

# The Place of Part VIII B in the s79 Process after *Coghlan*

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## Introduction

After the handing down of the decisions in *Hickey and Hickey and Attorney-General (Cwth)*<sup>1</sup> and, more recently, *In the marriage of Coghlan*<sup>2</sup>, what authoritative principles emerge about s79 practice in the light of the Part VIII B revolution?

We aim to we look briefly at the central controversy which divides the two cases. We suggest that, while both significant and interesting jurisprudentially, this divide provides little guidance on day to day practice and tells us little about how to grapple with Part VIII B within the s79 process.<sup>3</sup> Then, again briefly, we enunciate those principles and guidelines which clearly emerge from the decisions in those (differently constituted) Full Courts.

We then contend that, essential to any property case involving superannuation interests, practitioners should remind themselves what the Family Law Act says about how a court is to determine an application under s79. The decision in *Coghlan* is a timely reminder that family law is a creature of statute and that the Family Court is a superior court of record created by statute.<sup>4</sup> Any application under s79 must therefore observe the statutory requirements as laid down by Parliament.

In observing the statutory requirements in any application under s79, what is required is a careful examination of, and supported by evidence about,

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1 [2003] FamCA 395; [2003] FLC 93-143; 30 Fam LR 355.

2 [2005] FamCA 429; (2005) 33 FamLR 414.

3 Neither case addresses a further central debate – equally significant and interesting – present since the early days of the Act, namely whether a non-vested superannuation interest, being a contingent interest in property, is “property” within the meaning of s4(1) of the Act and sub-paragraph (ca) of the definition of “matrimonial cause”.

4 *DMW and CGW* (1982) FLC 91-274.

the “nature, form and characteristics” of not only superannuation interests, which is the focus of this paper but any property of the parties or either of them. It is fundamental to the s79 process that the four steps within it are seen as “*inter-related*”<sup>5</sup> and not necessarily rigidly compartmentalised. That is, it is likely to be important, in arriving at a just and equitable result, to have regard to the valuation (or “amount” as the statute provides<sup>6</sup>) of the interest<sup>7</sup> in assessing contributions (step 2) as well as providing evidence to the Court about the nature of the valuation in step 1 (marshalling and valuation of assets). And, crucially, it is important to carefully examine the nature, form and characteristics of the superannuation interests in framing the final order at step 4 (the “justice and equity” step).

What follows, we contend, is that practitioners should return to the basics of statutory construction. While the introduction of Part VIII B and its interpretation in the recent Full Court cases provides fertile ground for comment and debate, it must be said that if the statutory contours of s79 are closely observed, then the order will meet the ultimate test in s79(2).

However, there are three fundamental background considerations that must be stated.

Firstly, superannuation is complex. It always has been. The absence of Part VIII B in the Act for 30 years hid its complexity from practitioners, from judges – and from the s79 process itself. The introduction of Part VIII B has merely exposed its complexity. The nature, form and characteristics of superannuation were not changed by the introduction of Part VIII B.

Secondly, contrary to the impression emerging from both *Hickey* and *Coghlan* – and indeed all of the superannuation cases which preceded them – superannuation does not present itself in a single form. The nature and form of each superannuation interest emerge from its trust deed<sup>8</sup> and each interest has its own characteristics and peculiarities.

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5 An expression used in *Hickey* at para 39.

6 Section 90MT(2) of the *Family Law Act 1975*.

7 Which, as will be discussed below, are not necessarily the same.

8 Or in legislation in the case of public sector funds at both Commonwealth and State level.

The third background consideration is the court's jurisdiction and power. Like other courts, courts exercising jurisdiction under the *Family Law Act* operate on the basis of:

- jurisdiction – the authority to decide matters; and
- power – the ability to alter the obligations between the parties. The exercise of that power can be at large or it can be qualified.<sup>9</sup>

The decisions in *Coghlan* and *Hickey* confirmed that under the *Family Law Act* courts now have jurisdiction over the subject matter of superannuation. However, the question must then be asked: what powers can be exercised with respect to that jurisdiction? In particular, what does the *Family Law Act* provide as the source of the Court's power to alter the interests of the parties with respect to the superannuation entitlement of either of the parties or both of them and is that power at large or qualified?

It is respectfully submitted that:

- jurisdiction is conferred through s90MC<sup>10</sup>;
- power to alter the entitlement of a member (who is a party to the proceedings) to a payment of their superannuation is conferred by s79; and
- the operation of that power is not at large (because of the third party trustee interests and because it is a power to split payments not the underlying interest). The operation of the power is governed – and circumscribed - by Division III of Part VIII B.

### **The Central Controversy**

The central controversy between the respective Full Courts (and between the majority and minority judges in *Coghlan*) can be seen highlighted in the following table:

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9 For a discussion on the distinction between jurisdiction and power see *Harris v Caladine* (1991) FLC 92-217 esp at 78,493).

10 Operating with the definition of *matrimonial cause* in s4 and with s31(1)(a) and with s39(4) of the *Family Law Act* 1975.

<i>Hickey's case</i>	<i>Coghlan Majority</i>
<p>“A superannuation interest is therefore to be treated as property ...”<sup>11</sup></p> <p>“... the effect of s90MC is that in proceedings in relation to property under s79, a superannuation interest is to be treated as property irrespective of whether or not a splitting or flagging order is sought or proposed to be made”<sup>12</sup></p> <p>The expression “treated as property” should be understood as meaning “treated as if it were property even though it is not ...”<sup>13</sup>.</p> <p>“Because a superannuation interest is to be treated as property...it follows that it will be included in the list of property and valued at what is step 1 of the preferred four-step approach to the determination of an application pursuant to s79 ...”<sup>14</sup></p> <p>“The superannuation legislation introduced reforms which are directed to how a Court will deal with a superannuation interest at steps 1 and 4 of the preferred four-step approach ...”<sup>15</sup></p>	<p>The use of the word “also” in s90MS prevents ... an interpretation ... that “superannuation interests should be regarded as synonymous with property for the purpose of proceedings under s79.”<sup>16</sup></p> <p>“...superannuation interests are another species of asset which is different from property as defined in s4(1), and in relation to which orders can also be made in proceedings for property settlement under s79.”<sup>17</sup></p> <p>“... s79(1) provides that ... the Court may make such orders as it considers appropriate dealing with the interests of the parties in ... property, and s90MS(1) provides that, in such proceedings, the Court may <b>also</b> make orders in relation to superannuation interests of the spouses ...” [emphasis in original]</p> <p>“Nothing...would prevent a Court in the exercise of its discretion from including a superannuation interest as an item of property...which is drawn as ‘the first step’ in the determination of proceedings under s79, whether or not a splitting order is sought in those proceedings under s79. This approach</p>

11 Para 30 Judgment.

12 Para 75.

13 Ibid.

14 Ibid.

15 Ibid.

16 Para 40 Judgment.

	<p>could be adopted where the parties agree that it should be adopted, or where the Court is satisfied that the superannuation interest is indeed property within the meaning of the definition of “property” contained in s4(1) or if the interest is not within that definition, but is of relatively small value in the context of the value of the other assets in the case, or there are features about the interest which leads the Court to conclude that this would be an appropriate approach.”<sup>18</sup></p> <p>“<b>However</b>, ... we consider that <b>the preferred approach</b> to the determination of property settlement cases <b>must</b> be to prepare in addition to the list of items of property (which would clearly fall within the definition of that term in s4(1)), a separate list containing any superannuation interest or interests (valued according to the regulations if a splitting order is sought in any application before the Court, or if no such application is sought, valued either according to the regulations or otherwise) ...” [emphasis added in each case]<sup>19</sup></p>
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17      Para 40 and also para 43 Judgment.

18      Para 61 Judgment.

19      Para 64 Judgment.

## Clear Principles

We can be clear about some principles, in respect of which all judges in both *Hickey* and *Coghlan* were in agreement.

