally a contingent interest only; until [the beneficiary] 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.

Fogarty J indicated the distinction between 'property' in the classical sense on one hand and a mere hope or expectancy on the other in this case. He said in the context of s 79 FLA:³¹

27 *In the Marriage of Crapp* (1979) 5 FamLR 47; 35 FLR 153; FLC 90-615.

28 *Ibid.*

29 Above n 27 at 78, 170.

30 Above n 27 at 78, 181.

31 (1979) 35 FLR 153 at 168 –169; s 79 can be found in Appendix 2.

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An order can only be made ... under s 79 where a party has a present or future interest in a particular item of property. Clearly where a party has a present interest no difficulties arise, and by 'future interest' in the above sense I take it to mean a situation where a party has an established interest in an item of property but the date of receipt is postponed to some future time. That is different from the case where a party may become entitled to an interest in property in the future provided that certain events occur and/or provided that certain disqualifying events do not occur in the meantime.

Mrs Crapp was the ex-wife of a Qantas³² pilot and she became the first Australian to have the value of a spouse's superannuation taken into account when their divorce settlement was being worked out.

His superannuation benefit was one of the couple's biggest financial assets after a long marriage. The fact that his lump sum payout was not due for 11 years from the time of the court settlement gives an indication of the problems that arise when trying to place a figure on its worth.³³

Legal framework prior to effective date of 'new super splitting laws'

The problems of the legal framework before the New Super Splitting Laws can be summarised by the statement given by the Full Court of the Family Court in *Grace and Grace*.³⁴ In this case the court identified the most important features of the property settlement process as:³⁵

32 In *Van Essen and Van Essen* [2000] FamCA 775 one of the latest cases dealing with superannuation, the husband is also a Qantas pilot.

33 In *Carson and Carson* [1999] FamCA 53, the Court adjourned a property settlement for 13 years. (This was when the husband's superannuation became payable). At the time of divorce the value of the husband's superannuation was \$207,000, but it was estimated that it would be worth \$1.5m in 13 years. The clean break approach in s 81 and any prejudice to the husband was compared with the injustice which the wife would suffer unless the adjournment was granted. In the case of *Van Essen and Van Essen* [2000] FamCA 775, decided on 29 June 2000, the Full Court of the Family Court overturned an adjournment decision of the court in the first instance pursuant to s 79(5), which relied on the then proposed *Family Law Legislation Amendment (Superannuation) Bill 2000*, as justification for adjournment. (Section 81 can be found in Appendix 2). Compare this with the decision of Justice Strickland in *Taylor and Taylor* (Unreported July 2001), where his Honour found that the problems identified in *Van Essen* (supra) no longer applied.

34 *Grace v Grace* (1998) FLC 92-792. Further see the statement of Strickland J in *Taylor and Taylor*, a case decided after the Act was assented to on 28 June 2001 regarding the options prior to the legislation being assented to.

35 *Ibid*, (Nicholson CJ, Kay and Coleman JJ) at 84, 888.

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- First, the requirement to draw a distinction between ‘property’ which can be settled between the parties and ‘financial resources’ (eg superannuation) which the court should take into account but cannot settle.
- Secondly, that the powers of the court to make orders in respect to third parties, eg the trustee of a superannuation fund, are limited.³⁶

Anthony Dickey QC³⁷ sees two reasons why the Family Court treated superannuation schemes in a manner quite unsatisfactory for the people involved. The first point is that the Court only looks at the current value of property in proceedings for an alteration of property interests.³⁸ His second point is the problem of valuing economic benefits where the benefit will occur, if at all, sometime in the future.

As a result of the court’s approach in *Grace and Grace*, the New Super Splitting Laws, had to resolve this fundamental issue by addressing the following:

- Can a superannuation interest be included in the definition of property?
- If yes, what is the date of valuation?
- And how can we value the benefit?
- Additionally, how can a court or the member of the superannuation fund instruct the trustee of the fund to act according to the beneficiary or the courts orders?

IS A SUPERANNUATION INTEREST PROPERTY?

The meaning of property

The term ‘property’ is defined in subsection 4(1) of the FLA as follows:

‘[P]roperty’, in relation to the parties to a marriage or either of them, means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

36 *Ascot Investments v Harper and Harper* (1981) FLC 91-000; (1980–1981) 148 CLR 337.

37 A Dickey, *Family Law* (3rd ed, 1997) 617.

38 See for example, *Ferraro and Ferraro* (1993) FLC 92-335 at 79,550.

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The term property as defined in subsection 4(1) of the FLA has been held to include 'every possible interest which a party can have'.³⁹ It includes real and personal property. It does not include mere personal rights.⁴⁰ *Halsbury's Law of Australia*⁴¹ gives the following list of things which have been held by the Family Court to be property and which may be subject to the Family Court's jurisdiction to alter the interest of the parties in divorce proceedings:

...a vested right of superannuation, redundancy and long service leave entitlements.

What was not held to be property according to *Halsbury* was:

The non accrued or contingent interest in a superannuation fund of a potential beneficiary.

By way of summary, cases which have discussed the definition of property support the conclusion that society's perception of what entails property is changing and include such things as job security, fringe benefits and pension rights⁴² and a variety of workers entitlements, as canvassed in the discussions following the One.Tel and Ansett collapses.

Superannuation entitlements are financial resources

The Family Court and other courts exercising jurisdiction under the FLA have substantial discretionary powers according to subsection 79(1) of the FLA to vary property interest between the parties to a marriage.⁴³ As mentioned earlier, a contingent interest in a superannuation fund is not within the term 'property' as

39 *In the Marriage of Duff* (1977) 29 FLR 46 at 55-56 the Full Court of the Family Court held that the term 'property' is to be given a broad meaning. In particular the Court approved the statement of Lord Langdale MR in the old English case of *Jones v Skinner* (1835) 5 L J ch 87 where Langdale L said, "The word "property" is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have' quoted with approval in (1977) 29 FLR 46 at 55-56.

40 However see the discussion in Frank Bates, *An Introduction to Family Law* (1987) 306 where he discussed the development in the US regarding professional licences and some courts recognising them as part of the property of a person.

41 *Halsbury's Law of Australia*, Electronic Law Library, CDROM August 1998: 205-5020.

42 Bates, above n 40, 307.

43 A MacDonald, *Tax & Marriage*, Paper No 3, presented to the 32nd Annual State Convention of the Taxation Institute of Australia, Western Australia branch, (21 August 1998) 6.

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defined in subsection 4(1) of the FLA. The mechanism used by the Court in order to establish an equitable distribution between the parties to a marriage was to treat the superannuation interest as a financial resource, paragraph 75(2)(b) of the FLA. This gave the Court a wide discretion to adjust property interests of the parties to a marriage breakdown.

Types of superannuation fund

When discussing superannuation entitlements we must distinguish between two different types of superannuation schemes, the accumulation schemes and defined benefits schemes.⁴⁴

Accumulation schemes are schemes in which the employee and employer contributions are paid into a separate account in the employee's name. The benefit derived from the scheme depends on the amount contributed, the interest and the investment returns on the money, less administration costs.⁴⁵ The employee's entitlement to the fund is vested. When the employee has satisfied a condition (ie, retirement, disablement etc, or a certain age) he/she can access the benefits of the scheme.

A *defined benefit scheme* on the other hand, which is most common in the public service and other public sector employment, is one under which the benefits on retirement are not calculated by reference to contributions but to other factors. The factors most common are:

- length of membership in the fund;
- average salary during membership; and
- final salary levels.⁴⁶

44 Accumulation fund and defined benefit fund is defined in sub-regulation 1.03 (1) Superannuation Industry (Supervision) Regulation. 'Accumulation Interest' is defined in regulation 3 and 'Defined benefit interest' is defined in regulation 5 of the; *Family Law Superannuation Regulations 2001*.

45 Attorney-General's Department, *Superannuation & Family Law – a Position Paper* (ch 2, para 2.3, 19 May 1998), <http://law.gov.au/publications/super/super.htm> Types of Schemes; Attorney-General's Department, *Property and Family Law – Options for Change*, Discussion Paper (1999), para 12 Appendix 2; Dewar et al, above n 18, 3.

46 Regulation 76 of the draft Family Law Regulations and see regulation 1.03 of the *Superannuation Industry (Supervision) Regulations 1994*; *Superannuation & Family Law*, *ibid*, ch 2, para 2.3 Types of Schemes; *Property and Family Law*, *ibid*, Appendix 2, para 13 and Endnote 104; Dewar et al, above n 12, 3; Leow LP and Murphy S, *1999/2000 Australian*

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In most cases of defined benefits funds the employer is the Government and does not contribute, but guarantees that the scheme will provide the defined benefits. One of the consequences is that an employee of such a fund does not have a vested entitlement to the majority of the defined benefits, because the fund trustees reserve the right to alter the fund benefits. Defined benefit funds are becoming less common.⁴⁷ According to the latest data nearly 90% of membership in Australia belong to accumulation schemes. The other 10% belong to either defined benefit schemes or a hybrid arrangement where both an accumulation component and a defined benefit component exist.

A superannuation fund is a trust

One of the factors the Court is required to take into account when varying property interests is superannuation entitlements.⁴⁸ The entitlement to superannuation is seen as a financial resource⁴⁹ to be taken into account in determining who gets what and how much in a property settlement.⁵⁰

However, although the Family Court has the power to deal with property that is owned by the parties at the date of the hearing according to subsection 4(1) FLA, superannuation entitlements are not 'owned' by the individual members.⁵¹ This is because superannuation schemes are traditionally set up in trust structures – so that the rights and obligations of trustees, contributors and beneficiaries will be governed in part by the law of trusts.⁵² According to the normal principles of trust law,

Master Superannuation Guide (3rd ed), 495; *2001/2002 Australian Master Superannuation Guide* (5th ed), 332.

47 See Appendix 3.

48 The 'Superannuation' factors are provided for in sub-para 75(2)(f)(ii) FLA (see Appendix 2).

49 See *Gould and Gould* (1996) FLC 92-657 where the Full Court concluded that as a matter of principle there are no reasons to conclude that long service leave entitlements are not financial resources. However, in that case, there was not enough evidence, that the husband would not take the long service leave 'in kind.'

50 *In the Marriage of Gosper* (1987) 90 FLR 1; Judy Hogg, *Splitting up*, 108; See further, 'Instructions for completing a conciliation conference kit' or Form 17A, F Superannuation, Family Court of Australia.

51 In *Harris and Harris* (1991) FLC 92-254 the Full Court of the Family Court upheld the order made by the trial judge. It was 'irrelevant' in the Court's view whether the superannuation fund was property or a financial resource because no injustice was caused by the trial judge's order.

52 D Kovacs, *The Division of Superannuation Entitlements in Family Law Disputes*, (1996) 4.1; Subsection 19(2) *Superannuation Industry (Supervision) Act 1993* ('SIS Act') states that a

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individual members have only a beneficial interest. Therefore superannuation assets that are payable only on retirement, or on some other qualifying event, are not considered 'property' for the purpose of subsection 4(1), unless that event has occurred (i.e. the entitlement has vested) or benefits have been paid.⁵³ In *Crapp and Crapp*⁵⁴ it was held that such a benefit 'is not property under the Act. It is a contingent interest only.'⁵⁵

Further, the Court cannot direct a trustee of a superannuation fund to make a payment to the spouse of a superannuated party on divorce and is bound by the scope of any trust deed. This was confirmed by the High Court in *Ascot Investments Pty Ltd v Harper*.⁵⁶ In this case the court held that if the effect of an order:

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... [t]he Family Court must take the property of a party to the marriage as it finds it.

