

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

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ABSTRACT

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

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

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

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

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

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

DECLARATION OF ORIGINALITY

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

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