Given the length and breadth of the judicial dispute, and the wide discussion of the jurisprudence surrounding Part VIIIB, it is perhaps surprising that the summary of those binding principles can be brief:

- it is not necessary to determine the amount of superannuation in accordance with the Regulations (or scheme-specific method) where no splitting order is sought or made;<sup>20</sup>
- it is within discretion to not order a split – i.e. to leave superannuation interests lie where they fall;
- it is within discretion to order a split where neither party has sought same;
- in that event, it would be necessary for the court to determine the amount of the superannuation in accordance with the Regulations or scheme-specific method; and
- there is a fourth step in the determination of s79 applications at which the justice and equity of the proposed orders (including of course, whether there is to be a split and, if so, its quantum) needs to be examined.

## “Nature, Form and Characteristics” of Superannuation

We contend that in *any* property case involving superannuation interests there needs to be a careful examination of the “nature, form and characteristics” of those interests.

If we turn the clock back to 2001, prior to the superannuation amendments, for the Court to make any order with respect to the property of the parties or either of them under s79 it should consider the nature form and characteristics of all the property as part of the decision in determining the form and structure of its orders. Take the example of the particular partnership interest in a law firm in *In the Marriage of Best*.<sup>21</sup> The Court

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20 It needs to be noted that *Hickey* said “where a splitting order is **made**”; *Coghlan* said “where a splitting order is **sought**”. Given that both courts agree that the court has power to make a splitting order even when one is not sought by either party, the words are used by us in the alternative.

21 (1993) FLC 92-223.

knew it could not alter the interests in that item of property because of its (unique) nature, form and characteristics.

The Court was in many ways saying much the same thing about superannuation prior to the introduction of the super splitting amendments. However, it was never really expressed in those terms.<sup>22</sup>

After the introduction of the splitting amendments, superannuation still had the same nature, form and characteristics as it had before the amendments. What changed was that the Court now had **statutorily conferred** jurisdiction over the subject matter and the power to make particular types of orders under s79. The types of orders are described in s90MT. So in deciding the form and structure of its orders, the Court, as part of the 4<sup>th</sup> step, must consider the nature, form and characteristics of the superannuation and any other fact or circumstance. Those matters are also relevant to the other steps in the process.

The separate but related sub-sections of s79 are but the mandatory means to an end: the task is to arrive at a just and equitable distribution of property within the particular marriage under consideration. Achieving that mandatory end must be carried out by considering all of the matters outlined in the section. The four-step process itself was something derived over time as merely a logical means to bring order to that mandatory statutory process.

There is nothing revolutionary about considering the nature, form and characteristics of superannuation; courts have done it consistently (even if not expressed in that form) since the commencement of the Act in respect of property. The nature, form and characteristics of a post-separation inheritance, or a windfall, or a gift from third parties, for example, have always been taken into account. There has never been a requirement for different types of property to be treated the same as other types of property.<sup>23</sup> And neither has there ever been a requirement for different types of property to be treated differently. So it is with superannuation.

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22 In submissions in *Hickey's* case (and accepted by that Court), it was contended that superannuation satisfied the definition of “property” in s4 but the reason the Court had been reluctant to exercise its power was because of the unusual nature of superannuation. Examples of the Court exercising its power were provided to the Court (see *Evans and WA Public Trustee, Wunderwald and Wunderwald*).

23 See *Cahill and Cahill*.

The starting point in every case is to ask: how can justice and equity be achieved in this case. The practitioner’s response, or part of the response is, it is suggested, to take into account the nature form and characteristics of all of the property **and** of all the superannuation at **each** stage of the process in a manner and order which best illuminates the justice of the client’s asserted case. Later in this paper we suggest how the process might be looked at in that way.

### **Coghlan and the Traditional 4 Step Approach**

In terms of s79 jurisprudence, the problems become particularly acute when step 1 of the four-step process is applied with rigidity: the “property” must be ascertained and compartmentalised which, in turn, brings the issue of a “global” or “two pools” approach to centre stage. If, as the Full Court said in *Evans v The Public Trustee (WA)*:<sup>24</sup>

... (t)he question of what is “property” within s79 [has taken] on almost religious significance in proceedings under [s79].

we would respectfully suggest that the erstwhile rigid approach to step 1 of the s79 process forms part of the same theology.

A later Full Court in *In the Marriage of Best*<sup>25</sup> was to observe that the distinction between “property” and “financial resource”:

... can lead to narrow and artificial distinctions and inconsistent results.<sup>26</sup>

We would respectfully suggest that the same is true of allowing the questions of the appropriate approach at step 1 and the question of “property even though it is not” or “another species of asset” to dominate an analysis of the s79 task where superannuation interests are involved.

In *Norbis*<sup>27</sup>, Justices Mason and Deane said:<sup>28</sup>

... As a matter of construction of s79, Nygh J is right in saying that the section imposes no obligation on the Family Court to pursue in relation to this issue either the global approach or asset by asset approach **to the exclusion of the other**. ...

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24 (1991) FLC 92-223 at 78,547.

25 (1993) FLC 92-418.

26 At para 21 of the judgment.

27 (1986) 161 CLR 513.

28 At 523 – 4.

... The Family Court has rightly criticized the practice of giving over-zealous attention to the ascertainment of the parties' contributions, and we take this opportunity of expressing our unqualified agreement with that criticism, noting at the same time that the ascertainment of the parties' financial contributions necessarily entails reference to particular assets in the manner already indicated. [emphasis added]

The reference to Justice Nygh is to His Honour's decision in *G and G*<sup>29</sup> and, in particular, where His Honour said:<sup>30</sup>

... In my view, despite what was said by [the Full Court] in *Norbis*, both approaches are legitimate unless the High Court rules otherwise provided that those who take the global approach heed the warning **that the origin and nature of the different assets ought be considered** and that those who favour the more precise approach do not mistake the trees for the forest, i.e. add up their individual items without standing back at the end to review the overall result in the light of the needs of the parties. [emphasis added]

We respectfully suggest that both His Honour and Justices Mason and Deane were, in effect, suggesting that the nature, form and characteristics of the property must be taken into account at each stage of the s79 process.

Significantly, Justices Mason and Deane went on to say in *Norbis*:<sup>31</sup>

It has not been suggested that there is any fundamental difference between the two competing approaches which we have considered, in the sense that one will yield more just and equitable entitlements than the other.

Indeed, with respect, that should be the case because either approach (which should not be pursued "*to the exclusion of the other*"), is but a method by which the ultimate just and equitable result is illuminated. And this is, at least in part, why some judges suggest, having adopted one method or the other, that the alternative method should be used as a "cross-check".

However, the majority in *Coghlan* considered:

If this approach is adopted, whereby superannuation interests are dealt with separately from property as defined in s4(1), but are subject to the considerations in s79(4), then not only will any contributions, both direct and indirect, by either party to such superannuation interests be more likely to be given proper recognition, but the real nature of the superannuation interests in question can also be taken into account, both

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29 (1984) FLC 79,628.

30 At 79,697.

31 At 524.

in consideration of the s75(2) matters and in the final assessment of whether the ultimate order is just and equitable.<sup>32</sup>

This appears, then, to involve, at least implicitly, a significant shift in erstwhile judicial thinking. There is by the majority a clear assertion that the answer to a step 1 question (global or two pools?) will allow (a) contributions to better assessed and (b) will give proper recognition to the “*real nature of the superannuation interests in question*”.

But, with respect, why? And, more importantly for those providing day-to-day advice, in what way are contributions be given “proper” recognition (presumably as distinct from ‘improper’ recognition if a global approach was preferred)? These questions are not answered in *Coghlan*, nor, we would suggest, in any case decided since.<sup>33</sup> In particular, the majority do not tell us what is meant by the “real nature of the superannuation interests”. It is, with respect, not explained how a two pools approach takes account of these features any more than a global approach would.

Partly, we suggest, that is because the nature, form and characteristics of the superannuation interest were not, in fact, the subject of evidence and were not properly taken account of at trial and, therefore, on appeal.

But, the picture has also been clouded, we would respectfully suggest, because the issue of value appears to have become confused with the issue of the nature, form and characteristics of the property concerned. This is, perhaps, primarily because at step 1, the court is dealing with something completely new to the process: the notion of a mandated amount for an interest of the party or parties that must be taken into account. That, in turn, seems to have resulted in the notion (for which there had been some judicial support<sup>34</sup> pre-*Coghlan*) that there is something artificial about the (mandated) capitalised “amount” of a non-commutable pension income stream. The “artificiality” is, presumably, said to arise from the fact that the income stream can never be capitalised into its assumed capital value and, thus, is not worth that sum.