Following the High Court's decision in *Harper's* case, superannuation which is not yet available to the parties can not be treated as property for divorce settlement proceedings. In the alternative it was treated as a financial resource to the parties and dealt with by either an 'offset' or by adjourning the final order as detailed below. However, this treatment created many difficulties, especially when retirement is some time in the future.⁵⁷

Approaches of the courts

In order to overcome these perceived inequalities in the result and the limits to its power to allocate superannuation benefits between parties, the Family Court developed two approaches over the years, the 'offsetting' and 'adjourning' approach.

superannuation fund must have a trustee. See further, A Dickey, above n 38, 616 argued that for reasons which were originally connected with the old law of death duties, some superannuation schemes were set up as discretionary trusts which gave the trustees a discretion in respect of the disposition of superannuation benefits upon the termination of a member's employment before normal retiring age. The argument goes that in that way, upon the premature death of a member, superannuation benefits did not constitute part of the deceased's estate for the assessment of death duties.

53 *In the Marriage of Crapp* (1979) 5 FamLR 47.

54 (1979) FLC 90-460, on appeal at 78,181.

55 Other cases which followed this approach are: *Hauff and Hauff* (1986) FLC 91-747, *Coulter and Coulter* (1990) FLC 92-104; *Perrett and Perrett* (1990) FLC 92-101.

56 (1981) FLC 91-000.

57 *Van Essen and Van Essen* [2000] FamCA 775; MacDonald, above n 43, 10.

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- The offsetting or 'adjustment of non superannuation assets' approach entails increasing the dependent spouse's share of presently existing property to compensate for the loss of future superannuation rights;⁵⁸
- The 'adjourning' approach postpones part of the property settlement until the superannuation benefits become payable, and then makes an order with respect to those benefits once they become payable.⁵⁹

Both approaches were (and are) unsatisfactory. The 'offsetting approach' assumes that the liable spouse has sufficient assets to compensate the other spouse's loss of superannuation rights, (without discussing the problem of valuation of the superannuation rights),⁶⁰ and it is not a guarantee of an adequate retirement income for the recipient. The 'adjournment approach' means that financial issues between the spouses remain unresolved. Therefore, affected couples go through another 'little divorce' maybe 10, 20 years later, just to settle some financial entitlements with all the financial and emotional hardship involved. That is against the 'spirit of the clean break' as stated in s 81 FLA.⁶¹

58 In 'Trends in property orders', in: *Property and Family Law*, above n 45, para 1.24 and 1.25 the Government argued that the 'normal' 40/60 per cent property settlement in favour of women has to be seen in the context of 'the inability to divide superannuation upon the breakdown of marriage'.

59 Sub-section 79(5) of the *Family Law Act* invites the court to adjourn proceedings or part of the proceedings where there is likely to be a significant change in the financial circumstances of a party and where 'having regard to the time when that change is likely to take place it is reasonable to adjourn the proceedings'. In particular s 79(7) suggests that the fact that a party contributes to a superannuation fund or is entitled to a distribution under a discretionary trust, is a reason to adjourn proceedings under s 79(5); see Appendix 2; *Martin and Martin* (1986) FLC 91 -737; *O'Shea and O'Shea* (1988) FLC 91-964; *Kearney and Kearney* (1991) FLC 91-208; *Evans and Evans* (1991) FLC 91-203. *Finnis* (1978) FLC 90-437; *Harrison* (1996) FLC 92-682; *Grace v Grace* (1998) FLC 92-792; *Carson v Carson* [1999] FamCA 53. *Van Essen v Van Essen* [2000] FamCA 775 where the wife argued for an adjournment relying on the then new proposed legislation and the fact that her husband's superannuation entitlement worth some \$100,000 now, would be worth in excess of \$3,000,000 upon retirement.

60 Further, how can one compare, from a taxation point, the superannuation entitlement worth \$150,000 with the Porsche or the Penthouse worth \$150,000? One is exempt from any assessable capital gain (the porsche) the other may carry a latent capital gain.

61 The wording of s 81 can be found in Appendix 2. H Joshi and H Davies, 'Pension splitting and divorce' *Fiscal Studies* (1992) 69 at 73; Kovacs, above n 52, at 4.22 states that s 81 expresses only a guiding principle, and there are good reasons why a court should 'not finalise the financial relationships between the parties where a party has superannuation benefits'. Ingleby, above n 13 at 250 argues that the recent changes in the law, to ensure

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Another complicating factor is the passion for the 'lump sum payout'. In *Evans and the Public Trustee for the State of Western Australia*⁶² the court noted that Australia had occupied a unique position 'in its emphasis upon superannuation through large capital payments as distinct from periodic pensions and this gives rise to great difficulties in this jurisdiction.'⁶³

Date of valuation

In normal property settlement procedures, the date of the hearing is the date for valuation.⁶⁴ However, in a particular case there could be grounds for selecting a different date, notably the date of separation. In *Hauff and Hauff*,⁶⁵ the Full Court declined to interfere with the trial judge's decision to elect the date of separation.

Valuation of the benefit

The problems of accounting for superannuation in a property settlement have baffled the courts. The major reason is the difficulty, or the perceived difficulty, of arriving at a fair value for it.⁶⁶ The new legislation provides a formula for deferring the valuation. However, systematic problems still exist particularly for interests in defined benefit funds.

In the past, the court has adopted a number of different approaches, partly because superannuation could and cannot be withdrawn (or cashed) as part of a settlement nor could it be 'split' between the spouses. The most common approaches have been:⁶⁷

that child support reflects the cost of child-care and is actually paid (*Child Support Act (No 3) 1988*) could be seen as in conflict with the clean break principle in s 81.

62 (1991) FLC 92-223; 14 FamLR 646.

63 Similar to payments in personal injury insurance cases.

64 *Ferraro and Ferraro* (1993) FLC 92-335 at 79,550; quoted with approval in *Grace v Grace* (1998) FLC 92-792 at 84, 888; *In the Marriage of Hauff* [1986] FLC 91-747 at 75, 441.

65 [1986] FLC 91-747; 10 Fam LR 364; For a summary of the cases, see A Dickey, *Family Law* (2nd ed, 1990) 561.

66 N Whittacker, 'Superannuation 'Divorce a super rift'', *Sunday Mail*, Brisbane 15 March 1998.

67 For a summary see: ASFA – About Super – Fact Sheet No 7 – Divorce; For a more detailed discussion see: Jennifer Boland, *Superannuation and the Family Law Act*, 3.10. Watts, *ibid*, 40.

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The Global Approach: The court takes the view that superannuation is an asset of the marriage. It calculates the value of the super benefit accumulated during the marriage and takes this into account when splitting the other family assets. Because the super entitlement cannot be split, the wife, for example, might get the house and the husband all the super. While this might seem fair at first, it usually leaves the wife without any means of support in retirement years. An example of this approach is *Gosper's* case.⁶⁸

The Deferred Approach: Alternatively the court can decide to defer the decision on settlement until retirement takes place and the exact amount of superannuation is known. The Court's ability to postpone a case is well demonstrated in *O'Shea and O'Shea*.⁶⁹ This option is usually used where a defined benefit fund is involved. These funds usually pay a multiple of the employee's final salary, irrespective of what the member or the employer contributed or what the fund may have earned. If there are years to go before retirement, calculating entitlements is difficult.

The Mathematical Approach: Thirdly, the court might decide to order the husband to pay a certain proportion of the superannuation payout to the wife when the payout is eventually received. This would be the case, for example, where superannuation was the major asset of the marriage. In *West and Green*⁷⁰ the parties agreed that the Judge should make an order which would fix the wife's entitlement to the superannuation when it came to fruition. Further, the Judge ordered the husband to obtain a life insurance policy over his life in favour of his divorced spouse. Other examples of this approach are the cases of *William and William*⁷¹ and *Woolley (No 2)*.⁷²

68 *In the Marriage of Gosper* (1987) FLC 91-818; 11 Fam LR 601; (1987) 90 FLR 1.

69 In *O'Shea and O'Shea* (1988) FLC 91-964; 12 Fam LR 537 the period of adjournment was approximately 20 years. Her Honour said at FLC 76,982; Fam LR 540: 'However, in my view, such is the amount of the husband's prospective entitlement under the scheme, irrespective of when he might retire, as compared with the extremely small pool of assets presently available, that the injustice which the wife would suffer unless the adjournment is granted would significantly outweigh the prejudice to the husband of an adjournment.'

70 (1993) FLC 92-395.

71 (1988) FLC 91-959.

72 *In the Marriage of Woolley (No 2)* (1981) 48 FLR 328; [1981] FLC 91-011; 6 Fam LR 577.

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But these last two options mean the husband and wife may remain 'tied together' financially for a long time - an undesirable outcome according to statute,⁷³ case law⁷⁴ and most observers.

Background: Government objectives

The Government's intention to introduce legislation to amend the Family Law Act was announced in May 1998,⁷⁵ with the release of a position paper called *Superannuation and Family Law*⁷⁶

The Government stated as its (current) objectives:

- to encourage parties to take responsibility for their own affairs whenever possible;
- minimise compliance cost; and
- be consistent with the Government's broader retirement income policy goals.⁷⁷

The seven elements of these objectives

These three objectives are broken down into seven elements.⁷⁸

73 Section 81 FLA; (see Appendix 2). In property matters on marriage breakdown, the Court is trying to end the parties financial relationship and aims to avoid further proceedings between them.

74 *Tyson and Tyson* (1993) FLC 92-368, where the Full Court stated that 'the court should be reluctant to hang a sword of Damocles over the head of the respondent unless there is no present alternative means of providing for the needs of the applicant' at 79,847 – 79,848. In *Crapp*, (1979) 35 FLR 153, Fogarty J commented on the problem of adjournment. He said that the lack of finality might be thought contrary to the direction to the Court in s 81 that it: 'shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties.'

75 Treasurer's Press Release No 053 'Superannuation and Family Law', 19 May 1998, Canberra, <http://www.treasurer.gov.au/treasurer/pressrelease/1998/053.asp>. According to Dunn, above n 13, 215, the chosen date of the announcement on International Women's Day was an attempt to 'woo women voters'.

76 *Superannuation and Family Law*, above n 45.

77 *Explanatory Memorandum to Family Law Legislation Amendment (Superannuation) Bill 2000* ('EM'), 6, 'ASFA supports the Government objectives and believes that the proposals put forward provide a flexible approach for couples who are separating.' ASFA, *Quarterly Report* (August 2000) 20.

- **Fair value should be recognised**

While noting the difference between superannuation and other assets, the full value of superannuation should be taken into account when dividing assets on breakdown of a marriage.⁷⁹

The Act does not treat superannuation as property, instead the parties will be encouraged to agree on a division of the superannuation between them.⁸⁰

- **Guidance for parties agreeing on solutions**

In accordance with other family law matters, parties should have primary responsibility to settle their own affairs.⁸¹ In order to achieve this, clear guidance should be given by the court and the court should make decisions in the absence of an agreement.⁸²

- **Access to information**

In order for the parties to arrange their own settlement and make an informed decision they need unrestricted access to the partners superannuation fund and severe penalties apply for not disclosing interests in superannuation funds.⁸³ They

78 EM, *ibid*, 7ff; these are consistent with the proposal put forward in *Superannuation and Family Law* – ch 3, para 3.1; further see, LP Leow et al, above n 46, 494 which talks about six policy objectives (see comment at Footnote 93 regarding the missing objective). Stephen Bourke ‘An Overview of the New Scheme from it’s Creator’ in M Foster (ed) *Superannuation in Family Law: A New Era – Handbook* (2001) 15, at 32 talks about four competing principles – equity, simplicity, certainty and administrative convenience.

79 EM, above n 78 7; *Superannuation and Family Law*, above n 45, ch 3.1.

80 See s 90MC ‘Extended meaning of matrimonial cause’. Para 33 of the EM explains s 90MC as creating the jurisdiction to deal with superannuation in accordance with new Part VIIIB. Superannuation interests will not be able to be treated as property generally for the purposes of Part VIII.

