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Superannuation splitting and family law

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Contents

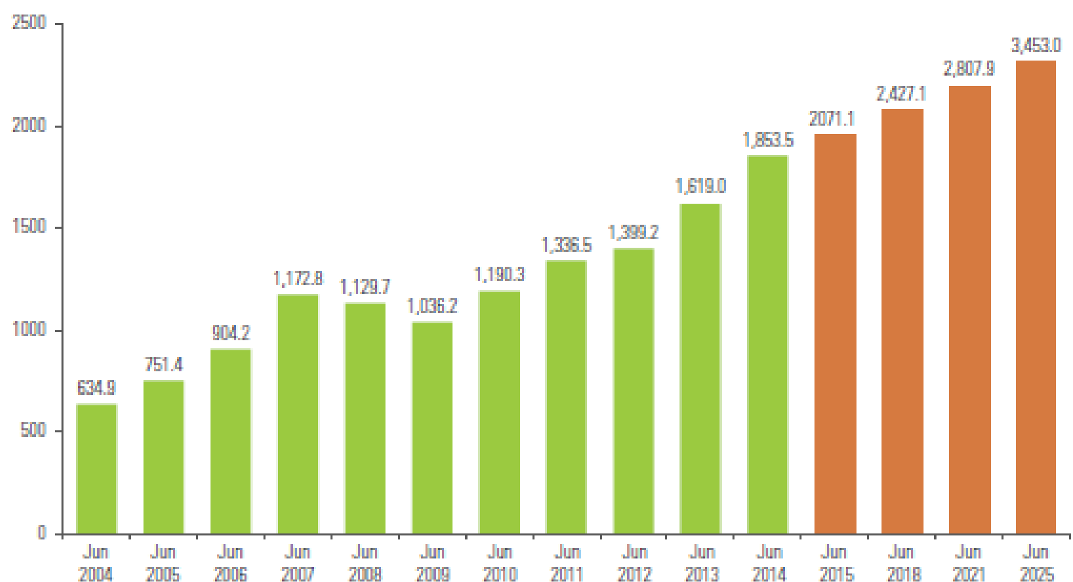
Background to the superannuation industry	3
Type of funds	4
Accumulation funds v defined benefit funds – key concepts	6
Why is superannuation important	7
Compliance/regulatory environment	8
Providing financial assistance to a member	11
In-house asset rule	11
Gearing	12
Non-compliance	13
Taxation of self-managed superannuation funds (Sale of assets)	14
Getting the money out	14
Transition to retirement	17
Superannuation splitting and family law	19
How to value a fund	20
Valuing a SMSF	28
Issues to consider when splitting	32
Other points	34
Conclusion	34

Background to the superannuation industry

Superannuation has, in the 20 years since the introduction of compulsory superannuation contributions, grown to be a significant part of the Australian financial system.

Assets held by superannuation funds now make up approximately 24% of all assets held by Australian financial institutions with only the banking industry holding more assets.

Total assets in superannuation have grown to almost $2 trillion at 31 December 2015 and are predicted to be close to $3.5 trillion by 2020.



Source: APRA Statistics – Annual Superannuation bulletin June 2013. APRA Statistics – Quarterly Superannuation performance June 2014. Asset projections for 2015 to 2018 predicted by KPMG.

Type of funds

There are five main types of superannuation funds:

1 Industry funds – regulated superannuation entities that have historically provided for employees working in the same industry or group of related industries.

2 Retail funds – regulated superannuation entities that offer superannuation products to the public on a commercial basis.

3 Corporate funds – regulated superannuation entities generally only open to people working for a particular employer or corporation.

4 Public sector funds – regulated superannuation entities that provide benefits largely for government employees, employees of statutory authorities, ore are schemes established by a Commonwealth, State or Territory law.

5 Small super funds – predominantly self-managed super funds (SMSFs), which are regulated by the ATO and have less than five members. They work like any other super fund, but the responsibility of managing it rests solely with the trustee, who is often the member.

The distribution of assets and members over the different funds is detailed in the table below.