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32 Para 67 judgment.

33 Although the rise of a mathematical (or pseudo-mathematical) approach is hinted at – a matter discussed below.

34 See eg. Coleman J in *Cahill*.

In *RDWH and SJLH*<sup>35</sup> Warnick J (sitting as a single judge of the Full Court in an appeal from a Magistrate) said on this issue:

In this regard, counsel for the husband suggested that the value of husband's entitlement had been 'plucked from the air' and he referred to terms such as "an air of artificiality", used by his Honour Justice Coleman in *Cahill v Cahill* [2003] FamCA 172. These terms seem to involve the assumption that a lump sum is inherently a more valuable form of property than an entitlement to a pension. I would not make such an assumption and certainly I would not make an assumption that such differences as existed could not be 'valued' in the absence of expert evidence on the point ...<sup>36</sup>

To view the assessed present amount of a future pension income stream as "artificial" is, it is respectfully submitted, to confuse two different aspects of the s79 process. The **nature and characteristics** of an income stream as a pension receivable only as a fortnightly sum for so long as a person lives is undoubtedly relevant to what order will achieve justice and equity – i.e. how an interest with those characteristics might be treated – or, perhaps, how a contributions assessment might be made. But it says nothing, per se, about its value (unless, of course, as Warnick J suggests, there was cogent evidence to that effect in a particular case).

As part of the step 1 process – and as part, in turn, of assessing the nature, form and characteristics of the particular superannuation interests involved – it is necessary for the court to know how the statutorily-mandated "amount" is arrived at and whether there might be arguments about whether its value differs from that statutory amount.

Equally, though, the fact that, say, a non-commutable income stream sits alongside, say, a house, car and shares at step 1 of a particular s79 process cannot be ignored. A guaranteed income stream is not the same as a house (although each undoubtedly has value). Apples are sitting alongside pears. But, it is arid (at least in the absence of cogent evidence) to assert that apples are more valuable than pears. Simply, the apples have certain natures, forms and characteristics and a value of x; the pears have certain natures, forms and characteristics with a (statutory) amount of y (and possibly, a value of z).

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35 [2005] FamCA 676, No. NA84 of 2004, 11 July, 2005, Warnick J, unreported.

36 At para 46.

We would respectfully say that putting, for example, a pension in a separate pool says **nothing** about contributions, because the nature, form and characteristics of the interest do not change as a result. There can, in our view, be no argument that the ultimate requirement to reach a just and equitable result means that the “real nature” of the superannuation interest must indeed be taken into account. But, that does not emerge from the technique a trial judge employs to determine contributions (i.e. a global or two pools approach). It emerges from a knowledge of the governing rules of the trust and from the superannuation regulatory environment.

It does, we contend, require practitioners to adduce evidence about the “real nature” of the superannuation interests in a case (and their form and characteristics) and, also, the effect of the particular order for which they contend as part of their case in satisfying the court that the order can be made because it meets s79(2).

The majority in *Coghlan* assert not only that a separate pool will reveal the “true nature” of the interest/s, but also that:

... any contributions, both direct and indirect, by either party to such superannuation interests [are] more likely to be given proper recognition.

It was not made clear, and, with respect, what remains unclear, why or how this is so.

Is this, in reality, a shorthand means of saying that, where the length of cohabitation is not coterminous, or nearly coterminous, with the length of contribution to a scheme by a member, a “different” assessment of contributions is required? And, if so, what other than a formulaic or mathematical calculation in that respect is contemplated. Does Part VIII B herald the rise of the sort of mathematical (or, more accurately, pseudo-mathematical) approaches to the assessment of contributions long eschewed by the Court?

The early signs are that this is precisely what is happening. A good example is provided in the retrial of *Coghlan* itself. Steele J assessed the wife’s contributions to the “general assets pool” as 75/25 and to the “super pool” as 25/75. His Honour then calculated that the “general assets” constituted 64% of the “total assets” and the superannuation pool 36%.

When those figures for the two separate pools are taken together, they give rise to a contribution based entitlement 57/43 in favour of the

wife<sup>37</sup>. That is a relatively precise figure, but it is the one arrived at and I see no need to round it out.<sup>38</sup>

In *PJM and STM*<sup>39</sup> the facts were more stark. The husband commenced receiving his DFRDB pension about 9 years prior to the commencement of the relationship. Coleman J assessed the wife as having made no contribution to it. As to other assets his Honour found they consisted of three parts: a rural property, lump sum super and other assets. His Honour assessed the wife's contributions to each part as 5%; 15.5% and 50% respectively. Totalling the respective proportions of each part of the assets gave a dollar value representing 15.5% of the total of those assets which:

... in the Court's view represent[s] a realistic reflection of the evidence  
....

Preceding that ultimate finding His Honour held:

Whilst the determination of contribution entitlements involves the exercise of a wide discretion, and does not readily permit mathematical precision, the figures indicated above are useful for present purposes

His Honour (with, it might be thought, familiar *West v Green* bells chiming in the background) said this in respect of the lump sum superannuation component of those assets:

It is evident that, of the 13 years during which the husband worked for Australia Post, he cohabitated with the wife for approximately four years. Without suggesting any precise apportionment, to regard the wife's entitlement in the superannuation fund as approximately one sixth and that of the husband as five sixths would tend to reflect, if only on a 'time served' basis, the years of Australia Post service prior to and subsequent to commencement of co-habitation. Recent decisions of the Full Court suggest that such an approach is less heretical than in earlier times.<sup>40</sup>

Inherent in the notion of the "better" assessment of contributions is surely the corollary: if contributions are assessed globally, then contributions to super must somehow be lost, or clouded or disregarded. No hint is given as to why or how this must be so. Moreover, no regard, with respect, seems to

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37 (75% of 64% = 48%) + (25% of 36% = 9%). 48% + 9% = 57%.

38 Reasons, para 45.

39 Above.

40 Reasons, para 16.

have been paid to the axiom that the same result should be achieved irrespective of the method of getting there.<sup>41</sup>

There is also, it is respectfully suggested, more than a hint that direct, financial post-separation contributions to superannuation are to be given additional weight – or, at least, weight at the expense of (usually predominantly indirect) contributions to the build-up of the base of superannuation interest which grows post-separation.

Of course, whatever criticisms might be made, they amount to nought if the majority in *Coghlan*, in specifying a “preferred approach”, are laying down a binding principle (as distinct from a guideline) that governs the exercise of the Court’s discretion.

We contend that the “preferred approach” is, at best, a guideline and suggest three principal reasons why this is so:

- such a conclusion is more consistent with High Court authority and existing Full Court authority;
- in *Coghlan*, the majority themselves appear to suggest that; and
- cases subsequent to *Coghlan* appear, in the main, to have assumed that to be the case.

It is, of course, a fundamental element of any discretionary jurisdiction that there be consistency in the exercise of discretion.<sup>42</sup> Not surprisingly, the High Court has confirmed this.<sup>43</sup> Guidelines are adopted to assist in achieving consistency within the jurisdiction and cannot be a fixed code.<sup>44</sup> To arrive at a point of setting guidelines in a Full Court decision, the question before the Court should be thoroughly canvassed and fully argued with all points of view considered. Alternatively, guidelines can be arrived at after a lengthy maturation process of the jurisprudence.<sup>45</sup> In *Norbis*, the High Court said that the Full Court of the Family Court was entitled to prescribe the adoption of the global approach in the majority of cases. In

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41 In that respect, see the comments in *I and I* – a decision of the same Full Court as in *Coghlan* and handed down contemporaneously with that decision.

42 See Galligan DJ, *Discretionary Powers*, Clarendon Press, Oxford, 1986 pp150-2 and cited in that discussion McCormick, N, *Legal Reasoning and Legal Theory*, Oxford University Press, 1978.

43 *Norbis v Norbis* (1986) 161 CLR 513.

44 *Browne v Green* (1999) FLC 92-873, 25 FamLR 482.