81 Division 2 of Part VIIIB.

82 Division 3 of Part VIIIB. Does this mean, that the court would do all the ground work, i.e receive the statements from the different superannuation funds, make a calculation regarding what the Court deems is just and equitable, and leave it then to the parties, - who in the end have to agree on it? In this context the authors question the ‘wisdom’ that ‘the vast majority of family law cases settle without the need for a hearing before the Family Court.’ EM, above n 77, 7. It is submitted that where the welfare of children is involved, the court should be heard and in the future when superannuation is involved, the same should apply because these decisions will affect society in general.

83 Section 90MZB Trustee to provide information. In EM para 167 it is stated that ‘The note to subsection 90MZB(3) explains that, pursuant to section 4B(3) of the *Crimes Act 1914*

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need further information, such as how to value the superannuation interest and must understand how accumulating assets for retirement are treated in a concessionally - taxed environment.⁸⁴

- *A clean break*

The treatment of superannuation interest on marriage breakdown, as far as practicable and equitable, avoids further proceedings between the parties.⁸⁵ As mentioned earlier, this element is stated in s 81 FLA and aims to avoid the need for unnecessary contact between the parties following marriage breakdown and to allow them to pursue independent lives as far as possible.⁸⁶

It is submitted that in theory this is fine, but at the moment children are involved the 'clean break' approach is illusory.⁸⁷

In the context of superannuation, the valuation issues still remain. The problem is of valuation and the accounting for difference between the fully vested accumulation schemes⁸⁸ and the defined benefit schemes.⁸⁹

(Cth), if a corporate body commits the offence the penalty will be 250 penalty units'. If it is not a corporate body, the penalty units will be 50, s 90MZB(3).

84 It is submitted that for the majority in a divorce proceeding that would be too complicated to absorb and make an informed decision. If the legislation regulating superannuation is already too complicated for most tax professionals how should the average Australian couple make an informed decision? (Especially in the emotionally charged situation of a property settlement in divorce?) If we leave the splitting of super to the court and not all the superannuation funds interest was disclosed to the court, the person involved could be charged with contempt of court, which would have a severe penalty as a consequence. If you leave it to the individual parties, the legal consequences could be fraud or unjust enrichment, with less severe penalties and consequences. However *ASFA – About Super – Fact Sheet No 6 ‘Women and Super’* states quite optimistically that 'Superannuation will provide women with an [sic] opportunity to learn more about the investment market'.

85 EM, above n 78, 7.

86 Ibid 8; *Superannuation and Family Law*, above n 46, ch 3.1.

87 Recent moves to ensure that child support reflects the cost of child-care and is actually paid might be seen in conflict with the principle of the clean break; *Child Support Act* (No 3) 1988 (Cth). Further in *Mapstone* (1979) FLC 90-681 at 78, 639 it was argued that the clean break is not possible where the future financial position of the parties is uncertain.

88 Leow et al (3rd ed), above n 46, 495 'Valuing interest in accumulation schemes does not generally present problems as the value can readily be ascertained at any time.'

89 Ibid 495 'Valuing interest in defined benefit schemes is more difficult. Such interest is typically based on years of service with an employer and salary levels before retirement, as well as contributions and investment earnings. It is not possible to place a definite figure on the value of an interest until the benefit becomes payable.'

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The second minor problem is that currently the employer is only obliged to pay the superannuation contribution once a year, and not monthly or fortnightly with the salary.⁹⁰ Therefore, in order to calculate a correct figure for the divorce proceedings, the parties should wait until the end of the financial year when the employer contribution is paid and the fund has distributed its surplus / earnings to the members. That would delay divorce proceedings, however, there is a mechanism to get around this problem.⁹¹

- **Ease of administration of superannuation scheme**

Arrangements adopted by the parties should be easily complied with and administered, and litigation should be, as far as possible, avoided.⁹²

90 But see: 'Labor calls for quarterly super guarantee payments' *Weekly Tax Bulletin* (30 October 2000), Issue 45, Australian Tax Practice, where it is stated that the Shadow Assistant Treasurer Kelvin Thomson, has indicated that he will be moving a Private Member's Bill to amend the *Superannuation Guarantee (Administration) Act 1992*, for the purpose of making quarterly superannuation contributions mandatory. The Private Member's Bill was introduced in the House of Representatives on 30 October 2000, as the *Superannuation Guarantee (Administration) Amendment Bill 2000*, *Weekly Tax Bulletin*, 6 November 2000, Issue 46, 2000, para 1960. As the bill was defeated, Mr Thomson introduced a Private Member's Bill with the same name on 20 August 2001, to amend the *Superannuation Guarantee (Administration) Act 1992*. The Bill has now lapsed. However the Government now supports quarterly employer contributions with a starting date 1 July 2003; see 'A Better Superannuation System' The Coalition's document, *Our Future Action Plan: A Better Superannuation System*, can be found at <http://www.liberal.org.au/policy/Superannuation%20policy.pdf>.

91 See the discussion of the German system under Part II and the possibility to separate the superannuation entitlement from the other property division, (in particular if you have a 50/50 split in superannuation) without any impact on the other property settlement.

92 EM, above n 78, 8; *Superannuation and Family Law*, above n 46, ch 3.1; There was a recent case in the newspaper where out of \$300,000 family assets, \$130,000 was spent on legal fees. In *Ferraro v Ferraro* (1993) FLC 92-335 the property hearing in the first instance continued over 29 days. We assume that was without the problem of valuation of superannuation etc. It is understood that legal fees are in general quite high in this country, especially if there is not a fixed fee for divorce, but a retainer based on time spent on the matter. Discovery and more and better particulars for valuation of superannuation entitlements could absorb many lawyers, accountants and actuaries fees. For a comparative analysis of the UK and German system, see G Dannemann, 'Access to Justice: an Anglo-German Comparison' 2 *European Public Law* (1996), 271 -292. Danneman's analysis is very useful. He concludes that on average, litigation is considerably cheaper in Germany than in England. It is submitted that what applies for the UK would apply in similar terms to Australia.

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- **Financial certainty following marriage breakdown**

A direct quote from the EM demonstrates that this element does not add anything of substance; it is really a 'motherhood' statement.⁹³

The financial circumstances of parties following marriage breakdown should be as certain as possible. Parties need to settle their financial affairs quickly and expeditiously so that they can re-establish themselves. Any proposals in relation to superannuation should also be designed to increase financial certainty for the parties so they are able to make informed decisions about their future financial situation.

It could be argued that this element is the justification for a 50/50 split of superannuation. Only such a result would give the partners the certainty that, except in rare cases, superannuation contributions during the time of marriage /cohabitation will be split 50/50 without any discussion, as a matter of law, ex officio without further discussion. However Division 2 of Part VIIB gives the parties a wide discretion to deal with superannuation interests.

- **Consistency with retirement income policy**

We consider this issue is the most important. The Government's retirement policies as stated in the Discussion paper⁹⁴ and repeated in the EM⁹⁵ include:

- 'ensuring that superannuation savings, which have benefited from concessional tax treatment, are used to maintain and improve living standards in retirement rather than being diverted to other uses; and
- effectively targeting Government assistance, in the form of age pensions and other benefits to those who have limited resources with which to fund their retirement.'

However this policy objective cannot be achieved as long as the parties and the Courts are allowed to 'trade off' the value of an interest one party has in a superannuation fund against other property. The New Super Splitting Laws have not changed this position.⁹⁶

93 It is perhaps not a coincidence that Leow et al (3rd ed), above n 46, 494 did not mention this element at all.

94 *Superannuation and Family Law*, above n 45, ch 3.1.

95 EM, above n 78, 8.

96 *Superannuation & Family Law*, above n 45, ch 3, para 3.0; and see Division 2 of Part VIIB.

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In order to achieve this the New Super Splitting Laws could have provided for the compulsory 50/50 split ex officio with no party involvement. This would be the cheapest way, as no lawyers would be involved; it would achieve the highest increase in standard of living particularly among women; as women in general earn less than men and therefore have less money in their superannuation funds.⁹⁷ Secondly, all lump sum payments should be converted to annuities; and finally the Government should pay every parent an additional monthly pension, per child; to make up for the time lost contributing to superannuation because of raising children. The parent who generally, of course, has major responsibility for the day to day care of young children, is the mother.

Family law legislation amendment (superannuation) act 2001⁹⁸

Adhering to the Government's objectives, the superannuation division can be achieved in one of two ways: either by agreement of the separating couple or by order of the court. The Government's emphasis is on the creation of a Superannuation Agreement and the Court can only 'interfere' if the parties cannot find a solution.⁹⁹

97 ASFA- About Super – '*Fact Sheet No 6 Women and Super*', states that the Government projects that in the year 2019 there will still be a gap of more than \$40,000 between the average superannuation balance for women compared to that of men.

98 For the first judicial examination of the then proposed legislation see *Van Essen v Van Essen* [2000] FamCA 775 where the court discussed the question if the wife had a right to an adjournment of the proceedings pursuant to s 79(5) of the FLA, because of the proposed new legislation. The Full Court of the Family Court held that property settlement could not be adjourned either pursuant to s 79(5) or pursuant to the general power of adjournment. However in *Taylor v Taylor* (unreported AD4761 of 1999;), a case decided after the Bill had received Royal Assent on 28 June 2001, Strickland J found that the problems with adjournment, as identified in *Van Essen* (supra) did no longer apply. His Honour found that under the Act parties '*have the ability to divide their superannuation by agreement or by requesting the Court to make an order and thus it alters, by adding to their rights, their financial circumstances*'. He found '*in this way the Legislation provides for a significant change.... and.., such a change is likely*.' The appeal to the Full Court was recently withdrawn.

99 In his second reading speech, Attorney-General Mr Williams said: 'Obviously it is preferable that people are able to make their own arrangements for dealing with superannuation interests. However, if they are unable to agree, the court will have the jurisdiction and power to make an order to divide superannuation.'

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Extended meaning of matrimonial cause to include superannuation

In order to give the separating parties and the court the power to deal with superannuation entitlements, the new s 90MC extends the definition of matrimonial cause in s 4 FLA and treats superannuation interest as property.¹⁰⁰

The definition of matrimonial cause is the key to jurisdiction under the FLA because, according to s 39 FLA, courts can only exercise jurisdiction if the matter falls within the defined 'matrimonial causes'.

Superannuation agreements, Division 2 of the new Part VIII B¹⁰¹

The new s 90MJ allows couples to make an agreement to split a superannuation interest upon marriage breakdown. Separating couples will be able to choose what proportion of the superannuation will go to each person. They can make a decision to suit their individual needs and circumstances, including trading off for an increased share in the present assets.¹⁰²

They can postpone the decision and 'flag' a superannuation interest. The flag will act as an injunction against the trustees, preventing them from making payments while the flag is in place,¹⁰³ and requires the trustees to notify the court when the flagged superannuation interest becomes payable. This requires the trustee of a super fund to maintain contact with someone who is not legally a member of the fund. It is in contrast to the 'clean break' principle in s 81 FLA.

100 Section 90MC provides: 'A superannuation interest is to be treated as property for the purposes of para (ca) of the definition of *matrimonial cause* in section 4.' As a consequence of this, superannuation will cease to be treated as a financial resource.

101 Comprising s 90MH to s 90MR.

102 The argument found in the EM is that: for example, people will be able to trade-off superannuation for housing where one parent needs to remain in the marital home to care for children. This is consistent with the trend towards private ordering in family law discussed by Marcia Neave, 'Private Ordering in Family Law: will women benefit?' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995); quote by Dunn, above n 15, 226; further see commentary from Coates, above n 4 'In a divorce, she gets the house, the kids and the debts, as the story goes, while he gets the girlfriend, the income, and best of all, the super'.

103 Subdivision C of Part VIII B- Payment flagging.

Final approach to valuation issues

Paragraph 90MJ(1)(b) allows one of three splitting methods, the actuarial, the fixed percentage or the transfer amount method.