Type of Fund	Total assets ($billion)	No. of funds	No. of accts (June 14)
Industry	431	43	11.4 million
Retail	526	147	14.0 million
Corporate	54	36	0.4 million
Public Sector	348	38	2.6 million
Funds with less than 5 members	578	567,414	1.0 million
Balance of statutory funds	56		
Total	**1,995**		**29.4 million**

While the number of member accounts that are in SMSFs is relatively small at approximately 3% of total accounts, they hold a substantial proportion of total assets and have been growing strongly as represented in the table below which approximates the average assets per SMSF member and per SMSF at the end of each financial year.

Asset values	2009–10	2010–11	2011–12	2012–13	2013–14
Average assets per member	454,870	486,585	476,993	513,805	564,086
Average assets per SMSF	866,431	925,323	905,503	975,206	1,066,080

Any doubt about the position of SMSFs as an investment vehicle should be doused by the comments of Jordan George, Head of Policy at the SMSF Association, who indicated that the numbers of new self-managed funds reached highs in 2015 with approximately 2800 new funds created every month.

One question often raised in relation to SMSFs is how much superannuation do you need in order to set up your own fund? A report by ASIC published in September 2013 indicated that SMSF face a number of challenges in being cost competitive against other larger funds.

The ASIC Report included some analysis that suggested:

- funds with a balance of $100,000 would not be cost competitive against corporate, retail and industry funds
- funds with a balance between $100,000 and $150,000 may be cost competitive but that it would depend on the extent of work that the Trustee of the funds was prepared or capable of conducting themselves
- funds that require a full service would need a balance of $500,000

Accumulation funds v defined benefit funds – key concepts

Regardless of the type of superannuation your client has, it will be held in one and very rarely both of the following types of funds:

Accumulation funds

The Australian Prudential Regulation Authority (APRA) defines accumulation funds as *"…superannuation entities where all members receive benefits based on defined contributions (accumulated benefits). The assets of the fund are invested and any earnings (or losses) are credited (or debited) to the member's account less any charges such as administration fees and insurance premiums…"*

Defined benefit funds

APRA describes defined benefit funds as *"…superannuation entities where all members are entitled to receive defined benefits. In defined benefit funds, a member's benefits are calculated based on a formula specified in the trust deed. Usually the member's final benefit depends on years of service with an employer (or years of membership of the fund) and level of salary near retirement."*

Comparison of accumulation and defined benefit funds

Item	Accumulation funds	Defined benefit funds
Also known as	Defined contribution funds	N/A
Existence	More common	Less common
Employer's contributions	Normally based on a percentage of the member's salary – at least statutory minimum	Vary according to actuarial advice to ensure that there is adequate money in the fund to meet expected liabilities for member benefits.
Value of benefit	Varies based on: Quantum of contributions; Earnings on investment, based on the investment option selected; and Fees, such as administration charges and insurance premiums.	Calculated by reference to a formula in the trust deed, which is at least partly dependent on the member's final or average salary or a specified amount. Generally also affected by years of service with the employer or years of membership of the fund.
Value of benefit on early withdrawal	Normally comprises additional member's contributions and earnings on those amounts as well as an entitlement to employer contributions, plus earnings according to a vesting scale based on years of service.	Normally comprises additional member's contributions and earnings on those amounts as well as a portion of employer-financed benefits (at least equivalent to superannuation guarantee requirements). It is occasionally based on the member's average salary at time of early withdrawal.
Investment risk	Borne by members	Borne by employers

Where will you find a defined benefits fund?

Accumulation funds are more common than defined benefit funds.

At June 2013, 37.4% of all superannuation assets were held by accumulation funds, 6.6% by defined benefit funds and 56.0% of hybrid funds (funds with a mixture of both accumulation and defined benefit members). Additionally, 83.6% of all superannuation assets were allocated to accumulated benefits and 16.4% to defined benefits.