45 In relation to guidelines under s44(3), see *Neocleous and Neocleous* (1993) FLC ¶92-377 (1993) 16 FamLR 557.

doing so, the High Court made it clear that, in doing so, the Full Court was prescribing a guideline in the majority of cases.<sup>46</sup>

In *Coghlan* itself, the majority said:

Nothing we have said in this judgment would prevent a Court in the exercise of its discretion from including a superannuation interest as an item of property in the list of property which is drawn as “the first step” in the determination of proceedings under s79, whether or not a splitting order is sought in those proceedings. This approach could be adopted where the parties agree that it should be adopted, or where the Court is satisfied that the superannuation interest is indeed property within the meaning of the definition of property contained in s4(1), or if the interest is not within that definition, but is of relatively small value in the context of the value of the other assets in the case, or there are features about the interest which leads the Court to conclude that this would be an appropriate approach.<sup>47</sup>

Although specifying a number of considerations where a global approach “*could be adopted*” those are enumerated after the clear opening words which would appear to make it clear that no binding principle as to the exercise of discretion was being laid down.

There is now a handful of cases decided after *Coghlan* (both at appeal and first instance), where different approaches have been adopted.

In *RDWH and SJLH*,<sup>48</sup> Warnick J<sup>49</sup> sitting as the Full Court confirmed that the trial judge has a discretion and is entitled to adopt a global or a two pools approach. The trial magistrate adopted a global approach and this was not disturbed on appeal, Warnick J saying that this was within the width of the reasoning of the majority in *Coghlan*. The trial magistrate

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46 At (1986) FLC ¶91-712 and (1986) 10 FamLR 819 and (1986) 161 CLR 513. Other areas where the Court has laid down guidelines are litigants in person (*Re F Litigants in Person Guidelines* (2001) FLC ¶93-072. See also *S v R* (1999) FLC ¶92-834 and (1999) 24 FamLR 213; the application of a percentage rather than a fixed dollar amount (see *Browne v Green* (1999) FLC 92-873); sterilisation of the intellectually disabled (see *P v P* at 82,150). And in denying guidelines, the High Court has said there is no rule that equality is a convenient starting point (see *Mallet v Mallet* (1984) FLC ¶91-507 (1984) 9 FamLR 449 (1984) 156 CLR 605 and applications under s44(3) the Full Court said “there is a distinct risk in reading into remarks clearly made obiter at an early stage of the development of this court a binding rule.” (See *Neocleous and Neocleous* (1993) FLC ¶92-377 (1993) 16 FamLR 557).

47 At para 61.

48 [2005] FamCA 676.

49 Who disagreed with the majority in *Coghlan*.

applied the percentage findings uniformly across all assets including superannuation. Warnick J did not disturb this finding on appeal.

At the retrial of *Coghlan* itself,<sup>50</sup> the trial judge (Steele J) interpreted the majority reasoning of the Full Court as requiring the asset pool to be divided into two pools – a general asset pool and a superannuation pool. The trial judge then assessed the contribution based entitlements against each pool but interestingly combined these individual assessments to arrive at an overall assessment. He assessed the wife made greater contributions to the general asset pool in the order of 75/25 but the husband made greater contributions to the superannuation pool in the order of 75/25. The general asset pool represented 64% of the total pool and the superannuation assets represented 36%. This gave an overall assessment of 57% to the wife and 43% to the husband at the end of step 2.

In relation to the superannuation pool, the trial judge took the amounts for the different superannuation entitlements at step 2 and compared these entitlements with each other. The husband was able to obtain \$225 per week from his superannuation and was presently enjoying the fruits of his superannuation entitlement. The wife, on the other hand had superannuation which was not accessible for a further 6 years. Based on the trial judge's assessment, the wife's superannuation (\$102,326) would yield \$100-\$110 per week at the cash rate of 5.5% (taken from the Sydney Morning Herald on 16 December 2005). In the end, the trial judge found the s75(2) factors balanced each other out and concluded there should be no s75(2) adjustment. The result was therefore the wife was entitled to 57% and the husband to 43%.

In *GH and CTH*,<sup>51</sup> the property pool was modest amounting to \$94,600. The husband's entitlements contained all his superannuation which was the husband and Finn, Boland and Warnick JJ sitting as the Full Court, found that this was within the generous ambit of the trial judge's discretion.

In *PJM and STM*,<sup>52</sup> Coleman J sat as the Full Court on appeal from a Federal Magistrate. The case involved a military pension in payment and a lump sum in Telstra Super which appeared still to be in the growth phase.

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50 SY 4174 of 2002, Steele J., 19 December, 2004, unreported.

51 [2005] FamCA 734, 5 August 2005.

52 [2005] FamCA 1245.

The superannuation before the court in this case was strikingly similar to *RDWH and SJLH* which also involved a military pension in payment and military super in the growth phase. There were however differences in the length of the marriage and the fact that there were children in *RDWH and SJLH*. Coleman J adopted a two pools approach even though the Magistrate adopted a global approach.

Coleman J upheld the appeal and said:

Where this Court differs from the learned Federal Magistrate, albeit this Court has had the benefit of the decision of the Full Court in *C v C* (2005) FLC ¶93-220 which the learned Federal Magistrate did not have, is that this Court prefers an asset by asset approach to the evaluation of contributions rather than the global approach adopted by the learned Federal Magistrate. This Court prefers to consider “two pools” of property, they being the net assets referred to by the learned Federal Magistrate and totalling \$844,000.00 less the sum of \$248,774.00 referable to the husband’s “DFRDB pension”, which the Court prefers to consider in a second “pool”.

So when should a trial judge adopt a global assessment and when should superannuation (or any other item of property that might behave in an unpredictable manner) be assessed separately. The test, we submit, should be as follows. When there is a risk that the prescribed value of the superannuation will not be realised such that the inclusion of that item in the main pool will have a distortive effect and the Court cannot be satisfied that the requirement in s.79(2) can be met.

The occurrence of that risk is obvious in the pension cases where the income stream is non-commutable. For example, a non-commutable income stream with a prescribed value of say \$500,000 carries the possibility of that amount either being exceeded (where the member lives beyond the actuarial life expectancy) or falling short (where the member dies next week). Including that amount in a global pool means that that amount would be compared to other items of property in the pool and those other items of property have quite a different nature and form as well as different characteristics. The non-commutable income stream will, we contend have a “distortive effect” if it is included in a single pool. The Court cannot be satisfied that it will meet the test in s.79(2) because the member may die next week or live beyond life expectancy. There is then a clear and logical basis, which has a statutory foundation, for assessing that item separately. And that applies to **any** item of property with behavioral characteristics that risk distorting the property pool.

Not all superannuation carries the risk of distortion. Accumulation super does not have the same nature, form and characteristics as the non-commutable income stream. Equally the allocated pension is the amount held in the account and behaves very much like a lump sum, although it does have some unique tax considerations. On the other hand, defined benefit super does carry the risk because assumptions are made about retirement age and benefit accrual.

In summary, the argument as to whether the determination of an application under s.79 should proceed by way of a global approach or two pools should not be approached, in our respectful submission, by way of a “preferred approach”. Rather a Court should receive evidence of the nature, form and characteristics of the superannuation and, having regard to that evidence, determine whether the inclusion of that superannuation will distort the property pool in such a way that the Court cannot be satisfied that the test in s.79(2) will be met.

### **The s79 Process post-Coghlan – what should a practitioner do?**

We have argued that the manner in which the traditional 4 step approach is applied needs to be a return to the fundamentals. We now want to respectfully suggest how that might be done.

We propose first, to give an overview of the sorts of issues that might arise within the 4 steps and to provide an overview of how they might be accommodated within the 4 step model.

Then, we want to illustrate how those issues, and that suggested approach might work in practice by working through some examples.

#### **(a) Assessing Nature, Form and Characteristics – step 1**

Step 1 will now involve understanding, analysing and presenting evidence about the nature form and characteristics of the superannuation interests involved and their methods of valuation. Crucially, evidence about those matters will almost certainly be required – particularly bearing in mind, for example, that a court is entitled to impose a splitting order even if neither party seeks one. Step 4 has become significantly more important as the questions exemplified above would indicate. Again, evidence relating to step 4 issues will take on much greater importance than it ever has before.