- The *actuarial method* in subparagraph 90MJ(1)(b)(i) is to be used for defined benefit interests and enable parties to arrive at a present value of the superannuation interest that is contingent upon particular events.¹⁰⁴
- The *fixed percentage method* in subparagraph 90MJ(1)(b)(ii) is to be used where the value of the superannuation interest is readily available and can be easily split.¹⁰⁵
- The *transfer amount method* in subparagraph 90MJ(1)(b)(iii) enables parties to identify an amount (rather than a percentage) to transfer.¹⁰⁶ The EM gives the example of a couple where one will get the house and a little part of the superannuation interest and the other the majority interest in the superannuation interest.¹⁰⁷

Court orders, Division 3 of Part VIIB¹⁰⁸

Section 90MT gives the court the power to order that property for the court proceedings includes superannuation and that it be split among the divorcing couple.

In the same way as a separating couple can flag a superannuation interest by agreement according to s 90MJ, the court will be given the power to make a flagging order, ss 90MD, 90MU.¹⁰⁹ As long as the flagging order is not lifted the trustee is prevented from making a payment. An order under s 90ML is made in accordance with s 90MS. Section 90MS provides that the court may make orders in relation to

104 See EM, above n 78, para 62. Further see James O'Dea 'Valuing a Defined Benefit Interest – An Actuarial Perspective' in M Foster (ed) *Superannuation in Family Law: A New Era – Handbook* (2001), 87.

105 Above n 78, para 64.

106 Above n 78.

107 In this context new tax planning issues will arise and there will be more work for tax advisers in figuring out the most tax effective split up of the property and the superannuation interest. (Especially when one considers that superannuation interest is normally treated differently for tax purposes than 'other' property).

108 Comprising ss 90MS to 90MU.

109 According to APMA Superannuation Trends June quarter 2002, 98.72% (240,650) of funds representing 1.7% of members are not covered and assets totalled \$95.48 billion.

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superannuation interests in proceedings under the court. The consequence of this is that the requirements apply to proceedings for making flagging orders.

Valuation

As was outlined earlier,¹¹⁰ the courts have always had problems placing an appropriate value on a superannuation interest.¹¹¹ In the new legislation, the valuation of superannuation is a mandatory step in the splitting process, (subsection 90MT(2).) The regulations referred to in paragraph 90MT(2)(a) cover most types of superannuation funds. However, interests in self managed superannuation funds are currently not covered. (*Family Law (Superannuation) Regulations 2001*, Reg 22.) It is up to the court to consider appropriate valuation methods, according to paragraph 90MT(2)(b). The same applies to small superannuation accounts, *Family Law (Superannuation) Regulations 2001*, Reg. 24.

For an interest in an accumulation fund, the valuation will be straightforward as it is calculated from the value of the contributions plus income and interest, less administrative charges.¹¹²

For an interest in a defined benefit fund, the valuation is more complex and regulations¹¹³ provide a method whereby parties will be able to obtain a present day value of an unvested superannuation interest.¹¹⁴

110 See above on 2.3.4. Valuation for benefit.

111 Further, see Dunn, above n 15, 223.

112 See *Draft Superannuation Industry (Supervision) Amendment Regulations 2000*, and *Draft Family Law Amendment Regulations 2000*, both issued on 16 October 2000. In Subdivision 6.4.1 (regulation 93) of the latter it is stated in relation to an Accumulation interest: 'If the whole of the superannuation interest is an accumulation interest, the overall value of the superannuation interest at the relevant date is to be determined to be the withdrawal benefit in relation to the member spouse at that date.' In August 2001, the Department of the Treasury released an updated *Draft Superannuation Industry (Supervision) Amendment Regulations 2001*. The valuation of an accumulation interest as it is being accumulated is governed by regulation 101 of the draft Family Law Regulations. For a summary of the key changes to the October 2000 version see *Weekly Tax Bulletin* 2001, [1489]. Further see above n 104.

113 *Draft Family Law Amendment Regulations 2000*, in Subdivision 6.4.1.(regulation 92) in relation to 'defined benefit interest' it is stated: 'If the whole of the superannuation interest is a defined benefit interest, the overall value of the superannuation interest at the relevant date is to be determined in accordance with the actuarial method of valuation set out in Schedule 9.' Schedule 9 describes the actuarial method. Valuation of a defined benefit interest in the accumulation phase is governed by regulation 100 of the draft

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This method requires the services of a qualified actuary. It is beyond the training of lawyers and accountants. Thus the parties will initially be placed at a financial disadvantage.

Trustee issues

The New Super Splitting Laws are paramount and override Commonwealth, State and Territory laws as well as trust deeds and other governing instruments, subsection 90MB(1).

The New Super Splitting Laws impose significant obligations on trustees, for example, ss 90MZB and 90MZD. However, this is balanced by trustees receiving statutory protection in exchange for proper implementation of the superannuation split, see subsection 90MB(2), s 90MZE, and the entitlement for fees for the service provided in relation to the superannuation split, see s 90MY.

Trustees are protected from any breaches of the privacy provisions even though when a declaration is filed by one party and the details of the spouse's account requested, the trustee must supply the information but is prohibited from advising the member that such a request has been made.

Family Law Regulations 2001. The *Family Law (Superannuation) Regulations 2001*, Statutory Rules 2001 No 303, dated 8 October 2001, is 163 pages long.

114 Leow et al (3rd ed), above n 46, 495. Above n 104 where he states that 'the determination of the superannuation interest of a member to defined benefits is considerably more complex' than the already very complex regulations in general.

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Issues for review

Superannuation now treated as property¹¹⁵

Superannuation entitlements will be treated as property in the New Super Splitting Laws, s 90MC.¹¹⁶ This was possible by extending the definition of property in sub-s 4(1) of FLA to include superannuation entitlements. This was suggested in the 1993 report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the *Family Law Act* in recommendations 75 to 83 and supported in academic writing.¹¹⁷ The positive aspect of this approach is that it is an easy fix to a perceived injustice.

This concurs with the Government objectives to 'encourage parties to take responsibility for their own affairs whenever possible.'¹¹⁸ However, this approach does not justify the special treatment superannuation receives in the tax system¹¹⁹ and the role superannuation should play in providing for retirement.¹²⁰

The effect of the change in definition of matrimonial cause in s 4 FLA will be that a court will be able to treat superannuation as property in divorce proceedings.

115 See: Dickey, above n 36, 617, problems concerning the notion of 'property'; Dickey, above n 64, 533 problems resulting from the meaning of 'property'.

116 See: APRA Superannuation Trends (Appendix 3).

117 McDonald (ed) *Settling Up: Property and Income Distribution on Divorce in Australia* (1986) pp 313–315 'A broad definition of matrimonial property ... needs to include ... assets such as superannuation entitlements ... the notion of compensation for loss of income-earning potential represents an extension of the conventional meaning of property ... the division of economic relationships or parties to a marriage into maintenance and tangible property is no longer an adequate basis for family law.' Ingleby, above n 13, 257 after quoting McDonald concluded that the law should provide for the division of superannuation entitlements in the same way as it presently provides for the division of the equity in the matrimonial home.

118 EM, above n 78, 6. However it is questionable how far this should go. In Kim MacDonald, '\$15,000 for first homes', *The Sunday Times*, October 29 2000, 5, it is stated that under a controversial plan, first home-buyers would be able to access, among other things, their superannuation if building or buying a new home. The article goes on to say that The Housing Industry Association claims that the Prime Minister's Office is considering the proposals, which are designed to boost the ailing housing industry.

119 See Part IX of the *Income Tax Assessment Act* 1936. The rates of tax for complying funds is 15% and 47% for non-complying funds, s 26(1) and s 26(2) *Income Tax Rates Act* 1986.

120 See s 62(1)(a) *Superannuation Industry Supervision Act* ('SIS Act').

Super is not property in the normal sense

Compulsory superannuation was introduced to increase the saving rate of the nation and to provide for old-age pension.¹²¹ Divorce settlements should not change the primary aim of superannuation, it should be treated differently from other property of the parties, which was acquired during the period of cohabitation. And, the property settlement should be distinguished from maintenance / alimony payments for further needs.¹²²

As mentioned earlier, property and maintenance settlements should remain at the disposition of the parties, but superannuation should only be the disposal of the parties in exceptional circumstances. This proposal is supported by findings of Dewar,¹²³ where it was stated that 'an even split of superannuation would slightly increase the women's share of assets, especially those in the low asset group'. However not everybody agrees with those findings.¹²⁴

Parties discouraged to agree on solutions

The Government, in its Executive Summary¹²⁵ to the new legislation, stated that:

121 Ibid.

122 *In the Marriage of Branchflower* (1980) FLC 90 -857 at 75,446 Evatt CJ and Opas J said that it is frequently difficult to distinguish between orders for distribution of property under s 79 and orders for maintenance under s 75 of the FLA. It is submitted that this statement cannot be correct because the property distribution after a marriage breakdown should fulfil a different function to an order for maintenance. Stephen Bourke, from the Commonwealth Attorney-General's Department, said in '*Matrimonial Property Law: A Discussion of the reform options*' in his address to a NSW Bar Association public forum on 20 May 1999 that '[T]here exists a tension between orders for spousal maintenance and orders adjusting the interests in property because they are both a means for the transfer of money or property between the parties and from the perspective of the parties at least, little distinction may be made between the different orders. This is even more so in those cases where the maintenance is a transfer of a capital sum.' Further see Watts et al, above n 22, 170.

123 Dewar et al, above n 17, 27.

124 Nicholson CJ, above n 19, where he said that 'I believe that women in particular are likely to suffer injustice as a result of this approach.' Similar comments were made by Graycar, above n 17.

125 Summary of Superannuation Bill – see General Summary
<http://law.gov.au/aghome/commaff/Fllad/Superannuation/SuperSummary.html>

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[S]eparated parties will be encouraged to make their own arrangements to deal with superannuation interests, including division if they so choose.

The argument is that this approach is consistent with other approaches in divorce settlement and people take more responsibility in their own affairs.¹²⁶ It could be argued that in general this approach is correct, but it is questionable if it should apply to superannuation.¹²⁷ Here we have a conflict between the policy of the FLA and the New Super Splitting Laws. The FLA as espoused in the 'clean break' section in s 81 promotes ideas of economic self-sufficiency and independence, while superannuation funds rely on the notions of dependency.¹²⁸ Superannuation should not be able to be dealt with by the parties for the sake of easier divorce proceedings and retirement policy of the Government. There should be an automatic 50/50 split. This could also increase Australia's household savings ratio, which stands at the lowest level ever recorded.¹²⁹

Justification for the special treatment of superannuation entitlements

It is submitted that there is justification for such special treatment of superannuation entitlements and the New Super Splitting Laws do not allow for this.

Superannuation is complex

Divorcing spouses already have problems agreeing on the value of current tangible assets. How much more difficult will it be to agree on the value of superannuation

126 See the concerns expressed by R Graycar, above n 18, 'about the increasing exhortation towards "private ordering" and the almost complete absence of legal aid for women in property cases.'

127 Nicholson CJ, above n 19, is strongly against the ability of parties to make binding agreements regarding their superannuation entitlements. A similar statement was made by R Graycar, above n 17, at the end of her paper when she asked 'Is it the case that women routinely trade off property to avoid disputes about their children, as overseas research suggests?' With the new legislation, spouses can enter into superannuation agreements at any time (before, during or after their marriage). Although this agreement will only operate after the parties separated, this is an interesting way of income splitting, or to receive concessional tax advantages if one superannuation fund exceeds the ETP threshold. So the saying; 'others get married, unhappy Australians get divorced' might be correct.

128 Ingleby, above n 10, 250.

129 ASFA, *Retirement Income Review, New Research and Possible Action Plan*, Canberra Briefing, July 11 2000, 4.

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entitlements?¹³⁰ Most recent research shows that people do not understand superannuation and this is particularly the case for women.¹³¹ In this context the question should be asked, do we need more than 200,000 different superannuation funds in this country?¹³²

Pension entitlements instead of lump sums

As more and more funds are accumulated, it should not be so difficult to put a value on the fund and divide it up.¹³³ Instead of lump sum payments, the government should encourage pension payments in accordance with their own policy aims.¹³⁴

130 The recently released *Family Law (Superannuation) Regulations 2001*, which comprise 163 pages and the *Draft Superannuation Industry (Supervision) Amendment Regulations 2001* shed some light on the problems of the valuation process. The method for determining the value of a defined benefit interest is set out in regulation 29. An actuarial perspective is provided by O'Dea in above n 104.

