



Supplementary submission to the *Parliamentary inquiry into a better family law system* regarding superannuation splitting in family law property settlements

Preliminary findings from a project conducted by Women's Legal Service Victoria ('WLSV'), *Small Claims, Large Battles* show a number of difficulties in obtaining a superannuation splitting order as part of a family law property settlement. This includes problems discovering the name of the superannuation fund of former spouses and the cost and complexity of the process for seeking a splitting order. We recommend reforms to provide an administrative mechanism for finding information about superannuation of a former spouse, and to simplify the process for obtaining super splitting orders.

This submission

This is a supplementary submission prepared by Women's Legal Services Australia ('WLSA') to the *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*. It addresses the issue of women's access to superannuation splitting orders in family law property settlements. WLSA's original submission was made on 27 April 2017.

The small claims project

WLSA's member organisation, Women's Legal Service Victoria ('WLSV'), has been conducting a strategic litigation and research project called *Small Claims, Large Battles*, ('**Small Claims**'). The project began to investigate the intersection of women's post-separation financial hardship and the family law system. The project aims to provide an evidence base of the barriers to fair financial outcomes for women in the family law system, particularly where they have experienced family violence, including economic abuse, and the asset pool is small. WLSV and partner law firms provide legal assistance to women seeking a property settlement and those clients are interviewed to understand their experience of the family law system. A research report will be published in February 2018.

Recommendations

1. Provide an administrative mechanism to obtain information about the location and value of a former partners' superannuation.
2. Reduce the procedural and substantive complexity associated with super splitting orders, by:
 - a. Allowing unrepresented parties to complete a simplified form which is submitted to superannuation trustees; or
 - b. As an interim option, provide assistance to unrepresented parties to draft orders seeking a super split.

Superannuation and recovery from family violence

Superannuation is one of the most significant assets for Australian households, although huge disparity remains between men and women's super balances.¹ For low income families superannuation can sometimes comprise the greatest share of the property pool because of compulsory contributions.²

Women are most at risk of financial hardship following separation,³ especially if they have experienced family violence.⁴ Family violence will often include economic abuse.⁵ Women leaving violent relationships might have few financial resources on which they can rely. Those who have been responsible for caring for children or prevented from working will also have little or no super in their name.

For women who do have super, some will be able to apply for its early release on the grounds of hardship. The appropriateness of early access to super will depend on individual circumstances. In particular, if a woman is at risk of ongoing poverty and unlikely to have access to significant paid employment (often because of continuing trauma and effects of family violence) then early super release can be an important aide to her immediate recovery.

Over half the clients from the *Small Claims* project for whom we have complete data faced delays caused by the failure of the former spouse to make financial disclosure. At least 40% of clients with finalised or close to finalised matters involved a superannuation split. The average amount received in a super split for five clients with a finalised outcome which included super was \$45,171.

Regardless of whether there is a superannuation split in the ultimate property settlement, it is important to know the size of each party's super interest so it can be accounted for in the property pool and offset against other assets.

The current process

The current process for splitting super has many steps. First, the name of the super fund of a former partner is obtained, usually by them making financial disclosure. Second, an application is made to the fund requesting information about the balance of the fund account.⁶ The

¹ Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post-Reform Practice and Settlement Outcomes' (2008) 22(2) *International Journal of Law, Policy and the Family* 206, 207; Australian Bureau of Statistics, 'Household Wealth and Wealth Distribution, Australia, 2011–12' (Cat No. 6554.0, ABS, 2013) 4; Ross Clare and ASFA Research and Resource Centre, 'An Update on the Level and Distribution of Retirement Savings' (March 2014) 1, 1, 3–4, 14–16; Sheehan, Chrzanowski and Dewar, 68; Chris Ketter and Sam Dastyari, 'A Husband Is Not a Retirement Plan': *Achieving Economic Security for Women in Retirement* (Australian Senate Economics Reference Committee, 2016) 60.

² Sheehan, Chrzanowski and Dewar, above n 1, 218.

³ Pru Goward, Human Rights and Equal Opportunity Commission and Sex Discrimination Unit, *Striking the Balance: Women, Men, Work and Family: Discussion Paper 2005* (Sex Discrimination Unit, Human Rights and Equal Opportunity Commission, 2005) 54; Rosalie McLachlan et al, *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper* (Productivity Commission, 2013) 141.