So, too, if one is to meet an argument based on a formulaic or mathematical approach to contributions, the basis of the valuation of the interest, how it has grown and is likely to grow and its valuation at other times in the superannuation life cycle are likely to be important and evidence of the factual foundation underpinning any such contrary arguments will need to be given.

In preparing and presenting a case involving superannuation, it is also necessary, as we have suggested, to understand (and prepare evidence about) the nature and valuation of the superannuation interests involved.

Rather than focusing upon whether there should be a “global” or “two pools” approach or how superannuation interests should be treated, we would rather say that step 1 should demand, first a marshalling of all of the superannuation, an analysis of the nature, form and characteristics of **all** of the property interests and the superannuation interests and an “amount”<sup>53</sup> attributed to each and, secondly, an analysis of the nature, form and characteristics of each and the respective valuation methods of each. That, in turn, serves as a precursor to examining the impact of each at each step of the four-step process.

Examining the nature, form and characteristics of property is usually straightforward, although examples can be found where that is not the case (see the partnership interest in *Best*, for example). Some examples of the sorts of issues, and, thus, the matters upon which instructions should be sought and evidence obtained in analysing the nature, form and characteristics of superannuation interests are as follows.

### **Nature**

Is the interest a defined benefit or accumulation interest? Defined benefit interests are not subject to the operating standards in Part 7A of the *Superannuation Industry (Supervision) Regulations 1994* and thus a clean break split depends on the governing rules of the superannuation plan. Accumulation interests are subject to the Part 7A operating standards. The Court is directed under s81 to achieve a clean financial break as far as practicable. The operation of Part VIIA of the *SIS Regulations* enables the clean break to occur because the trustee (not the Court) splits the

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53 See s90MT(2).

underlying interest. That is, it creates a new fund or a rolled over fund in the name of the non-member. However, in the case of defined benefit plans, the splitting order leaves the member's interest intact until a vesting event. The practical effect is that the split in terms of being a clean financial break can only occur on the vesting event. The exception to this is where the governing rules of the fund provide for a split of the underlying interest.<sup>54</sup>

This illustrates that an understanding of the broader superannuation environment is required and that it might be necessary in many cases to provide admissible evidence of the nature, form and characteristics of that particular fund.

### **Form**

Is the superannuation paid in lump sum form or pension? The consequences for taxation and preservation are relevant here. The taxation of a lump sum is different to the taxation of a pension. Lump sum superannuation may be withdrawn in the form of an allocated pension, which has different taxation consequences again. What are the intentions of the party / parties in that respect? Further there are different forms of pensions. The pension in *Coghlan* was a non-commutable income stream. But not all pensions are like this.

### **Characteristics**

Does the superannuation have any characteristics not already considered? If the superannuation interest is a pension, can it be commuted? What is the amount of the commutation factor? How, when and in what circumstances can commutation occur? If the superannuation is in lump sum form, can it be converted to a pension? What is the amount of the conversion factor?<sup>55</sup>

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54 See Part IXB of the *Superannuation Act* 1976, Clause 42 of the UniSuper Trust Deed as examples.

55 The number that is used to commute from pension to lump sum is called the commutation factor and the number that is used to convert lump sum to pension is called the conversion factor (see Cl 30, Schedule 2, *Family Law (Superannuation) Regulations* 2001).

### **Any other fact or circumstance**

This enables any other, very specific matters to be given consideration. For example, defined benefit interests cannot be split under Part 7A of the *Superannuation Industry (Supervision) Regulations* 1994. However, the governing rules of some defined benefit plans have been amended to permit a clean break split. This becomes, then, a relevant consideration in the decision whether to order a split or not order a split.

Where the governing rules permit a split of the underlying interest, what happens is similar to accumulation schemes: the trustee will create a new account, or roll over, an interest in the name of the non-member spouse. That interest will grow in accordance with what the governing rules provide. For example, some will provide for growth as if the interest was an ordinary accumulation scheme (and therefore subject to market fluctuation)<sup>56</sup>; others will provide that it remains a defined benefit interest and grows according to prescribed rates within that trust.<sup>57</sup> However, in a case where a court orders a split and the governing rules do not permit a split of the underlying interest, the non-member's interest grows at the statutory rate.<sup>58</sup> In either case, the practitioner should provide evidence, because the court should take account of the way the base amount is adjusted over time.

If a type (b)<sup>59</sup> order is employed, however, other considerations apply about which there should also be evidence. In that case, the percentage applies to the final amount paid to the member. It can immediately be seen that the non-member will, as a result, receive the benefit of the growth in the member's interest (which might, of course, take place over many years post-separation). The ramifications of this, when acting for a member, are obvious. Thus, a crucial question – and, perhaps, a crucial question at the outset of any trial – is, in the event that one party of the other contends for a split (or the court independently decides to order a split) whether the split

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56 Eg the Unisuper Scheme.

57 Eg the Commonwealth Super Scheme.

58 R.45D provides that the statutory rate is full time adult ordinary time earnings + 2.5%. The rate for 2004/05 was 7.8% and the rate for 2005/06 is 7.3% (see Family Law (Superannuation) (Interest Rate for Adjustment Period) 2005).

59 The type (b) order is an order made in the exercise of the Court's power under s79 but made in accordance with s90MT(1)(b) of the *Family Law Act* 1975. The other orders are the type (a) and type (c) orders made in accordance with s90MT(1)(a) and s90MT(1)(c) respectively.

should be a type (a) or type (b) order. That, in turn, might depend on whether a practitioner is acting for a member or a non-member.

#### **“Valuation” of Interest – Accumulation Funds**

Accumulation interests (sometimes called defined contribution interests) behave quite differently to defined benefit interests. Accumulation interests comprise the amounts contributed to the member’s account both by the employee and the employer as well as interest earned (or lost) less any fees. All very straightforward in terms of determining the value. It may be locked away because of the preservation rules but we know how much is locked away.

A defined benefit amount is the amount that has accrued to the member’s account but payable at some point in the future (usually retirement).

#### **“Valuation” of Interest – Defined Benefit Funds**

The value of defined benefit interests, on the other hand, is the subject of actuarial formulae and tables. It is these interests which continue to bedevil most practitioners. The prescribed method of valuation is a lifting of the actuarial veil and many are saying it is too unsightly and should never have been lifted in the first place. But what exactly does it mean?

Defined benefit super is an obligation under the trust deed for the trustee to pay superannuation on the occurrence of certain events specified in the governing rules of the trust. That characteristic is really no different to accumulation super. However, the way defined benefit super accrues is quite different to the way accumulation super accrues. The way the defined benefit super accrues is then used to work out the amount of super to be paid to the member on retirement.

There will be a formula under the governing rules of the trust<sup>60</sup> which the trustee must use to calculate the member’s entitlement for a defined benefit interest whereas accumulation super is simply the amount standing to the balance of the member’s account.

The formula for calculating the amount to pay a defined benefit member can be relatively simple or quite complex. But if practitioners are to

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<sup>60</sup> Or, in the case of some Commonwealth schemes, in legislation.

properly to present a case on behalf of their client, the way the defined benefit super accumulates to the member's entitlement must be understood and evidence gathered for presentation to the court.

A crucial question for the court at step 1 is "can the amount of defined benefit super be obtained at any point in time, given that the actual amount can only be known with certainty at the point of release?" This is the province of actuarial science.

The simplest form of defined benefit super will be based on two fundamental concepts set out in the governing rules of the trust - length of the member's service and final average salary. The length of service is represented by the accrued benefit multiple – the longer the employment the bigger the multiple. The final average salary is just that (it is typically the average of the final three years of employment).

To illustrate, a member remains with the company for forty years. The benefit multiple under the governing rules of the superannuation trust say that for each year of service the member is awarded 0.2 of benefit multiple. After forty years service, the member therefore has a multiple of 8. The final average salary after forty years service is \$100,000. The superannuation benefit is therefore \$800,000.