131 Dewar et al, above n 11, 28 where it was stated that 'there are low levels of awareness amongst divorcing couples about their own superannuation entitlements, and those of their spouses. This is especially true for women'. A similar point was made in the EM, above n 78, 4, referring to Dewar et al's study. Further see Senator Watson, above n 7, 14 where he stated 'The Committee is aware of the need for increased education of consumers. Research by the ABS has shown that 46% of Australians have unsatisfactorily low level of literacy. The implication of this is that there will always be a percentage of people who will never understand the concepts involved in the complicated fields of superannuation and finance.' It does not help in this context that APRA claims that superannuation will provide women with an opportunity to learn more about the investment market, see ASFA – *About Super, Fact Sheet No 6 - Women and Super*.

132 See Appendix 3 for the numbers of superannuation funds. Ingleby, above n 10, 265 asked the question whether the superannuation industry needs to consider if there is a need for computerised records of all schemes, and perhaps a smaller range of schemes available. This concern is supported by the Superannuation Industry itself. However, according to CPA Australia, Press Release, December 10 2001, the number of self-managed super funds is on the increase and there are about 224,000 self-managed super funds in Australia. On the other hand, according to the Regulations for these self managed superannuation funds there is no requirement of mandatory valuation (reg 91(2)(b)).

133 According to APRA information, (June 30 2001) there were 225,542 Accumulation Funds compared to only 470 Defined Benefit Funds in Australia. The numbers for the previous year were 212,965 Accumulation Funds compared to 406 Defined Benefit Funds. The figures for June 2002 were 242,860 compared to 410, (see Appendix 3).

134 ASFA supports that move, see ASFA, above n 190, 11 and 15.

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Further, it should be ensured that the savings are 'preserved' for retirement,¹³⁵ and not used for some other purposes.¹³⁶

We cannot afford 'justice on an individual basis'

Justice Faulks,¹³⁷ after discussing a variety of Family Court cases dealing with superannuation, came to the conclusion that the way we deal with superannuation must be changed. At the beginning of a new century the time we spend in court trying to implement justice for everybody (at least the rich)¹³⁸ on an individual basis is over.

I suggest that it is time for us to consider, within our Court and within our community whether our concepts of justice may need to be revised. People who enter into arrangements and agreements should know fully in advance what the consequences of those arrangements would be. They should have some certainty about the application of the law if those arrangements should break down. This may have to be achieved legislatively in a way, which offends our traditional concepts of individualism. It may be that the need for certainty and resolution will become the pathway to justice in the twenty-first century.

Justice Faulks should be applauded for this. If we consider the fee structure for lawyers in Australia¹³⁹ in combination with the 'best evidence rule'¹⁴⁰ and the money now invested in superannuation funds¹⁴¹ there must be, first of all, a way to deal with

135 This is supported by ASFA – *About Super – Super Fact Sheet No 5*. It would also be worthwhile to mention that the background of the Gunning Inquiry in Western Australia is a stern reminder of the advantages of pension payments rather than lump sums. The Gunning Inquiry was into the conduct of Finance Brokers and the lack of regulation by the Finance Brokers Supervisory Board and the Ministry of Fair Trading.

136 Such as buying or building a house, see K MacDonald, above n 179. See Senator John Watson, *Inquiry into early access to Superannuation Benefits*, Press Release, November 16 2001 at: http://www.aph.gov.au/senate/committee/superfinan_ctte/index.htm

137 Faulks, above n 16.

138 Bates, above n 40, 303 quotes in the context of 'How Pleasant it is to have Money...': Family Dissolution – Finance and Property in the context of the *Married Women's Property Act 1882* (England) from AV Dicey, *Law and Public Opinion in England*, (2nd ed 1920) as saying 'There came ... to be not in theory but in fact one law for the rich and another for the poor. The daughters of the rich enjoyed, for the most part, the considerate protection of equity, the daughters of the poor suffered under the severity of injustice of the common law.'

139 See Dannemann, above n 93.

140 J D Heydon, *Cross on Evidence*, (5th Australian ed, 1996) 82.

141 Appendix 3 and *Australian Financial Review*, August 24 2000.

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superannuation in divorce and secondly an easier and more equal way to deal with it than is now in place.

Although it is against 'choice' and individualism, the German approach¹⁴² of pension rights adjustment and equal division upon divorce of all pension rights of the spouses accrued during the period of marriage, *ex officio*, becomes more and more appealing.¹⁴³ In this context we have to consider that no legal aid is available for women or men for property settlement on divorce in Australia.¹⁴⁴

Following Justice Faulks' suggestions:

- people would know, when they get married, what the financial consequences of divorce would be;
- it would be a very cost effective way of dealing with superannuation settlements;¹⁴⁵
- it would counterbalance a perceived or real prejudice of male judges towards the contribution of women to marriage;¹⁴⁶ and
- finally, it is submitted, the 50/50 split is in general an equitable outcome.¹⁴⁷

142 See Part II of the paper.

143 Nicholson CJ, above n 19, 10 would disagree with this. It is submitted that the presumed injustice in property settlement could be counterbalanced through an increase in maintenance payments. With this point Nicholson CJ agrees, above n 19, 6.

144 Graycar, above n 17. Nicholson CJ in *Annual Report 1999 – 2000* of the Family Court of Australia Part One: Year in Review 7 stated that '[T]he limited provision of legal aid to those involved in family law proceedings continues to be unsatisfactory.'

145 *Ibid*, 5 stated that the biggest problem for women is the fact that their pool of property is too small to pay a lawyer.

146 That this prejudice is still prevalent is evident in the judgment of His Honour Justice Treyvaund in *Ferraro and Ferraro* (1993) FLC ¶92-335 Full Court. But consider the following from J Treyvaund at first instance, delivered on 24 December 1991 and quoted in the appeal book at 97. 'The parties' property empire blossomed because the husband had the innate drive, skills and abilities to enable him to succeed in his chosen occupation, whereas the wife's contribution was neither greater nor less than when the husband had been a carpenter. To equalize the parties' contributions is akin to comparing the contribution of the creator of Sissinghurst Gardens, whose breadth of vision and imagination, talent, drive and endeavours led to the creation of the most beautiful garden in England, with that of the gardener who assisted with the tilling of the soil and the weeding of the beds.'

147 Dewar et al, above n 17, 31 discussed the question of whether there is a case for more than half. On the other hand J Scutt, quoted in Dunn, above n 15, questioned whether we

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If we split superannuation entitlements 50/50 then the old question of whether this is property or not, is no longer important.

Leaving the superannuation splitting to the parties has the potential for leaking of the money out of the superannuation funds.¹⁴⁸

Nicholson CJ said that:¹⁴⁹

[A]ny change to the law governing the resolution of financial matters after marriage breakdown has profound consequences for a community's social and economic fabric ...

A proposal of the Housing Industry Association in 2000, to access superannuation money for buying or building a house and the claim that the Prime Minister's Office was considering such a proposal, is an indication of the gross misunderstanding of the role and purpose of superannuation in parts of the society and the Prime Minister's Office.¹⁵⁰ We can only hope that the claim of the Housing Industry Association was incorrect.

Conclusion

The New Super Splitting Laws are a big step forward in recognising superannuation interest as part of the property settlement in divorce.

It is the first systematic approach to this perceived inequality in divorce proceedings. Therefore, the government should be applauded for this legislation.¹⁵¹ The New

can change socio-economic shortcomings with individual acts, such as a 40/60 or 30/70 split.

148 Australia already has one of the lowest household savings rates in the OECD countries, see ASFA, above n 136, 4.

149 Nicholson CJ, above n 19.

150 MacDonald, above n 119.

151 Most people interviewed for the article by Coates, above n 4, agree with this statement, where she states that 'the planned legislation has met a generally enthusiastic response from Family Law practitioners'. Further ASFA, above n 137 supports the legislation in general. ASFA, *'New Super Divorce Rules Welcomed – But Clear Guidelines Needed for Trustees'*, Press Release, April 3 2000.

<http://www.asfa.asn.au/media/rpm.cfm?page=mr000413>; Kelvin Thomson, Shadow Assistant Treasurer and Robert McClelland, Shadow Attorney-General, *'Labor Welcomes Long Delayed Super And Divorce Bill But Many Questions Remain Unanswered'*; Joint Media Statement, April 13 2000

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Super Splitting Laws are effective and the right step forward, as seen from the view point of a Family Law lawyer. From the view point of superannuation, the result is not as positive.¹⁵² Some details are quite unsatisfactory and the outcome could be an administrative nightmare for funds.¹⁵³ This is particularly the case, bearing in mind the present Government's approach to superannuation in the past and the current push for 'choice', where there is no definite commitment to pensions and superannuation as a social issue. They are seen as just another financial issue.¹⁵⁴

However, the biggest problem from the authors' point of view is the 'choice' approach to superannuation. This means not the choice of different superannuation funds, but the choice to separate superannuation entitlements or to trade superannuation entitlements for property rights. In the extreme it can be said that the Government has diminished the effectiveness of its retirement policy by allowing traded off superannuation entitlements. This may indeed have 'profound consequences for a community's social and economic fabric'.¹⁵⁵

We consider that a superannuation agreement should only be at the disposition of the parties in exceptional cases. If one looks at the policy of the Government regarding the introduction of superannuation, it was for the support of the old-age pension,¹⁵⁶ and that should remain the dominant approach to the splitting of superannuation at divorce. This should remain in the domain of the Court and not the individual parties.

In conclusion we refer to the problems we have identified earlier:

<http://www.alp.org.au/media/0400/ktrmmssup130400.html>.

152 As the 'Creator' of the new scheme said: 'The new scheme represents the outcome or resolution of tensions between four competing principles – equity, simplicity, certainty and administrative convenience. Some will make the judgement one way saying that the Bill and Regulations are too difficult to understand and is of no use to have this degree of complexity because it will not be understood. But to simplify the proposals will see a loss of equity as between spouses.' S Bourke 'An Overview of the New Scheme from it's Creator' in M Foster (ed) *Superannuation in Family Law: A New Era* (2001) 15, 32.

153 Coates, above n 4.

154 It is the authors opinion that the Prime Minister's announcement on 5 November 2001 'A Better Superannuation System' changed this statement, and a definite commitment to pensions can now be seen by the current government. The Coalition's document, *Our Future Action Plan: A Better Superannuation System*, can be found at <http://www.liberal.org.au/policy/Superannuation%20policy.pdf>.

155 Nicholson CJ, above n 19.

156 Section 51 (xxi) of the Commonwealth Constitution.

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First of all, superannuation is far too complicated to leave it in the hands of the separating parties expecting them to deal with it appropriately for the purpose of the saving rates of the nation and the old age pension. That will not happen. Therefore, it is not advisable to encourage people to take responsibility for their own affairs in this context.¹⁵⁷

Secondly, the cost involved in reaching a satisfactory outcome is in most cases too expensive, in particular as there is no requirement of mandatory valuation for self managed superannuation funds (which represents the majority of funds), and there would often be little money left in the superannuation fund after the lawyers, actuaries and accountants are reimbursed. An ex officio split of super is the only consistent approach with the Government's broader income policy goals¹⁵⁸ and would support an increase in household savings.

From a gender point of view,¹⁵⁹ the division of superannuation by the Courts, ex officio, would provide women (in most cases) with a better outcome than at the present time where it is included with the normal settlement. At the moment the argument is: 'You get the house, (because you look after the children) and I take the super.'¹⁶⁰

This outcome leaves the wife with no money in retirement, she has to apply for government pension, while the husband would argue, 'you got the house, I do not have to pay for maintenance'.¹⁶¹ This outcome is not economically satisfactory in the long term.