⁴ See also Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Report, Centre for Rural Regional Law and Justice, Deakin University School of Law, 2014) 35; Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Report, Women's Legal Service Victoria, 2015) 6; National Council to Reduce Violence Against Women and Their Children (Australia), *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Their Children, 2009-2021* (Dept. of Families, Housing, Community Services and Indigenous Affairs, 2009) 44; Ilsa Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (Centre for Women's Studies and Gender Research, Monash University, 2007) 24; Natasha Cortis and Jane Bullen, *Domestic Violence and Women's Economic Security Building Australia's Capacity for Prevention and Redress: Final Report* (ANROWS, 2016).

⁵ Smallwood, above n 4.

⁶ see Family Court of Australia, 'Superannuation Information Kit' (Approved by the Principal Registrar in accordance with the Family Law Rules on 1 July 2007, July 2007)
<<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/diy-kits/kit-diy-superannuation-info>>.

charges for processing these requests vary for each fund. If a former partner has multiple funds, an application must be made to each fund, increasing costs. Third, orders are drafted and sent to the super fund to provide 'procedural fairness' to the fund. Fourth, if the fund finds errors in the format or wording of orders, they must be redrafted and resent. Fifth, if the fund is happy with the draft orders, they are provided to the court to make final orders.

Recommendation 1: easier access to information about superannuation

Duty to disclose information in family law property settlements

There is an obligation for parties to family law proceedings to make full and frank disclosure of their financial situation.⁷ However, especially where there is family violence, men who are obstructive or refuse to engage with the court will often fail to make disclosure, including the name of their super fund.

Consequences of failing to disclose

If a person engages with the court process but fails to make full and frank disclosure the court can exercise their discretion in a way that is adverse to that person, including by imposing penalties.⁸ In practice, however, where there is a small amount of property in dispute, the court is unlikely to impose such penalties. To do so may reduce the available property pool.

Limited options currently available to find a former partner's super fund

There are limited ways to discover the name of a former partner's super fund without that person disclosing it. Some options include:

1. Finding letters or documents relating to superannuation on paper around the house. With the trend towards electronic statements, this is becoming less viable.
2. Guessing a former partner's fund based on their employment in a particular industry. Each fund will charge a fee for processing requests for information. Fishing exercises like this can be both expensive for those with a low income, and have limited guarantee of success.
3. Subpoenaing HR records from their former spouse's employer in the hope they contain information about superannuation. However, subpoenas can be expensive, especially for women with low income. There are filing fees, conduct fees and sometimes women will be charged by the employer for the time taken to comply with the subpoena.

With all options, there are the following issues which make them inadequate 'workarounds':

- No guarantee of having the complete picture of all superannuation interests held by the former spouse.
- Costs associated with searching for information with no guarantee of finding useful information.
- Lengthy administrative and court processes.

⁷ *Federal Circuit Court Rules 2001* (Cth) r 24.03(1)(a); *Family Law Rules 2004* (Cth) r 13.04.

⁸ See Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, Second edition, 2015) 513.

Recommendation 1

Provide an administrative mechanism to obtain information about the location and value of a former partners' superannuation.

An administrative mechanism to give access to superannuation information would improve the operation of splitting provisions of the *Family Law Act 1975* (Cth); closing a loophole which lets people hide their assets and providing the most fulsome picture of super interests in a party's name. Having a single point from which to seek information would reduce cost and delay for both women seeking property settlements and the superannuation funds who are dealing with requests for information.

There are already government bodies, such as the Australian Taxation Office ('ATO'), which hold the most complete records of all individuals' superannuation. The ATO hold information about both the fund and the balance of individual's super accounts, including any lost or unclaimed super a person might have. The ATO already offers services for individuals to locate their own super. This is done through the "secure environment" of online my.gov accounts which can be linked to the ATO.

Recommendation two: reducing complexity

Legal complexity

Even if a fund name is known, an initial challenge in drafting splitting orders is knowing the trustee name to use. The trustee may have a completely different name to the fund's trading name, or there may be a stylised trading name which can cause confusion. For example, the trustee for 'CBUS Super Fund' is United Super Pty Ltd, and the trustee name for 'Care Super' is different to the stylised name 'CareSuper' which is used on the fund's website and other documents.