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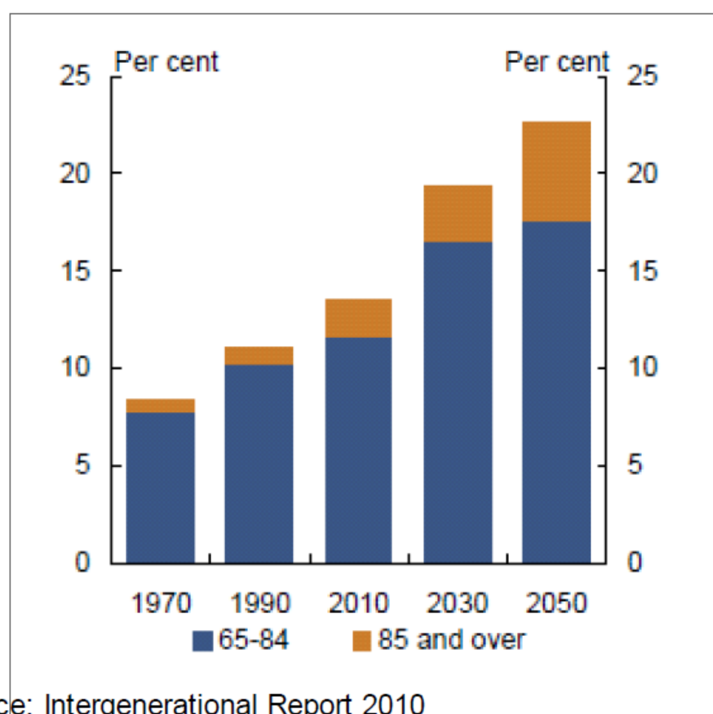
	Number of entities	Number of member accounts ('000)	Assets ($ billion)	Average account balance ('$000)
Accumulation	512,569	15,894	906.7	57.0
Defined benefit	30	610	70.0	114.8
Hybrid	101	14,231	596.8	41.9
Total	512,700	30,736	1,573.6	

Once commonplace in the public sector, defined benefit plans are being phased out in favour of accumulation funds, with many now closed to new members. The Commonwealth Superannuation Scheme, a defined benefit and accumulation fund, opened to new members in 1976 and closed in 1990. Likewise, the Public Sector Superannuation Scheme, a defined benefit superannuation fund, opened to new members in 1990 and closed in 2005. The Public Sector Superannuation Plan, an accumulation fund, opened to new members in 2005. The Military Superannuation and Benefits Scheme, opened to new entrants of the Australian Defence Force in 1991 and its predecessor, Defence Force Retirement and Death Benefits Scheme, which closed to new members in 1991, are both defined benefit schemes.

Defined benefit funds are not exclusive to the public sector, however. Some older corporate and industry funds, for example, still have defined benefits members. APRA's *Superannuation Fund-level Profiles and Financial Performance – interim edition 2014 (issued 20 May 2015)*, provides a listing of superannuation funds and classifies them as defined benefit, accumulation or hybrid.

Why is superannuation important

Australia, like all western countries, is experiencing, and will continue to experience, a growth in the proportion of older members of the population. This has arisen due to a combination of declining birth rates and longer life expectancies. It is estimated that, by 2050, almost one quarter of the population will be aged over 65 and about 5% over 85:



Source: Intergenerational Report 2010

This projected increase in the age of the population will lead to tremendous economic change:

- as more people retire, there will be less people in the workforce, potentially leading to reductions in productivity and economic growth
- retirees discretionary spending is generally lower than that of workers, reducing economic activity
- a reduction in both numbers of workers and economic activity will lead to a reduction in the tax that is collected and from which the government pays for age pensions and healthcare
- a declining tax base and increasing budget requirements will present the government with a funding gap that would need to be met by either increasing taxes, reducing spending or increasing debt

The Treasurer, Scott Morrison, stated in a speech on 27 November 2015 that the ordinary Australian worker should no longer expect to receive an age pension from the government when they retire.

Superannuation is one of the measures that will be relied upon the narrow this funding gap.

Advantages of superannuation:

- earnings are taxed at a maximum of 15%
- contributions are taxed at 15% (taxed at 30% for high income earners (>$300,000 income for FY16) which is generally less than personal marginal tax rates
- earnings and capital gains are tax free on the portion supporting the pension when they are paying pensions to members (pension phase)
- personal contributions to superannuation can be tax deductible
- benefits can also be paid to dependants tax free in the event of death and can be an effective estate planning investment
- bankruptcy protection

Disadvantages of superannuation

- savings will be locked until the conditions of release are met (e.g. retirement)
- given the length of an investment in superannuation it is likely to be subject to changing regulatory and taxation environments

