

# **H**ARRINGTON FAMILY LAWYERS



## **SUPERANNUATION**

The Family Law Courts have always had the ability to take superannuation into account on a property settlement. In recent years, in most cases, they have also had the ability to treat superannuation as property and to split it. This has led to increasing troubles about how the courts treat superannuation.

### **FORMS OF SUPERANNUATION**

As we all know, superannuation is an overly complex area, and as a result there are no easy solutions. The forms listed below are just a summary of the types of funds.

#### **I. ACCUMULATION FUNDS**

These are now the most common type of funds which are similar to bank accounts, in that money is deposited, interest is accrued, fees are taken out and hopefully they grow. They are fairly straightforward to deal with.

## 2. DEFINED BENEFIT FUNDS

These are usually seen in the old style funds, for example Comsuper, DFRDB, some Qsuper, Amcor, some Qantas, some Telstra, some banks. They have a completely different method of calculation to accumulation funds. With these funds the member is paid by the trustee an amount calculated in accordance with a defined formula, for example based on final salary. The formula changes from year to year based on such fund specific methods as length of service, position held and the like.

Sometimes these funds also have pension components attached with them, some with a CPI index and some without. To make matters more complex, some members will be, at the same time, members of both an accumulation fund and a defined benefit fund. They may also be a member of a partially vested fund, which is like a form of hybrid.

These funds can be **very** complex to deal with.

There are major issues as to how to value these funds, including the pension component, and how to split them fairly.

## 3. SELF-MANAGED FUNDS

Although these are treated by APRA as accumulation funds, as with all funds it is necessary to check the trust deed. We have experience of dealing with a self-managed fund that said it was a defined benefit fund.

It is possible that these can be treated separately from the strict requirements for other splitting orders as they have been treated for many years as being the property of the parties.

### THE KEY ISSUES IN HANDLING SUPERANNUATION AND FAMILY LAW:

- What type of fund is it? This can sometimes be a difficult question to answer, as sometimes the fund says it is one type but is in reality another type altogether. The type of fund may make a major difference to the amount of value in the fund and how it might be split.
- Is the member a member of various funds although at first blush he/she is a member of only one?

- What is the value of the member's interest? When members receive a possible pension component, this needs to be calculated very carefully. There are ongoing disputes within the Family Court on this issue.
- What was the value of the member's interest at the commencement of cohabitation? Sometimes this is almost impossible to calculate.
- How much did the member's interest grow in the period between separation and trial? Whose contribution was that? What was the cause of that?
- What is the effect of tax or notional tax on the member's interest? Will the member's entitlement be over the Reasonable Benefit Limit (RBL)? Can the member so structure his or her affairs to avoid the RBL? Should a member be forced to so structure?
- What impact will there be on the parties if the member is receiving or is to receive a pension from his or her superannuation entitlements?
- Should a member be allowed to take superannuation entitlements as a lump sum or be forced to take as a pension or annuity?
- If there is to be a split now based on prospective pension entitlements, what effect will that in fact have on the member's pension entitlements, with tax on those pension entitlements?
- Is the fund complying or non-complying?
- If a super split were to occur, does this transform a self-managed fund into an APRA regulated fund? What are the consequences (legal and financial) of that?
- Should a non-member spouse be forced to sell his or her home to allow a member spouse a portion of the home? Should any impact on the children of the marriage be taken into account? Conversely, should a member spouse miss out on an interest in the home (and thereby prevented from likely ever having home ownership) because his or her former spouse does not want a superannuation split?

## USE OF VALUATIONS AND FINANCIAL PLANNERS

We are lawyers, not accountants nor financial planners. We can only advise you about the law. It is essential that careful consideration is given to:

- obtaining an appropriate valuation, and especially caution to obtaining a joint valuation, except in the simplest of cases.
- obtaining clear actuarial or superannuation advice about specific funds, and the interests in those funds.
- the use of an appropriate financial planner.

This area is a maze, and it is our view that it is very easy for clients to get it wrong. We have liaised with competent other experts, to assist our clients. We like to take extreme care in this process, in order to protect our clients. Julie, Stephen and Bruce have all dealt with complex superannuation matters. Bruce has written for Proctor about recent Family Court superannuation decisions.

*Harrington Family Lawyers pride ourselves on our accurate advice to clients. This brochure is of a general nature only, and may not reflect your specific needs. For specific advice in your matter, you should contact us, so as to ensure that the advice for you is accurate.*

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