But what if the member becomes divorced after 20 years service? The salary at that point might be \$60,000 and the multiple would be 4. Actuarial science tells us that \$240,000 has accrued to the member - but it is not payable today. If the member resigned today and the money was payable to the member out of the trust in 20 years time, the amount the trustee should have in its reserves to pay this particular member is \$240,000 discounted to take account of the fact that it will be invested, and therefore earn interest, for the period of time until payment.

Over time, the discount factor reduces such that it approaches 1 at the time of payment. For example, if the member were divorced after 30 years service at a salary of say \$80,000, the amount in reserves would be \$480,000 but a smaller discount factor is applied than at 20 years (because that sum is invested for less time). What will become immediately obvious is the amount that the trustee should have in its reserves starts to escalate over time so that if the trust were fully funded (which they often are not), then it will have \$800,000 in its reserves to pay that member after forty years service.

The general formula under the prescribed method for a lump sum entitlement is as follows:

$$\text{Amount} = A \times f_{y+m}$$

Where:

A = Accrued benefit multiple x Salary

$f_{y+m}$  = lump sum factor in completed years and completed months.

The elements for the calculation of the amount represented by A are supplied by the trustee.<sup>61</sup> The lump sum factor is supplied by the actuarial tables. The lump sum factor operates to discount the amount that has accrued to the member's entitlement having regard to the period of time (in completed years and completed months) until maximum retirement age.

#### **Valuation of Interest – Pension Schemes**

We can now add a layer of complexity. The above example is a lump sum scheme. But there are also pension schemes. So an accrued benefit multiple will be one of two forms – in pension based schemes, it will be a pension multiple and in lump sum schemes, it will be a lump sum multiple. They both perform a similar function: the pension multiple will determine the pension payable on retirement and the lump sum multiple will determine the lump sum payable on retirement.

The pension multiple also accrues by an amount for each year of service. A simple example familiar to all practitioners is the judges' pension scheme. The maximum pension multiple is 0.6. In other words, the judicial officer is entitled to a pension of 60% of salary on meeting the specified release conditions (typically retirement). However, the judicial officer must serve at least ten years and reach the age of 60 before the entitlement arises. The rate of accrual would therefore be 0.06 per annum.

The trustee in a pension scheme should (but does not) also have a sum of money held in the trust for the payment of the pension (assuming the scheme was fully funded). The same principles apply to pension schemes as to lump sum schemes. This explains why the actuarial factors deliver a lump sum amount even though the lump sum amount may never be paid in

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61 See r64 of the *Family Law (Superannuation) Regulations 2001*.

that form. Warnick J was alive to this as the passage from His Honour's judgment in *H and H*<sup>62</sup> above demonstrates.

The tables were devised by the Australian Government Actuary and, like all things actuarial, take account of the probability of certain events such as the probability of death before maximum retirement age, release earlier than maximum retirement age and similar contingencies. The complete set of assumptions is available in a paper by the Australian Government Actuary.<sup>63</sup>

Can the actuarial tables be ignored? As a matter of strict law, no. s90MT(2) provides:

- (2) Before making an order referred to in subsection (1), the court must make a determination under paragraph (a) or (b) as follows:
  - (a) If the regulations provide for the determination of an amount in relation to the interest, the court must determine the amount in accordance with the regulations;
  - (b) otherwise, the court must determine the value of the interest by such method as the court considers appropriate.
- (2A) The amount determined under paragraph 2(a) is taken to be the value of the interest.

This provision was amended after the commencement of Part VIII B to insert the concept that the prescribed method delivers an amount. That amount must be taken to be the value. But what if a Court has evidence that a particular member will behave differently to the assumptions made by the Australian Government Actuary?

Consider the following:

**Case A:** The member is 54 years of age and gives evidence that he or she intends to retire at age 55.

**Case B:** The member is 54 years of age and there is no evidence of the member's intentions regarding the release of superannuation.

**Discussion:** In case A, the member is clearly not going to remain in the plan until maximum retirement age but in case B, there is no evidence either way. The problem for the Court is that in case A, the discount is

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62 [2005] FamCA 676.

63 See Australian Government Actuary, "Superannuation and Family Law – Calculation of Superannuation Valuation Factors", 25 February 2002.

going to work to the disadvantage of the non-member. This is because the prescribed method assumes retirement at age 65 and applies a heavier discount than if the member were to retire at age 55. The funds will be released to the member earlier than the discount has assumed and, if the circumstances justify, the Court may, arguably, take that financial advantage into account as a factor under s79(4)(e). That is, although the amount is to be taken to be the value under the Act,<sup>64</sup> the dollar difference can, arguably, be taken up as a s75(2) factor. The extent of the advantage to the member (i.e. the dollar amount of the difference) would have to be the subject of evidence.

Alternatively, the Court may flag the superannuation interest and leave the split until the member receives the superannuation. This is what Young J did on *BAR and BMR*.<sup>65</sup> The reason His Honour did this was because he could not be satisfied that the splitting order at the time of trial would be just and equitable. However, there was no discussion in that case (and it seems no evidence) of the effect of the adjustment between the splitting order and payment. This approach has the advantage that the amount of the member's superannuation will be known with certainty – but not now. Flagging a superannuation interest does not provide finality and so it carries with it the disadvantage of further proceedings. This two stage process of flagging the superannuation for later split was anticipated in the design of the splitting amendments.<sup>66</sup> The length of time between the flag and split is a matter for the court but it is submitted that the longer the period of time until payment, the less likely that a flag should be imposed. (And, in any event, it might be said that s79(5) might be a more appropriate tool in those circumstances.)

What would happen with case B? Here the court has no evidence of the member's retirement intentions and, therefore, no basis to arrive at a value other than the mandated amount.

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64 Section 90MT(2).

65 (2005) FLC 93-231.

66 The explanatory memorandum at paragraph 180 states: "Similarly, when a court is called upon to make a property settlement it may be that the actual value of the superannuation interest is unknown, but will become known in the very near future. While the regulations will provide for a method for valuing superannuation interests, a court may consider it more appropriate to 'defer' a final decision on the superannuation and in the context of some or all of the property, until the actual value of the superannuation interest is known."

The above discussion<sup>67</sup> highlights one of our starting assertions: superannuation is comes in different forms having quite different characteristics. Further, it can be seen that the nature form and characteristics of particular superannuation might present a member or non-member with arguments at each stage of the s79 process. Importantly, it can also be seen that simply identifying and ascribing a Regulations-mandated amount to superannuation as per the traditional step 1 process is, in the case of defined benefit or pension schemes, pregnant with assumption and, therefore, difficulty and potential argument. But to successfully argue the case, the practitioner must be fully cognizant of the assumptions.

**(b) Contributions – step 2**

By way of introduction to this issue, we would suggest that due regard must be paid to existing jurisprudence by courts applying Part VIII B. For example, the High Court has unequivocally agreed that there should not be “*over-zealous attention to the ascertainment of the parties’ contributions*”.<sup>68</sup> Similarly, the High Court has unequivocally determined that “*homemaker and parent*” contributions should be taken into account “*not in a token way, but in a substantial way*”.<sup>69</sup> There is nothing in the Act, including Part VIII B, that suggests those matters – or any other existing jurisprudence in respect of contributions – are any less true of superannuation interests (whether property or not).

We have suggested attempting to eschew the “global” vs “two pools” debate in favour of a return to basic principles of statutory construction. How might that work? Let us test it by avoiding the expression “property of the parties” or any of its derivations (or species). Let us call it “stuff”. Let us also test it by avoiding using the “global” or “two pools” approach in the first instance. Instead, let us respectfully adapt and work within what Justices Mason and Deane and Justice Nygh said of the s79 process 20 years ago:<sup>70</sup>

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67 The prescribed method of valuation involves, of course, a much more comprehensive treatment than this paper allows.

68 Mason, Deane JJ in *Norbis*, cited above.

69 *Mallett* (1984) 156 CLR 605 per Gibbs CJ at 609, citing *Rolfe*; Mason J at 623; Wilson J at 636; Deane J at 640-1; Dawson J 646.

70 See the quotations from *Norbis* and *G and G* quoted earlier in this paper.

- don't allow any approach to exclude any other (and thereby ensure that no one approach will yield a more just and equitable result than the other);
- take the nature, form, characteristics and "origin" of **all** of the stuff into account;
- stand back at the end and review the overall result to ensure its justice and equity.