Compliance/regulatory environment

The Australian superannuation system is highly regulated, with several government agencies responsible:

- the Australian Taxation Office (ATO) – which administers SMSFs
- ASIC – which regulates financial services
- APRA – the prudential regulator that regulates superannuation funds other than SMSFs and provides guidance to trustees in relation to the early release of superannuation entitlements on the basis of severe financial hardship; and

- the Department of Human Services (DHS) – which is responsible for the administration of applications for early release on compassionate grounds

As noted above the SMSF sector of the industry is significant. Given the nature of how SMSFs work there is greater risks to member's benefits in a family law context. This arises with members being the Trustees of the funds and ultimately responsible for how the member's benefits are used and applied.

The ATO, responsible for regulating SMSFs, describe their activities as:

- verifying that a fund's primary purpose is to pay retirement benefits to its members
- providing information and forms to help set up and manage your fund
- checking that the fund is managed in accordance with the super laws
- implementing and maintaining systems to ensure legal compliance
- taking enforcement action to correct matters when there is a breach of the law
- checking that SMSF auditors perform their duties to the required standard

The ATO have published a list of concerns about SMSF audits and the actions of Trustees:

- lack of independence – specifically with the actions of SMSF auditors who audit their own or relatives' funds as well as auditors who audit funds for which they prepare the accounts and provide advice
- poor documentation – proper documentation allows the ATO and ASIC to understand the process undertaken and the level of detail of the audit – where auditors can't provide this evidence, or the evidence is incomplete, it raises concerns about the effectiveness, and sometimes, the genuineness of the audit
- auditor knowledge – ineffective audits are often the result of Auditors that are not as knowledgeable as expected
- trustees and professionals who fail to understand their obligations
- trustees who fail to comply with their obligations, including lodging their annual return
- approved SMSF auditors who don't audit funds properly or don't report contraventions
- SMSFs being deliberately misused: Set up for illegal early release or the money in the fund being accessed early, before a condition of release is met, or the SMSF being used for tax avoidance

The ATO reports that the proportion of SMSFs reported to them by approved auditors is relatively stable at about 2% of Funds.

Key compliance issues

The sole purpose test

This test requires that a SMSF's sole purpose is for providing retirement benefits to members, or to their dependants if a member dies before retirement (this test applies to all superannuation funds). Members and related parties must not obtain an immediate financial benefit when making investment decisions and arrangements, eg collectables such as art or wine.

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Example - use of work of art by members: more than an incidental benefit

A trustee of an SMSF acquires a significant work of art. The investment strategy of the SMSF requires it to hold a certain percentage of its investment as listed securities. The SMSF trustee liquidates all of the listed securities that the SMSF holds to fund the acquisition of the work of art. The trustee is unable to demonstrate how the acquisition of the work of art is a better investment than the listed securities it previously held. Soon after the work of art is acquired, it is displayed in the home of a member, who pays the SMSF a reasonable rental fee for this privilege.

If an asset, such as a work of art, owned by the SMSF is provided for the use and enjoyment of the member, this may indicate that a purpose of the investment is to provide a benefit otherwise than in accordance with subsection 62(1). Here, the liquidation of a class of assets forming an integral part of the SMSF's investment strategy reinforces the conclusion that the provision of the benefit outside of those stipulated in subsection 62(1) was purposeful and not in accordance with the sole purpose test, even though a reasonable amount is paid to the SMSF for the use of the work of art.

Example - use of work of art by a related party at no cost: more than an incidental benefit

Helen and Reginald are trustees of an SMSF. They are also partners in an accountancy firm.

As SMSF trustees, Helen and Reginald purchase a painting as an investment in accordance with the investment strategy of the SMSF. While it is a sound investment due to expectations of strong capital growth, the painting is not a major piece that is likely to attract strong interest from major galleries.

Helen and Reginald wish to avoid the high cost of professional storage of the painting in climatically controlled conditions, and so are willing to lease the painting on the basis that it would be insured and preserved by the lessee. However, they are unable to find an unrelated third party that is willing to lease the painting on this basis.