The Government has placed 'an oval peg' in a round hole!¹⁶²

157 See Senator Watson, above n 7.

158 See EM, above n 78, 6.

159 See, ASFA –*About Super – Fact Sheet No 6 Women and Super; Fact Sheet 8 – Do Women get as much out of superannuation as men?*

160 See, Coates, above n 3.

161 Keri Welham and Dan McDougal 'Men bank on divorce' *The Sunday Times*, October 29 2000 11, referring to a recent study and claiming that men are likely to emerge from a divorce financially better off than their partners.

162 According to the authors the New Super Splitting Laws provide a solution that is 'almost' there, but not quite.

Comparative approach, an overseas consideration of the issues

Although we know that a comparative approach is always difficult because consideration must be given to the individual political and historical backgrounds in which a system was developed and is developing, such an approach can be quite helpful to see how other jurisdictions deal with a similar factual situation.¹⁶³

Firstly, we will look at the UK situation as the Australian law emerged and developed based upon the UK system, and is still today heavily influenced by British thinking. Secondly we will look at the US approach, and in this context we will discuss the 'Community of Property' concept¹⁶⁴, favoured in some States of the US and in Civil Law countries. Finally we will examine the German approach. The reasons behind spending a little more time on the German approach are:

- First of all it is seen as a 'model' approach;¹⁶⁵
- Secondly it was the first country to introduce legislation for pension rights adjustment on divorce ('*Versorgungsausgleich*');
- Thirdly it is not a common law approach; and
- Finally, one of the authors' legal background¹⁶⁶ and understanding of this system, makes it ideal to make a comparison to the Australian system.

163 *Superannuation & Family Law*, Above n 41, ch 1.3 Overseas Consideration of the Issues; Attorney General's Department; <http://law.gov.au/publications/super/super.htm>; The Government paper looked cursorily at the UK, NZ, Canada and the US, (altogether only two pages long). Further, in the introduction, the Constitutional impediments of division of power between the State and Commonwealth governments were mentioned, and why Australia is quite different from the rest. First of all, Canada and the US are federal legislations too, and secondly it is submitted that the trading and financial corporations powers in s 51(xx), the divorce and matrimonial powers in s 51(xxii) and the old-age pensions power in s 51(xxiii) of the Constitution gives the Federal Government enough power to regulate and legislate in the area of superannuation and divorce. The author has the impression that the Government, in this position paper, was not so interested in the overseas experiences.

164 The Community of property was proposed by the Government as option 2 in *Property and Family Law*, above n 41.

165 Ingleby, above n 9, 258.

166 One of the authors personally represented people in divorce proceedings in the German Family Courts.

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United Kingdom

Similar to Australia, Britain has a state Basic pension scheme and a State Earnings-Related Pension Scheme. Legislation recently-introduced by the Labour Government requires pension assets to be split up at the time of divorce under the cash out method.¹⁶⁷

Pensions Sharing Bill UK

It was debated that the draft Pension Sharing Bill UK avoids the presumptive equal split of pension entitlements by allowing pension splitting to remain a matter of discretion,¹⁶⁸ which 'may be a wiser policy than that currently proposed in Australia'.¹⁶⁹

It is submitted that on paper it sounds fantastic, but in the reality of the courtroom and the property settlement of divorce, it makes a settlement more complicated and legalistic.

As more and more people have superannuation and more and more money in these funds, the 50/50 split is an easy way to achieve a fair and equitable result, without all the headaches and pain associated with a discretionary splitting of property.

Conclusion

It is submitted that English law has embraced 'the cash out option' and with *Brooks v Brooks*,¹⁷⁰ has taken tentative steps towards embracing 'the in kind method' as well. It is argued that this would be in line with the trend in other industrially developed countries such as the United States¹⁷¹ and Germany.¹⁷² Further the amended *Family Law Act 1996* (the new Act) also provides for the splitting of pension entitlements.¹⁷³

167 Margaret Hughes, Pension Hope for Divorcees, *The Guardian*, Jan 27, 1996, 33; *Superannuation & Family Law*, above n 41, ch 1.3 Overseas Consideration of the Issues.

168 M Rae, 'Solving the pensions issue, (1998) 28 *Family Law* 626.

169 Dewar et al, above n 10, (at the end of the paper). It is submitted that the authors do not agree with this statement for reasons explained later.

170 (1995) 3 All ER 257.

171 For a discussion of the laws regarding divorce and pensions settlement in the US see Charles C Marvel, *Annotation, Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement or Property Rights between Spouses*, 94 ALR 3d 176, 189 (1979 & Supp. 1995).

United States of America

In the United States, three fundamental changes have reshaped the treatment of pensions in divorce proceedings. The first was a 1976 decision by the California Supreme Court. The second was a 1984 amendment to the *Employment Retirement Income Security Act* of 1974, and the final was a further amendment to the *Retirement Security Act* 1997.

Community of Property¹⁷⁴

The Australian Government, in its discussion paper 'Property and Family Law'¹⁷⁵ described the community of property as Option 2 in the following terms:

5.32 A community of property regime is based on the assumption that marriage is an equal partnership, having both a social and an economic dimension. Each party performs an integral role as part of that single social and economic unit, however the role that each plays will differ in type and quality. A community of property regime does not inquire into, nor does it attempt to weigh, the different contributions each party makes. It assumes an equality which is reflected in the fact that each party has an equal interest in the communal assets of the marriage. Parties may retain separate legal ownership of the communal assets during the marriage but in the event of marriage breakdown, the property is treated as joint and divided between the parties.

5.33 Under this approach, communal assets would be identified by reference to the period of cohabitation/marriage. Any property acquired during the period of cohabitation/marriage would be a communal asset. Any property held by either of the parties that is not within the definition of communal assets is the separate property of that party and is not divided in the event of marriage breakdown. Adopting such an approach to the identification of communal assets would give

172 For a discussion of the laws regarding divorce in Germany see Peter Holzer, *The Second Legal Assistance Symposium – Part III: Legal Assistance Overseas: A Practical Guide to German Divorce Law*, 112 *MillRev* 121 (1986).

173 However, this part of the new Act has not yet commenced, quoted from *Property and Family Law*, above n 44, para 3.35 to 3.38.

174 Was discussed earlier in Australia but rejected by the Law Reform Commission. One of the main proponents of this model in Australia is Jocelyne Scutt, 'Equal Marital Property Rights' (1993) 18 *Australian Journal of Social Issues* 128, mentioned in Dunn, *Splitting the Difference*, above n 12, 217. However in *Property and Family Law – Discussion Paper* (1999), above n 44, the concept of 'community of property' was proposed as option 2 again.

175 Above n 44.

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clear legislative recognition to the fact that marriage is both a social relationship and an economic partnership. Both parties contribute in their own way to the relationship and should therefore share in the outcomes of that relationship.

5.34 The definition of the property to be included in the pool of communal assets would rely on the current law. Property under the current law is accorded a wide meaning and includes assets over which a person has control. Under this definition, superannuation in its benefit phase referable to the period of cohabitation/marriage would be included. Entitlement to an equal share of the income stream would arise on marriage breakdown but the parties would be able to trade off their entitlement for other property. Superannuation in its accumulation phase would be dealt with under the proposals released by the Government in May 1998.

As the Family Council of the Law Society of NSW stated, 'this is a far-reaching and radical proposal for change to the law relating to property settlement between parties to marriage. It is a cure for unidentified and unclear problem/s.'¹⁷⁶

A similar statement was made by Nicholson CJ on 20 May 1999. His Honour said that: 'The 'community of property' approach contained in Option 2, in my view, is so unrealistic as to be unthinkable. It is gender-biased in favour of men and a reversion to the marital regimes of the 18th and 19th centuries.'¹⁷⁷

Could Superannuation Be Property in the US?¹⁷⁸

In the case of *In re Marriage of Brown*¹⁷⁹ the Supreme Court of California held that pensions are a contingent interest in property and therefore, as other property, divisible, whether vested or non-vested. The two methods of dividing the property interest were the 'cash out' and the 'in kind' method.¹⁸⁰

176 Law Society of NSW, Family Law Committee 'A response to the discussion paper: Property and Family Law – Options for Change' 8 August 1999. One of the arguments against Option 2- Community of Property was the belief that this would 'lead to greater impoverishment of women'.

177 Nicholson CJ, above n 16 (at the end of the speech).

178 See discussion of the concept of community of property in California in *Property and Family Law*, above n 41, para 3.21 - 3.29.

179 544 P 2d 561 (Cal 1976); (1976) Sup 26 Cal Rptr 633.

180 See discussion by Ingleby, above n 11, 252, 'Could Superannuation Be Property' where he discussed the approach taken by Article 2399 of the *Louisiana Civil Code*.

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Prior to the 1976 decision, California's courts held that non-vested pensions were a 'mere expectancy' and therefore not divisible property.¹⁸¹

The change of the Californian courts was followed by other Supreme Courts.¹⁸² Today over 40 states recognise future benefits under a pension or retirement plan as a form of property.¹⁸³

In the recent amendment to the *Retirement Security Act 1997* one half of the vested benefits which accrued during the period of the marriage will be vested to the former spouse. The exception is a negotiated alternative settlement or a different court order.¹⁸⁴

Germany

In most comparative research, Germany is rarely mentioned.¹⁸⁵ This could be because it is not a 'common law' country and secondly as most of the publications are written in German they are not easily accessible to English speaking researchers.

Germany introduced a pension insurance system back in the 1920's and in 1974 was the first country in the world to introduce 'pension rights adjustment at divorce' (called '*Versorgungsausgleich*')¹⁸⁶. In summary it can be said that the spouses do not have to institute proceedings for the compensation of pension assets. This will be

181 *French v French*, 112 P 2d 235 (Cal 1941); However in an earlier decision in *Messersmith* (1956) 86 So 2d 169 of the court of Louisiana held that incorporeal movable was community property and had to be divided at divorce, referring to arts 460, 470, 475 and 2399 of the *Louisiana Civil Code*.

182 *Ward v Ward*, 476 NYS 2d 712, 712 (1984).

183 Ingleby, above n 9, 255 who stated that today almost all American States have adopted the position that prospective entitlements, such as superannuation, are property. See further Charles C Marvel, above n 8.

184 See, *Superannuation and Family Law*, above n 44, Ch 1, 1.3 Overseas Consideration, United States of America.

185 The exceptions are Ingleby, above n 9 and Joshi et al, above n 60, 71.

186 Supply balance or *Compensation des droits da retraite* in French . Further see: Wolfgang Mincke, *Die Problematik von Recht und Sprache in der Übersetzung von Rechtstexten, Archives for Philosophy of Law and Social Philosophy*, 1991, 446, 458ff where he states that one should not translate a phrase if it is so unique that you cannot describe it properly in a foreign language. 'Ein Terminus muß daher unübersetzt wiedergegeben werden, wenn das bezeichnete Rechtsinstitut so eigenartig ist, daß es in einer anderen Sprache nicht eindeutig bezeichnet werden kann.'

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done ex officio by the family court.¹⁸⁷ The whole procedure is an administrative act in which the main actors are the family court and the pension organisations.¹⁸⁸ Germany may not have the most modern approach to the problem, but it is submitted that it is one of the most streamlined approaches.¹⁸⁹

The *ratio legis* for the *Versorgungsausgleich* is based on two principles, the first one is an equalisation of the increase moneys in the pension funds accrued during a marriage and the second is the idea of creating independent pension rights for divorced housewives.¹⁹⁰ The legislative basis can be found in §§1587 ff Civil Code Germany.¹⁹¹

Ancillary Property Matters of Divorce

The German Family Law system distinguishes quite clearly between pension rights adjustments (and property division) and maintenance payments after divorce.¹⁹² Property in the widest sense¹⁹³ will be separated into the following categories:

187 § 623 I 3 Zivilprozeßordnung (ZPO) Code of Civil Procedure in connection with § 1587 b BGB.