Orders also require complex and specific legalistic clauses. For example, common required elements of splitting orders include:

- that the trustee is 'to calculate the entitlement of the non-member spouse in accordance with the *Family Law (Superannuation) Regulations 2001*'; or
- 'that the trustee of the X Superannuation Fund do all such acts and things and sign all such documents as may be necessary to... calculate, in accordance with the requirements of the *Family Law Act 1975* and the *Family Law (Superannuation) Regulations 2001* the entitlement awarded to the non-member spouse; in the immediately preceding clause of this order';⁹
- 'notations' for the court to make (as opposed to binding orders) such as 'the value of the non-member spouse's interest is calculated in accordance with the *SIS Regulations*'.¹⁰

The above elements of the orders will vary depending on what type of fund is involved (i.e. accumulation or defined benefit), as well as the type of split being sought (i.e. a lump sum or a percentage) and whether the fund is in growth phase or payment phase. Very few (if any)

⁹ See Robert Glade-Wright and Craig Nicol, 'Superannuation Orders (by Courtesy of Stephen Bourke)' in *The family law book family law, procedure, forms and precedents in one volume* (Family Law Book Pty Ltd) vol March 2017 Quarter Update <<http://www.thefamilylawbook.com.au/academic-version>>.

¹⁰ Ibid.

funds provide an example of how the draft orders should be set out. Each error in drafting orders increases delay in what can already be a protracted process, as every new draft must be provided to the fund to review.

Procedural complexity

Before applying for a court order to split a superannuation interest, the party seeking the order must provide 'procedural fairness' to the superannuation trustees. That is, they must provide trustees with the draft orders so they can indicate any objections or foreshadow any problems they might have with complying with the orders. If there are errors in the draft order provided to the fund, it must be amended and sent to the fund again for checking, which can cause delay in already lengthy processes.

In practice, funds rarely object to the quantum of the split being sought. Unlike other third parties in family law proceedings (such as bank creditors) super funds have a very limited practical interest in the substantive impact of orders.

Issues with multiple funds

An additional barrier to obtaining a superannuation split arises when a former spouse has multiple funds with small balances. The *Family law (Superannuation) Regulations* set out that superannuation interests of less than \$5,000 are 'unsplittable'.¹¹ To obtain a super split these funds need to be rolled into one account. A court order will often be required to oblige a former spouse to do this. If the other party is obstructive or disengaged, the party seeking the super split could seek that a court registrar sign the relevant rollover documents in place of the super account holder. Again, this process can add further delay to family law proceedings and is difficult to navigate without legal assistance.

Recommendation 2

Reduce the procedural and substantive complexity associated with super splitting orders, by:

- a. Allowing unrepresented parties to complete a simplified form which is submitted to superannuation trustees; or
- b. As an interim option, provide assistance to unrepresented parties to draft orders seeking a super split.

The *Family Law Act 1975* (Cth) already recognises super as a relationship asset but the process for including it in a property settlement is almost impenetrably complex. In a jurisdiction which is supposed to be relatively unbound by legal formalism and where there are increasing numbers of self-represented litigants, those seeking a super split bear the burden of navigating a long and legalistic process. Superannuation funds rarely, if at all, object to the quantum of super being sought and are instead asked to review orders for correct legal phrasing. Those without legal training are asked to construct orders which refer to abstract calculation processes and legislation.

When relationships end, many women walk away from super they may be entitled to through the *Family Law Act* because it is just too difficult. Legal assistance to split superannuation when it is the main asset is also limited because private lawyers cannot be paid from

¹¹ *Family Law (Superannuation) Regulations 2001* (Cth) r 11(1A).

superannuation interests which vest on retirement. However, for low income households, superannuation is often one of the most significant assets.

Reforms to simplify this process or provide assistance to unrepresented litigants would improve women's access to timely property settlements and help protect against post-separation financial hardship as well as poverty in the future.

Conclusion

Superannuation is a significant asset for Australian households, and it is recognised by the *Family Law Act* as relationship asset. However, many women are unable to obtain a fair property settlement which includes a split of superannuation because of a lack of information and the complex procedures involved.

Providing an administrative mechanism for accessing information about super would modernise the process of splitting super under the Family Law Act; recognising that today individuals often have multiple super accounts. Simplifying the process for obtaining splitting orders would improve the financial wellbeing of women escaping violence and those at risk of post-separation economic hardship.

Further information

If the committee requires any further information or would like to discuss this submission further, please contact **Estelle Petrie**, WLSV Small Claims Project Coordinator on [redacted] or at [redacted]

Yours faithfully

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On behalf of Women's Legal Services Australia