While continuing to seek third party lessees, Helen and Reginald arrange to hang the painting in their accountancy office. The accountancy firm regularly leases paintings from unrelated third parties to hang in the office on arm's length terms and conditions. However, the firm does not pay any amount to the SMSF for the use of the painting and the painting is not insured by the firm.

This arrangement for the free use and enjoyment of the SMSF's asset by the related firm demonstrates a purposeful benefit that is more than an incidental benefit. The asset is treated in a different way to the other works of art leased by the firm from unrelated third parties. Therefore, on balance, an assessment of these facts indicates that a contravention of the sole purpose test has occurred.

While there are some practical reasons for arranging for the work of art to be hung in the office of the accountancy firm, the sole purpose test imposes a strict standard of compliance requiring exclusivity of purpose. The failure to provide any consideration for the use of the painting (in contrast to the treatment of other works of art leased by the firm) would be a particularly important factor.

Providing financial assistance to a member

Section 65(1)(a) of the Superannuation Industry (Supervision) Act 1993 prohibits the **lending of fund money** to a member, or a relative of a member, of the fund. Section 65(1)(b) prohibits **using fund resources** to provide any other financial assistance to a member, or a relative of a member, of the fund.

The ATO regards any of the following as a breach of Section 65(1)(b):

1. giving a gift of an SMSF asset to a member or relative of a member
2. selling an SMSF asset for less than its market value to a member or relative of a member
3. purchasing an asset for greater than its market value from a member or relative of a member
4. acquiring services in excess of what the SMSF requires from a member or relative of a member
5. paying an inflated price for services acquired from a member or relative of a member
6. forgiving a debt owed to the SMSF by a member or relative of a member
7. releasing a member or relative of a member from a financial obligation owed to the SMSF, including where the amount is not yet due and payable
8. delaying recovery action for a debt owed to the SMSF by a member or relative of a member
9. satisfying, or taking on, a financial obligation of a member or relative of a member
10. giving a guarantee or an indemnity for the benefit of a member or relative of a member
11. giving a security or charge over SMSF assets for the benefit of a member or relative of a member

The consequences of breaching Section 65(1)(b) is that the Fund could be found to be non-complying. If the ATO finds the Fund to be noncomplying the ATO has a number of options available to it as a punishment, which are discussed below. The good news is that the ATO will generally give you an opportunity to correct the breach depending on the Trustee's willingness to cooperate, history of breaches and how blatant the breach was.

In-house asset rule

A SMSF is prohibited from holding more than 5% of the Fund's assets as "in-house assets".

An in-house asset is any of the following:

- a loan to, or an investment in, a related party of the fund
- an investment in a related trust of the fund
- an asset of the fund that is leased to a related party

There are some exceptions, including:

- business real property that is leased between the fund and a related party of the fund
- some investments in related non-geared trusts or companies
- most investments and loans entered into before 11 August 1999

Example - Lease of machinery to an employer
Tom and Julie are the sole members and trustees of the TJ SMSF. They are also sole directors of TJ Pty Ltd, which is also their employer. The contributions to the TJ SMSF are made by TJ Pty Ltd.

TJ SMSF owns a machine which is leased to TJ Pty Ltd and used in its business. The lease is on arm's length terms with a commercial rent paid.

The two members of the TJ SMSF together control TJ Pty Ltd. Consequently, the machine is leased to a related party of the TJ SMSF and is an in-house asset of the SMSF.

Example - Part of an asset subject to lease
An SMSF owns a residential home which is leased to an unrelated third party with the exception of a garage at the rear of the property with its own street access. This garage is specifically excluded from the residential lease and the tenant has no access to it. Instead, one of the members of the fund holds the keys and security alarm code to the garage as they use it for the storage of their vintage car. No rent is paid for the garage but the member pays for insurance and a monitored alarm. The part of the property comprised of the garage is subject to a lease arrangement with the member (a related party) and consequently is an in house asset of the SMSF.

In these circumstances, if the value of the in-house assets are >5% of the fund, the Trustees would be required to remedy the breach and return the fund to a complying state.