188 In an adversarial legal system such as the Australian one, this approach would be unthinkable.

189 Ingleby, above n 9, 258 described it as the most comprehensive scheme for the redistribution of entitlements on divorce.

190 Brudermueller in *Palandt, Bürgerliches Gesetzbuch* (2001) 60th ed, CH Beck, Munich, Einf v § 1587 Rz 1.

191 Bürgerliches Gesetzbuch ('BGB'); For a comprehensive commentary see Brudermueller, in *Palandt*, *ibid*.

192 Maintenance is governed by Sub-title II comprising §§1569 to 1586b and *Versorgungsausgleich* is governed by Sub-title III comprising §§1587 to 1587p (see Appendix 1) of title seven 'Divorce' In the Australian context maintenance is covered by s 72, 75, 77A, 81, 82, 86 and 87. In the middle of all these sections is s 79 - Alteration of property interests. In this context the comments of Evatt CJ and Opas J in *In the Marriage of Branchflower* (1980) FLC 90-857 at 75, 446 that 'it is frequently difficult to distinguish between orders for distribution of property under s 79 and orders for maintenance under s 75' is understandable.

193 In the German context the phrase '*Vermögen*' is used. '*Vermögen*' is more than property. Property is part of '*Vermögen*'. '*Vermögen*' could be translated as fortune, assets, wealth, means, see Clara-Erika Dietl, *Dictionary of Legal, Commercial and Political Terms, German - English*, 3rd ed, 1988, Verlag CH Beck Munich; Further see Mincke, above n 23, 458ff where he states that 'property in the English law' means something different from 'property in the German law'.

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- *Hausrat* - division (or allocation) of household effects (of or the contents of the matrimonial home) on separation of spouses.¹⁹⁴
- *Zugewinnausgleich* – ‘equalisation of the surplus’ The *Zugewinnngemeinschaft*¹⁹⁵ is the statutory (matrimonial) property regime of the community of surplus. On termination of the *Zugewinnngemeinschaft*, the ‘surplus’ effected by each spouse in his / her assets (excluding pension rights) is equalised. Different rules apply according to whether the marriage is terminated by death or by some other event (e.g. divorce). It was introduced as the statutory matrimonial property regime as a consequence of the Equal Opportunity Law in 1958. Despite its name, it is not a true community of property between spouses, but a separation of property with *Zugewinnausgleich*.¹⁹⁶ Each spouse owns and administers independently his/her own property, being liable only for debts incurred by himself/herself. Any additional wealth created during the period of the marriage (surplus) remains the property of the spouse who created it. It will, however, be equalised on termination of the marriage (e.g. divorce).¹⁹⁷
- *Versorgungsausgleich* – pension rights adjustment. Upon divorce the equal division of all pension rights of the spouses accrued during the period of marriage has to be carried out.

194 Household Effects Regulation (*Hausratsverordnung*); in particular § 11 II VAHRG, which gives the family courts the power to request information.

195 §§1363ff BGB.

196 This is important to understand because the doctrine of strict operation of separate property remains the basis of modern Australian family law property; Bates, above n 41, 304.

197 Joshi et al, above n 60, 71 argued that German law ‘explicitly incorporates the idea of community of property within marriage: assets acquired by either partner during a marriage are regarded as assets of the partnership and are split down the middle on divorce’. This statement is only partly correct.

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The 'Versorgungsausgleich'¹⁹⁸

In 1976 the German Civil Code was amended to provide for an equalisation of pension rights upon divorce.¹⁹⁹ It was the first country on earth to introduce such a rule. Since 1st of July 1976 a pension rights adjustment must be done *ex officio*.²⁰⁰ This is done via transfer of pension claims. The spouse, who acquired the larger amount of worth during the marriage, must transfer to the other spouse half 'of the difference' in value of their pension fund accrued between the commencement and cessation of the marriage. The aim of this balance is that both people come out with exactly the same accrued entitlement to pension rights from the marriage.

Because the parties can only impose a different percentage split in very limited circumstances regarding the pension rights adjustment, in most cases there is no dispute.²⁰¹

198 Pension rights adjustment (equal division on divorce of all pension rights of the spouses accrued during the period of marriage) The official website of the Bundesversicherungsanstalt fuer Angestellte translates the phrase as 'Maintenance in the statutory pension scheme'.

http://www.bfa.de/eng/eng_versicherung.2/eng_versorgungsausgleich.28/eng_28_versorgungsausgleich.html . The French version is ' Compensation de ressources dans le cadre légal de l'assurance-retraite, see

http://www.bfa.de/frz/frz_versicherung.2/frz_versorgungsausgleich.28/frz_28_versorgungsausgleich.html.

199 Versorgungsausgleich, BGB, §§1587 to 1587 (see Appendix).

200 §623 I 3 Zivilprozeßordnung (ZPO); Code of Civil Procedure, Germany.

201 §1587b –see Appendix; The exception is §1587o. Therefore the legal fees are minimal. In general it is submitted that legal costs in Germany are cheaper than in Australia. There is no direct comparable research available for the two countries, but there is empiric material for a German – UK comparison. Dannemann, Part I. It is submitted that what applies for the German – UK comparison would apply to a large extent to a German – Australian comparison. Dannemann said that a juxtaposition from German law and English law runs into several difficulties, the most important one, is that English solicitors and barristers are paid according to number of hours they spend on a case, their German colleagues according to the German Fee Scale. The fees according to the scale depend on the values of the individual claims. He concludes that 'on average, litigation is considerably cheaper in Germany both at the lower and at the upper end of a scale of litigated values'. Further he states that not only is the German system cheaper, the fees are also more predictable in the German system. However his findings are in congruence with the different role of courts in the civil law and common law system. German courts do part of the work which the English system assigns to solicitors or barristers. In this context the above mentioned §623 I 3 ZPO fits. In particular, German judges are more actively involved in establishing the facts of a case

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Example:

During the marriage the wife acquired EUR200, the husband EUR700 in the pension funds. The difference of the amounts is EUR500. Half of it, EUR250 will be transferred to the wife's account. After the divorce both spouses have EUR450 accrued during the marriage. This will be added to whatever their balance was at the commencement of the marriage.²⁰²

The 'pension rights adjustment' is triggered when a marriage is terminated by a divorce.

The 'pension rights adjustment' is triggered regardless of which property law regime governs the marriage. In outline there are three different property regimes. * Three property regimes in the law of property of the increase community or agreed upon another law on property (e.g. separation of property) by marriage contract. However the spouses can exclude the supply balance by marriage contract totally or partly. The exclusion is however ineffective, if within a year after conclusion of a contract a petition for divorce is filed. The *Versorgungsanspruch* will be executed regardless of the law of property the spouses lived under during their marriage, §1587(3) BGB.²⁰³

Everything that is connected with the divorce, thus also the 'pension rights adjustment', is executed by the family court, a special department of the district court.

The family court determines the allocation for pension rights adjustments for the time during the marriage. Included are such moneys which were maintained or acquired with the help of the fortune or due to a gainful employment of the spouses. The exception to the automatic allocation is §1587 o BGB,²⁰⁴ an agreement between the parties. In practice this allocation happens when the marriage lasted only for a short period of time, both partners were working and the divorce proceedings were instigated by mutual agreement.

than their English or Australian colleagues. According to Dannemann, Germany compared to Great Britain, with a similar population, had in 1993, a total of 20,672 professional judges, compared to 941 judges serving at English and Welsh courts, Dannemann, *ibid*, Footnotes 25 and 26. The number of German judges increased to 20,969 at 01.01.1999 Unpublished speak by Justice Doering 'Judicial Review of Public Administration in Germany' 5 December 2001, University of Sydney.

202 That can easily be achieved in Australia in accumulated funds. The problem is what will happen with the additional benefits such as life insurances? Will they be split?

203 See Appendix 1.

204 See Appendix 1.

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Compensation payments arising from the need to support a disability caused by an accident (for example) do not fall under the 'pension rights adjustment' regime.

Included are, in particular:

- Entitlements from public service conditions;
- Pensions or claims from the legal old age pension insurance;
- Entitlement of a company pension scheme (Occupational pension, Special performances payments, direct insurance); and
- Pensions or claims from private insurance contracts.

The court requests the old age pension insurance fund to provide 'pension information' regarding the pension rights accrued during the marriage. If there are different pension funds then,²⁰⁵ If circumstances exist which require the account balance to be clarified, it is the duty of the individual person to assist this process. The 'pension rights adjustment' can only be made from a completely 'cleaned' or determined account.

If the individual person does not fulfil his/her obligation to provide assistance and co-operation, the family court can force the person to pay a coercive penalty payment, §1587 e(1) BGB.²⁰⁶

After the family court has received all the information of all pension-paying institutions regarding pension rights accrued during the marriage, it decides on the 'pension rights adjustment' by judgement or resolution.

In the corresponding pension rights adjustment decision it is not only laid down, which spouse is due to pay and which to receive pension rights adjustment, and the level of same, but also in what form the pension rights adjustment is to be effected. As regards the forms of the pension rights adjustment affecting the statutory pension scheme, relevant are the:

205 The most important are: The Federal Labour Office, the Federal Insurance Office for Salaried Employees *Bundesversicherungsanstalt für Angestellte* (BfA), Federal Authority responsible for the pension fund for white collar workers.; the Regional Insurance Institution - *Landesversicherungsanstalt* - LVA , State based Authority responsible for pension funds for blue collar workers, §1326 RVO *Rentenversicherungs-Ordnung* (Social Security Pension Insurance Code). *Bundesknappschaft* - Federal Miners' Insurance, Federal Authority responsible for the Miners' pension insurance scheme.

206 See Appendix 1 and see § 888 ZPO and § 11 II VAHRG.

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- **transfer of pension claims (splitting)**
Herewith the pension claims of the statutory pension scheme are compensated for.
- **Establishment of pension claims without payment of contributions (quasi-splitting)**
Herewith the entitlements to civil service or civil service-related provision or other entitlements, which are due of a public law or equal pension provision representative, are compensated for.
- **Extended transfer of pension claims**
Herewith non-expiring entitlements to provisions due of a civil law representative may be compensated for by the transfer of further pension claims.
- **Establishment of pension claims by means of payment of contributions**
Herewith non-expiring entitlements to provisions due of a civil law representative may also be compensated for by means of the party due to make compensation being ordered to establish pension claims by means of payment of contributions.

The family court determines exclusively the amount of the transfer. If the amount should change in the course of the time (e.g. by law changes or personal circumstances) an examination or an alteration procedure with the family court could be requested.

Criticism

It was said that even the 'German' approach may not ensure horizontal equity, as it does not account for 'the relative rates of accumulation or depreciation of human capital during marriage.'²⁰⁷ However as mentioned earlier, it is the most streamlined mechanism for the division of property rights at divorce.²⁰⁸

It could be argued that for the sake of simplicity, it is the easiest way. Further it is submitted the '*Versorgungsanspruch*' is only one of three divisions of property resulting from a marriage breakdown under German law. As mentioned earlier

207 Joshi et al, above n 60, 72.

208 Ingleby, above n 9, 258.

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there is still the equalisation of surplus²⁰⁹ and the division of households effects. Further, primarily with the maintenance claim²¹⁰ any perceived injustice or inequality can be counterbalanced. This technique of preservation of maintenance rights was used in Australia in *Mapstone and Mapstone*²¹¹ and in *Tyson and Tyson*.²¹²

The German way

For Australia to adopt the German approach would be quite difficult, if not impossible. The socio-economic and legal background is quite different in Germany compared with Australia. Compulsory pension insurance has existed since the 1920s in Germany, in Australia only since 1983. There is no state minimum pension in Germany, therefore it is more important to receive money from the pension insurance fund. However the two biggest differences are the role of the courts in civil law countries compared to common law countries²¹³ and secondly Germany may have 20 pension funds,²¹⁴ but 90% of the population is in one of the three biggest funds. This compares with the 213,747 funds in Australia in June 2000 and 226,480 in June 2001 and 243,748 in June 2002.²¹⁵ Therefore in Germany, for the courts and the pension funds it is relatively easy to receive all of the necessary information and to make an appropriate decision. For Australia, we will have to see what the future will bring.