That can be achieved, it is suggested, by:

1. Laying out the stuff of the parties;
2. Giving each such item of stuff its value or "amount";
3. Examining the nature, form and characteristics of each (and the derivation of its value or 'amount');
4. Examining the origin of each such item of stuff;
5. Then asking the question: how did the parties get to this point - ie what contributions did each make? Note: not contributions to this or that stuff, but simply a listing of all contributions of all types.
6. Then asking the question: by reference to the origin, nature, form and characteristics of the stuff, and each and all of the contributions made by each of the parties and by them jointly, does a picture emerge that any item of stuff, or any group of items of stuff, demand to be treated differently;
7. If no, an assessment of contributions can be made to all of the stuff;<sup>71</sup>
8. If yes to question 6, what is it about those contributions, and that item or item (its origin, nature, form and characteristics), that demands different treatment;
9. By reference to those matters, the terms of s79(4)(a), (b) and (c) can be satisfied. In other words, an assessment of contributions can be made in respect of that stuff and an assessment made in respect of the balance of the stuff.

It should be noted that such an analysis reveals possible differences in the treatment of some "property" as well as "superannuation". An after-acquired inheritance, or windfall, or unique partnership interest, is

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<sup>71</sup> Note: that is not the same as saying that all the 'stuff' is treated the same way: steps 3 and 4 are yet to be considered.

accommodated by the above analysis just as much as a non-commutable pension paid from a superannuation fund.

**(c) Other factors including Section 75 (2) – step 3**

The manner in which the nature, form and characteristics of ‘stuff’ is relevant to the required third step is more obvious: if one party is in possession of a guaranteed income from a trust or a pension from a super fund, that is a matter of which the court, clearly, must be cognizant in arriving at a just and equitable order.

Factors specific to the nature, form and characteristics of a superannuation interest, in that respect may become important if a splitting order is proposed or made; avoiding “double-dipping” becomes an important consideration.

*PJM and STM* Coleman J determined that the wife had made no relevant contribution to the husband’s DFRDB pension. That pension had a Regulations “value” of \$248,774. The “other assets” had a value of \$596,000. His Honour held:

As a number of the superannuation appeals decided by benches of five judges in 2005 confirm, very careful care needs to be exercised to ensure that superannuation interests are not double counted ... Having concluded [in this case] that contribution based entitlement to be entirely that of the husband’s and for reasons earlier given, the value of the interest in accordance with the Regulations has not been added to the pool of other assets for the purpose of determining contribution entitlements. In those circumstances, to revisit superannuation in the context of s75(2), a permissible approach in itself, does not entail any double counting in ways which would potentially arise had the wife been found to have a contribution based entitlement to the superannuation interest.<sup>72</sup>

In the *Coghan* retrial, it will be recalled that Steele J made differing contributions findings in respect of each of the “general assets” and ‘superannuation’ pools. In respect of the relevance of the DFRDB pension as a s75(2) factor, His Honour held:

In terms of income stream, the Husband’s superannuation pension must be ignored because it has been taken into account as a lump sum entitlement valued in accordance with the regulation ...

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72 Para 29 Reasons.

Comparing the two approaches, Coleman J found no relevant contributions (including any s79(4)(c) contributions) but Steele J found there were relevant contributions. In the first matter, such a finding permits s75(2) considerations to arise and there would be no double counting. However, if that same approach were adopted by Steele J, it would have amounted to double counting.

In terms of the prevailing authority, it needs to be remembered that the Full Court in *Clauson*<sup>73</sup> was clear in saying that the any adjustment to the assessment of contributions having regard to the other factors, including those under s75(2) must be undertaken in the light of the real impact of the adjustment. It is not just a question of applying the prevailing tariff of 10% or 15%. What is required is to have regard to the real impact.

**(d) Nature of Interest and step 4**

There is little doubt that the 4<sup>th</sup> step has taken on greater importance in the s79 process as a result of the introduction of Part VIII B. The Court now has available to it an important new power – the power to split the payments arising out of a superannuation interest of a member in an eligible superannuation plan. A split of superannuation allows a fundamental change to the nature, form and characteristics of what might be received, for example, by a party who has no, or little, superannuation prior to the split or who has no pension component of their superannuation interest.

In preparing a s79 case involving a superannuation interest, practitioners must be able to answer questions such as:

- Does the imposition of a splitting order in respect of the superannuation interest or interests lead to a more just and equitable order across all of the assets of the parties considering the nature, form and characteristics of both the superannuation interests and the other property of the parties? If yes, why? If no, why not?
- If it is contended that the court should leave the superannuation interests as they lie, why is that a more just result if, say, one

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73 (1995) FLC 92-595.

party is in receipt of a pension? Or an accumulation interest in the growth phase?

- If it is contended that one party should end up “superannuation rich” and the other party “asset rich”, what is it about the nature, form and characteristics of the superannuation interests (and/or the property) that leads to that conclusion?

### **Examples**

We turn now to give examples of how those suggested considerations might work in practice.

We again want to emphasise that superannuation does not come in a single form. Each particular superannuation interest must be properly assessed and analysed according to its particular nature, form and characteristics. As a convenient starting point in aiding an understanding of how to apply the statutory requirements to an application under s79, we will do this by reference to accumulation plans, defined benefit plans and pensions.<sup>74</sup>

In doing so, it should be remembered that the vast majority of superannuation interests in Australia are accumulation interests and that number is only likely to increase as the large public (and some large private company) funds move away from defined benefit schemes and into the more common accumulation plans.

**Scenario 1:** The member (husband) had an accumulation interest and the amount determined under the regulations is \$400,000. This was all accumulated prior to the three year (late in life) marriage. The husband proposes to draw this down in the form of an allocated pension. The husband also had a house at the commencement of the marriage and this is now valued at \$400,000. The wife brought little into the marriage having an accumulation interest with the amount determined at \$40,000.

Applying the integrated assessment for the determination of an application under s79 would be as follows:

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<sup>74</sup> This covers the vast range of superannuation interests but note that self managed superannuation raises a separate set of questions peculiar to the manner in which it is held and regulated. Self managed superannuation schemes are beyond the scope of this paper.

1. The inventory shows two accumulation superannuation interests, one at \$400,000 and the other at \$40,000. These can be drawn down as a lump sum or as an allocated pension. The husband proposes the latter. Does this affect the amount? No. The characteristics of the allocated pension are that while the pension attracts the 15% pension rebate for amounts drawn down within the prescribed statutory limits,<sup>75</sup> the superannuation interest is tested against the lump sum RBL and lump sum amounts can be drawn down at any time. There is also a house at \$400,000. Is there anything about this item that needs to be recognised? There may be in the sense that the husband (it being his house) may have an extraordinary attachment to this (and it was a short marriage) but he does not have the same attachment to his super. This might influence how the order is structured.
2. How did the parties arrive at this point? The husband brought in the accumulation interest at \$400,000 and the house (which might have been valued at \$300,000 at the commencement). The wife has contributed to her \$40,000 but it had a value of, say, \$20,000 at the beginning of the relationship. The parties have both worked and the wife has made superannuation contributions, but the husband has not:
 

Husband:	\$400,000 (super)
	\$300,000 (house at beginning)
Wife:	\$20,000 (super at beginning)
Joint:	\$100,000 (house)
	\$20,000 (wife's super)
3. Other factors: None of any significance
4. Form and Structure of Order (which cannot be made unless it is just and equitable): Each party keeps their super and the husband pays the wife \$50,000 for growth in the house.

**Comment:** This is relatively straightforward because there is nothing unusual about the assets that form the pool. The husband brought in the majority of the assets and takes the majority away. Should this settlement

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<sup>75</sup> See Schedule 1A of the Superannuation Industry (Supervision) Regulations 1994.

have been determined in accordance with the Coghlan preferred two pools approach? Being a late in life marriage and being a marriage of short duration, it fits neatly within the asset by asset approach. It is also possible to do a global check because the accumulation interests pose no risk that the value will not be realised. A 'global check' says it is a 90/10 settlement in favour of the husband.