Gearing

A SMSF can borrow money only in very limited circumstances. These circumstances include:

- borrowing money for a maximum of 90 days to meet benefit payments due to members or to meet an outstanding surcharge liability (the borrowings can't exceed 10% of the fund's total assets)
- borrowing money for a maximum of seven days to cover the settlement of security transactions if the borrowing does not exceed 10% of the fund's total assets (borrowing to settle security transactions is only acceptable if, at the time the transaction was entered into, it was likely that the borrowing would not be needed)
- borrowing using instalment warrants or limited recourse borrowing arrangements that meet certain conditions

Gearing in a SMSF by way of a limited recourse borrowing arrangements requires an SMSF trustee to:

- take out a loan

- use those funds to purchase a single asset (or collection of identical assets that have the same market value) to be held on a separate trust
- ensure any investment returns earned from the asset go to the SMSF
- ensure that if the loan defaults, the lender's rights are limited to the asset held in the separate trust. This means there is no recourse to the other assets held in the SMSF
- failure to ensure the loan is set up in accordance with the rules would render the investment not compliant and the trustees could be required to remedy the situation to ensure the Fund itself was not found to be noncompliant

Non-compliance

The following courses of action are used by the ATO to deal with SMSF trustees who have not complied with the superannuation laws:

- education direction
- enforceable undertaking
- rectification direction
- administrative penalties
- disqualification of a trustee
- civil and criminal penalties
- allowing the SMSF to wind up
- notice of non-compliance
- freezing an SMSF’s assets

Notice of non-compliance

Serious contraventions of the super laws may result in an SMSF being issued with a notice of non-compliance. In this case the fund remains non-compliant until a notice of compliance is given to the fund.

The ATO will consider the following factors when deciding whether to issue a notice of non-compliance:

- The tax consequences in making a SMSF non-complying and the financial impacts this would have
- The seriousness of the contravention, including
  - trustee’s behavior
  - the effect the contravention has on the SMSF’s assets
  - the number and duration of contraventions
- All other relevant circumstances, including
  - if the trustee has rectified the contravention
  - the trustees’ level of skill and knowledge
  - the compliance history of the fund
  - the events which led to the contravention

Making a fund non-complying can have a significant financial impact on the SMSF because:

- for every year that the fund remains non-complying, its assessable income is taxed at the highest marginal tax rate
- in the year that it becomes non-complying, it includes in its assessable income an amount equal to the market value of the fund's total assets less any contributions the fund has received that are not part of the taxable income of the fund

Taxation of self-managed superannuation funds (Sale of assets)

A capital gain generated on the sale of an asset by a SMSF will be subject to tax. Complying SMSFs are entitled to a CGT discount of one-third if the relevant asset had been owned for at least 12 months, meaning the gain is effectively taxed at a rate of 10%.

A capital loss (for example, losses on the sale of commercial premises) is not an allowable deduction and is only able to be offset against capital gains. If capital losses are greater than capital gains in any financial year, they **must** be carried forward to be offset against future capital gains of the fund. The exception to this is when the fund is in pension phase. At this time, capital gains and losses are disregarded and capital losses carried forward are often lost when moving to pension phase as they are offset against exempt income.

Rollover relief is provided under s126-140 ITAA (1997) where assets of one SMSF are transferred to another fund due to a marriage breakdown. In this situation the capital gains position of the asset is transferred to the new fund.

To qualify for the rollover relief, in essence the following must occur:

1. The transfer must arise from a payment split or be the transfer of an existing interest

2. The transfer must be by way of a superannuation agreement, binding financial agreement or Court Order

3. The entire interest of the departing member must be transferred

4. At the time of the transfer the Parties must be separated with no likelihood of cohabitation being resumed

5. The transfer occurred because of reasons directly connected with the breakdown of the relationship between the Parties

Getting the money out

As noted above one of the disadvantages of superannuation is that money is locked away until the conditions of release are met (retirement is often one of these) and the funds can only be utilised to provide retirement benefits for members.

Regardless of whether the interest is held in a public fund or a SMSF, funds are not available to be used for the deposit on the family home, the beach shack, the motor boat, the overseas holiday or legal fees unless the conditions of release have been met.

When can members start using the money they have accumulated?

A person is able to withdraw money from a superannuation fund when the meet a **condition of release**. Schedule 1 of the Superannuation Industry (Supervision) Regulation 1994 outlines the conditions for the release of benefits.