The way forward

Is there anything that Australia can learn from overseas experiences, or do we need 'a new approach'?²¹⁶ So far it is clear that, from all overseas experiences,

209 Zugewinnausgleich §§ 1363ff BGB.

210 §§ 1569 to 1586b.

211 *Mapstone v Mapstone* (1979) FLC 90-68.

212 (1993) FLC 92-368. However in general this is quite alien to the Australian approach and thinking. As Fogarty J in *Crapp v Crapp* (1979) 35 FLR 153 stated, and supported by s 81 FLA (see Appendix 2 Part I of the paper), the court should settle financial relations once and for all.

213 See Dannemann, above n 93.

214 Estimation by the authors.

215 APRA Superannuation Trends – June quarter 2000; APRA Superannuation Trends – June quarter 2001, APRA Superannuation Trends – June quarter 2002 (Appendix 3, Part I of the paper). Approximately 211,000 of these funds are self managed super funds, M Roberts, *Self Managed Superfunds – Preliminary Statistics* (2001). The numbers for the small funds for the quarter June 2002 was 240, 650.

216 The Justices of the Family Court do not think that Australia can learn anything from overseas experiences, see above n 19, para 68 and 69.

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superannuation or pension entitlement is part of a person's assets, property or financial resources and therefore in divorce proceedings it should be dealt with. Disregarding superannuation entitlement in divorce proceedings is out of touch with developments in the UK, US and Germany, human rights and the spirit of the Australian Equal Opportunity legislation.²¹⁷

We must keep in mind that in general, superannuation in Australia 'is essentially a private fund. It might be Government regulated, but that's where it ends.'²¹⁸

217 Ingleby, above n 9, 258.

218 John McCallum in; Helen Matteron and Glenda Price 'Those brittle nest eggs' *The Weekend Australian*, August 26 -27, 2000, 40. However this statement is contradicted by Dewar et al, above n 14, 2 where it is stated that 'Superannuation funds are, in a sense, public entities. They are heavily regulated by government in the interests of investor protection and the pursuit of social and macro-economic objectives'.

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APPENDIX I

APRA Superannuation Trends June Quarter 2002
Superannuation Industry at a Glance

Distribution of Funds – June 2002

	Number of Funds ^a	Members (000's)	Assets (\$billions)
by Fund Type			
Corporate	2,633	1,491	68
Industry	122	7,369	50
Public Sector	89	2,777	105
Retail	254	12,169	171
Small funds ^b	240,650	419	98
Annuities, life office reserves, etc	na	na	27
TOTAL	243,748	24,225	519
by Benefit Structure			
Accumulation ^c	242,860	20,961	332
Defined Benefit	410	413	19
Hybrid	479	2,851	143
TOTAL	243,748	24,225	493^d

Note:

Fund numbers are preliminary estimates based upon 2001-02 returns

Small Funds refers to those with less than 5 members and include both SAFs and SMSFs

Funds with less than 5 members are assumed to be accumulation funds.

This total does not include the \$27 billion of annuities and life office reserves etc.

Source: APRA *Superannuation Trends*, June quarter, 2002.

APPENDIX II

GERMAN CIVIL CODE (English Version)

Excerpt from the German Civil Code in English § 1587 to § 1587p. regarding Pension Rights Adjustment in Divorce, §§ 1587 to 1587p

III. EQUALIZATION OF SUPPORT²¹⁹

1. Principles

§1587 [Conditions]

- (1) An equalization of support occurs between the divorced spouses to the extent that expectations or promises of a pension on the grounds of age or disability or incapacity have been established or maintained for them or one of them during the period of marriage in the manner stated in §1587a(2). Expectations or promises which have been established or maintained without the aid of the property or without the work of the spouses are not taken into account.
- (2) The period of marriage within the meaning of the provisions concerning the equalization of support is the time between the first day of the month in which the marriage took place and the last day of the month which precedes the one during which the action for divorce was filed.
- (3) The ensuing provisions find exclusive application to the expectations and promises of pensions regarding which equalization of support occurs; provisions concerning property rights shall not apply.

2. Equalization of Value of Expectations or Promises of a Pension

§1587a [The spouse's duty of equalization; kinds of claims of support required to be settled]

- (1) The spouse who has the higher income expectation or prospect subject to equalization is obligated to perform the equalization. The claimant spouse is entitled to one half of the difference in value.
- (2) For the determination of the difference in value the following shall be taken as a basis:.....

²¹⁹ Translated By Simon L Goren, *1981 Supplement to The German Civil Code AND the Introductory Act to the German Civil Code and The Marriage Law of the Federal Republic of Germany*; Fred B Rothman & Co, Littleton, Colorado 80127, 1982.

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§1587b [Transfer and determination of pension rights by the Family Court]

- (1) If a spouse has during the marriage acquired annuity rights in a statutory annuity insurance within the meaning of §1587a(2) No 2 and these exceed the prospective pension rights within the meaning of §1587a(2), No 1, 2, which the other spouse acquired during the marriage, then the Family Court transfers half of the difference in value of these pension rights. The procedure follows the rules applicable to statutory annuity insurances.

§1587c [Exclusion of equalization of support]

There shall not be an equalization of support,

- (1) so far as the making of a demand on the debtor having regard to the circumstances of the parties, especially the acquisition of property by each during the marriage or in connection with the divorce would be grossly inequitable; hereby circumstances may not be taken into consideration solely on the ground that they led to the failure of the marriage;
- (2) so far as the creditor has, in expectation of the divorce or after the divorce, by his act or omission, caused the pension rights or prospective support due to him, and liable to equalization under §1587(1), to fail to materialize or to be lost;
- (3) so far as during the marriage the creditor has for a long period grossly violated his duty to contribute to the maintenance of the family

§1587d [Suspension of the obligation to establish pension rights]

§1587e [Duty to furnish information; extinction of claim for equalization]

- (1) §1580 applies mutatis mutandis to the equalization of pensions under § 1587b.
- (2) The equalization claim becomes extinct with the death of the creditor.
- (3) The right to payments by way of contributions (§1587b(3)) becomes extinct as soon as contractual equalization of support under § 1587 (1) Sent.2 can be demanded.
- (4) The equalization claim does not become extinct upon the death of the debtor. It can be enforced against the heirs.

3. Contractual Equalization of Support

§1587f [Claim for contractual equalization of support; assumptions]

In cases in which

1. the establishment of an annuity right in a statutory annuity insurance pursuant to the provisions of § 1587B(1) Sent.1 is not possible,

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2. the transfer or establishment of annuity rights in a statutory annuity insurance pursuant to the provisions of § 1587b(5) is excluded,
3. the spouse who is obliged to make equalization has failed to make the payments for the establishment of an annuity right in a statutory annuity insurance incumbent upon him pursuant to § 1587b(3) first half sentence of the first sentence,
4. payments from the pension fund or an enterprise which must be included in the equalization owing to the existence of annuity rights or prospects not yet vested at the time of the judgement,
5. the Family Court provided a settlement in the form of a contractual equalization of support pursuant to § 1587o, the equalization takes place on the petition of one of the spouses pursuant to the provisions of §§ 1587g to 1587n (contractual equalization).

§1587g [Right to claim annuity payments]

- (1) The spouse whose equalizable pension exceeds that of the other must make periodical cash payments (equalization payments) to the other spouse amounting at any given time to one half of the excess amount. The periodical payment may only be demanded if both spouses have obtained a pension or if the spouse obliged to make the equalization has obtained a pension or if the spouse obliged to make the equalization has obtained a pension and the other spouse is unable, within the foreseeable future, to carry on a gainful activity suitable to his education and ability owing to disease or other infirmity or physical or mental feebleness, or has reached the age of sixty-five.
- (2) § 1587a is applicable mutatis mutandis to the determination of the pension liable to equalization. If the filing of the action for divorce has changed the value of a pension or a pension right or a prospective annuity, or if a pension or pension right caused a prospective annuity to be lost, or gave rise to qualifications for an annuity right which have not obtained before the filling of the action, this must also be taken into account.
- (3) § 1587d (2) applies mutatis mutandis.

§1587h [Exclusion of equalization right]

A claim for equalization pursuant to §1587g does not arise,

1. so far as the claimant is able to support himself in a manner suitable to his circumstances from his own income and his own property, and the grant of a pension equalization would mean an inequitable hardship for the obligee

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- considering the financial circumstances of both parties. § 1577 (3) is applicable *mutatis mutandis*;
2. so far as the claimant in the expectation of the divorce or after the divorce, caused by his action or omission, a pension liable to equalization under § 1587, to be withheld;
 3. so far as the claimant during the marriage grossly and for a long period violated his obligation to contribute to the support of the family.

§1587i [Assignment of pension claims]

- (1) The claimant can demand from the debtor the assignment of pension right included in the equalization up to the amount of current equalization payments, which have fallen due or will fall due within the same period.
- (2) The validity of assignment to the spouse under (1) is not contrary to the exclusion of the transferability and liability to attachment of such claims.
- (3) § 1587d (2) applies *mutatis mutandis*.

§1587k [Applicable provisions; extinction of equalization claims]

- (1) §§1580, 1585(1) sentences 2, 3, and § 1585b(2) , (3) are applicable *mutatis mutandis* to the equalization claim pursuant to § 1587 g(1) Sent. 1.
- (2) The claim becomes extinct with the death of the claimant; § 1586 (2) applies *mutatis mutandis*. To the extent that the claim becomes extinct pursuant to this provision, the claims assigned pursuant to § 1587I(1) are transferred to the debtor.

§1587l [Cash settlement for future equalization claims]

- (1) A spouse can demand from the other a cash settlement in consideration of his future equalization claims if the other will not be inequitably burdened thereby.
- (2) The value at that time of the mutual annuity rights of prospective pensions determined pursuant to §1587g(2) includable in an equalization of pension rights shall serve as the basis for fixing the amount of the cash settlement.
- (3) The cash settlement may only be demanded in the form of cash contributions to a statutory annuity insurance or to a private annuity or life insurance. If the settlement elected is in the form of cash contributions into a private life or annuity insurance, the claimant must cause the insurance policy to be made out for his person to cover the event of his death or the reaching of the age of 65 or a lesser age, and to provide that his share in the profits is to be applied for increasing the insurance the insurance payments [sic] On application the debtor shall be permitted to pay in instalments, to the extent that this is equitable considering his financial circumstances.

§1587m [Death of the claimant]

The claim for the payment of the cash settlement becomes extinct on the death of the claimant, to such extent as it has not yet been performed by the debtor.

§1587n [Set-off against claim for maintenance]

If the claimant received a cash settlement pursuant to § 1587l, he must allow a set-off against a maintenance claim from the divorced spouse in the amount he would receive as the equalization of pensions under § 1587g, if the cash settlement had not been paid.

4. Agreements between parties

§1587o [Equalization agreements; form]

- (1) The spouses can conclude an agreement in connection with the divorce on the equalization of annuities or rights to a pension on the grounds of age or disability or incapacity to earn an income (§1587). Annuity rights in statutory annuity insurance under § 1587b(1) or (2) may not be established or transferred by the agreement.
- (2) An agreement under (1) requires notarial authentication. §127a is applicable mutatis mutandis. The agreement requires the approval of the Family Court. The approval shall be withheld only, if after the inclusion of the maintenance arrangement and the property settlement, the payment agreement upon is manifestly unsuitable as financial security for the claimant in case of disability or old age, or fails to bring about an equalization between the spouses which is suitable by reason of its nature and amount.

5. Protection of the debtor

§1587p [Payment to the former payee of the annuity]

If by virtue of a valid judgment of the Family Court annuity rights in a statutory insurance have been assigned to the spouse entitled thereto, the latter must allow being debited in favour of the debtor-spouse with an amount which the person providing the pension pays out to the debtor-spouse up to the end of the month, which follows the month in which the divorce judgment was served on him.