But what if there were s75(2) factors? Suppose the parties became parents during the marriage and the wife no longer works (she is 55). How would the order be structured in those circumstances? The wife and child would need to be accommodated but the husband has extraordinary attachment to the house. The superannuation is readily transformed into a lump sum some of which could be given to the wife to meet her housing needs. How much of the lump sum? Assume a 25% adjustment for s75(2) factors. This is \$294,000. The wife already has \$90,000 on contributions and therefore \$204,000 of the husband's super could be transferred to the wife. At this stage of the determination process, we have argued that the Court needs to consider the nature, form and characteristics of the superannuation. The superannuation is accumulation super and even though the Court's powers only extend to payment splitting, Part 7A of the SIS Regulations permits the underlying interest to be split. The funds would therefore be put into the wife's name in accordance with the requirements under superannuation law and a clean break is achieved.

What if the wife were 45? The relevance of this is that the preservation rules on the superannuation would prevent it being withdrawn. The form and structure of the order might have to change.

If we now add a layer of complexity and suppose the interest held by the husband were a defined benefit interest. Does this make a difference to the analysis? It depends. If the husband were 55 and on the cusp of retirement and the interest was held in a corporate superannuation plan, it is most likely going to be a lump sum payment, but it will depend on the governing rules set out in the trust deed. The fact that it is a defined benefit interest simply means that the way it accumulates is different to an accumulation interest.<sup>76</sup> But there are different types of defined benefit interests.

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<sup>76</sup> See the discussion earlier on accumulation and defined benefit growth.

Suppose the interest were a pension interest but it was commutable into lump sum form.<sup>77</sup> The Husband could be ordered to commute 50% into lump sum form and he could make his own decision about the balance.

Suppose now that the superannuation interest is in the form of a non-commutable income stream, for example a DFRDB pension. This form of superannuation has some unusual characteristics. We know it is non-commutable, so the lump sum cannot be realised. On the member's death, the absence of a spouse means nothing further is paid (even if that occurs the day after the orders are made). If the husband had this type of superannuation, it would mean that housing is going to be difficult and despite the husband's sentimental attachment to the house, it might mean sale. But a further relevant consideration is s49B of the *Defence Forces Retirement and Death Benefits Act 1973*. This provides that if the Court makes a splitting order over the pension (which it has the jurisdiction and power to do), the part which is split to the wife becomes a pension interest in her name, called an associate pension. It is paid to her for the remainder of her life. So if the husband died shortly after the order was made (the parties have to be alive at the operative time, so this becomes a critical consideration), the wife's split pension interest is safe.

If we made it just a bit more complex again and the husband was in receipt of a judicial pension, further considerations arise. First, those pensions are for the most part non-commutable. Second the pension, like the military DFRDB pension ceases on death if there is no spouse or children. Third, the underlying interest cannot be split.<sup>78</sup>

So in fashioning the form and structure of the order, all these considerations regarding the nature, form and characteristics of the superannuation become relevant.

**Scenario 2:** The husband has an accumulation interest and the amount determined under the regulations for this interest is \$800,000. This was all

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<sup>77</sup> The NSW SSS Scheme is of this variety.

<sup>78</sup> Some jurisdictions (eg Victoria) are considering this and the split would occur by way of lump sum payment to the non-member. Thus a different outcome can occur for a Victorian judge as opposed to a NSW judge or a Commonwealth judge.

accumulated during the twenty-five year marriage, at the start of which the parties had very little by way of property. The parties also have a house now valued at \$400,000. The husband has worked throughout the marriage and the wife has been the primary homemaker. The children are now all independent and the wife has accumulated \$40,000 in accumulation super from part time work.

Applying the integrated assessment for the determination of an application under s79 would be as follows:

1. The inventory shows two accumulation superannuation interests, one at \$800,000 and the other at \$40,000. These can be drawn down as a lump sum or as an allocated pension or perhaps a market linked income stream. We know (from the previous example) that the amount of each of the superannuation interests will not change whichever way the superannuation is withdrawn, although the way it is withdrawn does have different tax consequences. There is also a house at \$400,000.
2. How did the parties arrive at this point? The parties started with very little and accumulated their wealth over the course of their twenty-five year marriage. They each made their contributions in their own particular ways and the inventory is as follows:

Husband:	\$800,000 (super)
Wife:	\$40,000 (super)
Joint:	\$400,000 (house)
3. Other factors: there is a difference in earning capacity and so the court will need to take that factor into account. They are both in good health and fifty years of age.
4. Form and Structure of Order: This looks and feels like a 50/50 split with an adjustment for the disparate earning capacity. The question is how much. They both have a need for housing. They both have a legitimate call on the equity in the current house and they both have a legitimate call on the retirement savings. *Clauson's* case tells us to look at the real impact of any third step adjustment.

**Comment:** The first possibility is to make the adjustment across both the retirement savings and the equity in the house. This global assessment is

in our view open<sup>79</sup> because there is no risk that the value of the superannuation will be diminished by unknowns into the future, such as may occur with the non-commutable income streams.

An adjustment of 5% in favour of the wife would result in the following:

Husband:	\$378,000 (Super)
	\$180,000 (House)
Wife:	\$462,000 (Super)
	\$220,000 (House)

The effect of this split means that the wife pays the husband \$180,000 or the house is sold. Depending on the wife's income, this may be beyond her. Giving the wife less of the super but more of the housing equity may be a possibility in the way Moore J did in the unreported decision of *Levick*.<sup>80</sup>

What would be the situation if the husband's super was defined benefit super? The Court should be cognizant of what it can do with this form of super. It is different in nature to accumulation super and has different characteristics. If it is split, we know that Part 7A of the SIS regulations prevents the trustee from splitting the underlying interest. We also know the Court cannot use its powers in accordance with Part VIII B to split the underlying interest. The super may be corporate super which is payable as a lump sum. In those circumstances, when the super is released to the member, there will be a payment to the wife because the payment to the member is a splittable payment.

But what if the super were payable only as a pension? The Court would need to know if there were anything in the governing rules of the trust to enable that part of the pension payable to the wife to be transferred into her name. If not, then when the husband dies, the pension payments to the wife would cease. This will be fine if the husband outlives the wife, but not if the wife outlives the husband. In those circumstances, the wife's solicitor should be arguing for a greater proportion of the currently

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<sup>79</sup> Warnick J sitting as the Full Court on appeal from a magistrate in a post Coghlan appeal could not find error when the magistrate adopted a global approach – see HRDW and HSJL [2005] FamCA 676.

<sup>80</sup> SY3054/01, 31 January, 2003, unreported.

available property because it would not be just and equitable to allow the wife to be exposed to the exigencies of the husband's livelihood.

These two simple examples show that taking the nature form and characteristics of the superannuation into account can result in quite differing submissions and outcomes.

## ABOUT THE AUTHORS

**Stephen Bourke** is a partner of Farrar Gesini and Dunn, Lawyers and the principal of the consulting practice, SuperSplitting Pty Ltd.

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Stephen joined Farrar Gesini and Dunn Lawyers in July 2006. Prior to joining SuperSplitting, he was head of the taskforce on the Government's superannuation and family law reforms. He continued in that role and was head of the legislation team, seeing it through Parliament in 2001.

Stephen was formerly head of the Family Law and Legal Assistance Division in the Commonwealth Attorney-General's Department.

Stephen Bourke was a member of the Family Law Council in Australia from 1997 to 2001.

**Peter Murphy SC** was admitted as a solicitor in 1978 and practiced extensively in family law before going overseas for a number of years. He lived and worked in London for many years, where he worked (among a miscellany of other jobs) in the Ethics and Guidance Department of the Law Society of England and Wales. He returned to Australia and private practice as a solicitor in 1988 and was admitted to the Bar in 1990.

He has practiced at the private Bar since, predominantly in family and crime. He was appointed Senior Counsel in December, 2004. Peter is a contributing author to the Butterworths *Australian Family Law*, is a member of the Legal Services Tribunal (Qld) and is currently the Queensland Bar representative on the Family Law Section of the Law Council of Australia. He has prepared and presented many papers on diverse topics throughout Australia.

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