Broadly speaking a condition of release is met and superannuation can be accessed:

- when the member reaches preservation age and is terminating their employment, or
- when the member turns 65 (even if they haven't retired), or
- when the member reaches **preservation age** and retires, or
- under the **transition to retirement rules**, while continuing to work

There are very limited circumstances in which superannuation savings can be accessed early. These circumstances are mainly related to specific medical conditions or severe financial hardship.

The **preservation age** is not the same as the pension age. The preservation age is the age at which the member is eligible to access superannuation on retirement (or has commenced a transition to a retirement income stream).

The preservation age depends on the age of the member as detailed in the table below:

Date of birth	Preservation age
Before 1 July 1960	55
1 July 1960 – 30 June 1961	56
1 July 1961 – 30 June 1962	57
1 July 1962 – 30 June 1963	58
1 July 1963 – 30 June 1964	59
From 1 July 1964	60

Superannuation can be accessed before the member reaches preservation age in some special circumstances, including:

- compassionate grounds
- severe financial hardship
- temporary incapacity
- permanent incapacity
- temporary residents leaving Australia permanently
- super death benefits (inheriting super)
- where the balance is less than $200
- on **compassionate grounds**

Compassionate grounds include a need to:

- pay for medical treatment for a member or a dependant
- make a payment on a loan to prevent a member from losing their home
- modify the member's home or vehicle to meet the special needs a member or a dependant because of a severe disability
- pay for expenses associated with a death, funeral or burial

To release funds on compassionate grounds, members need to apply to the regulator for release. The amount of superannuation able to be withdrawn on compassionate grounds is paid as a lump sum and is limited to what is reasonably needed. The payment is taxed as a lump sum payment. You may be able to access your super if you have a medical condition that is likely to result in your death within the next 24 months. Any funds paid in these circumstances are paid tax free.

Access due to severe financial hardship

Members may be able to withdraw some superannuation after having received Australian Government income support payments continuously for 26 weeks and if they are unable to meet reasonable and immediate family living expenses.

The minimum amount that can be paid in these circumstances is $1,000 (unless the superannuation balance is less than $1,000) and the maximum amount is $10,000. Funds will be paid as a lump sum. Members can make only one withdrawal because of severe financial hardship in any 12 month period. Any amount paid will be taxed as a lump sum.

Regulation 6.01(5) of the Superannuation Industry (Supervision) Regulations defines severe financial hardship if:

1 the trustee of a superannuation entity is satisfied:

  a based on written evidence provided by at least one Commonwealth department or agency responsible for administering a class of Commonwealth income support payments, that:

    i the person has received Commonwealth income support payments for a continuous period of 26 weeks; and

    ii the person was in receipt of payments of that kind on the date of the written evidence; and

    iii that the person is unable to meet reasonable and immediate family living expenses; or

    iv the person has reached the age that is the person's preservation age plus 39 weeks and the trustee of a superannuation entity is satisfied:

      - based on written evidence provided by at least one Commonwealth department or agency responsible for administering a class of Commonwealth income support payments--that the person received Commonwealth income support payments for a cumulative period of 39 weeks after the person reached the person's preservation age; and

- that the person was not gainfully employed on a full-time, or part-time, basis on the date of the application for cashing of his or her preserved benefits, or restricted non-preserved benefits, in the entity.

Transition to retirement

Once preservation age has been reached, he or she can choose to receive a transition to retirement income stream.

A transition to retirement income stream enables the member to receive regular payments (an income stream) from the fund while continuing to work. During each financial year the member can access between X% and10% (where X is determined by the member's age) of the funds in their superannuation account and can, through their ongoing employment, continue to contribute to the fund. This can lead to the advantageous tax situation of being able to withdraw cash from the fund tax free while obtaining a tax deduction for further contributions. In the 2016-17 Federal Budget, a proposal was put forward to remove this exemption, with TTR pensions subject to tax within the fund at normal rates (will apply from 1 July 2017).This type of scenario can be a powerful factor in fashioning a just and equitable property settlement but is being subject to greater scrutiny.

Concessional contributions cap

Concessional contributions include:

- employer contributions (including contributions made under a salary sacrifice arrangement)
- personal contributions claimed as a tax deduction by a self-employed person

If a member has more than one fund, all concessional contributions made to all funds are added together and counted towards the concessional contributions cap.

The current and recent concessional contributions caps are as follows:

Income year	Age and applicable Cap amount		Treatment of excess
2015-16	<49: $30,000	49+: $35,000	Included as taxable income, taxed at marginal tax rate plus an excess concessional contributions charge, less 15% tax offset. Excess contributions are counted towards the non-concessional contributions cap, unless election is made to withdraw from the fund.
2014–15	<49: $30,000	49+: $35,000	
2013–14	<59: $25,000	59+: $35,000	
2012–13	All ages: $25,000		Taxed at 46.5%(15% levied in super fund, additional 31.5% payable).
2011–12	<50: $25,000	50+: $50,000	
2010–11	<50: $25,000	50+: $50,000	
2009–10	<50: $25,000	50+: $50,000	
2008–09	<50: $50,000	50+: $100,000	
2007–08	<50: $50,000	50+: $100,000	

Non-concessional contributions cap

Non-concessional contributions include personal contributions for which you do not claim an income tax deduction.

If a member has more than one fund, all non-concessional contributions made to all funds are added together and counted towards the non-concessional contributions cap.

Non-concessional contributions cap	
Income year	**Amount of cap**
2015–16	$180,000
2014–15	$180,000
2013–14	$150,000
2012–13	$150,000
2011–12	$150,000
2010–11	$150,000
2009–10	$150,000
2008–09	$150,000
2007–08	$150,000

People aged under 65 years may be eligible to make non-concessional contributions of up to three times their non-concessional contributions cap for the year, over a three-year period. This is known as the 'bring-forward' option.

The bring-forward cap is three times the non-concessional contributions cap of the first year. If you brought forward your contributions in 2007–08, it would be 3 x $150,000 = $450,000.

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Superannuation splitting and family law

History

It is easy for practitioners not exposed to family law prior to 28 December 2002 to underestimate the fundamental change that Part VIIIB of the Family Law Act represented.

Prior to the introduction to Part VIIIB, the capacity to bind a third party (the trustee of a superannuation fund) to effect a division of an asset that had not yet fully vested in a party to proceedings under the Act, was nonexistent. The restrictions imposed by section 81 meant that it was not possible for the courts to treat superannuation as anything other than a financial resource that would vest in one party at some future date.

Superannuation could not be treated as property and this did not change until the 2002 amendments came into effect and the Full Court confirmed, in *Coghlan & Coghlan* (2005) FLC 93-220, that superannuation interests are *"another species of property as defined in s4(1) and in relation to which orders can be made in proceedings under s79" (*at 79,642*).*

Occasionally, under the old regime, adjournments under s79(5) could be sought where a superannuated spouse was close to retirement but even in those cases sometimes all that could ultimately be dealt with was pension income. Otherwise, the best outcome for the non-superannuated spouse was to receive a larger share of the remaining assets. Frequently, and particularly in modest asset pools, such an outcome meant that there was little justice and equity (as it was then understood to be) to be had by the non-superannuated spouse. Conversely, where there was a significant period before the superannuated spouse was eligible to retire, a division of assets primarily in favour of the other party, created a situation where all that could be hoped to be retained was a future superannuation entitlement and the income to contribute towards it.

To address these issues courts approached superannuation in various ways including:

- ordering member spouses to pay an amount of their superannuation to the other spouse when it was received. There were issues of enforceability in these circumstances as the superannuated spouse essentially had full control of the asset until reaching the retirement threshold
- applying what became known as the West and Green formula (West & Green (193) FLC 92-395) which essentially divided equally the amount by which a superannuation interest increased during the period of the marriage
- 50% x **period of membership** x estimate net value of current superannuation
  period of cohabitation

The artificiality of the formula – and the necessary application of it against other non-superannuation assets – was considered in *Bartlett & Bartlett* (1996) FLC 92-721 and *Tomasetti & Tomasetti* (2000) FLC 93-023

Advantages of split

The advantages flowing from an ability to accurately and realistically deal with each of the (domestically located) assets of separated parties is obvious. Recognising the nature of the superannuation asset and the limitations and opportunities it presents allows parties to fashion creative and mutually beneficial outcomes, particularly in relation to SMSFs where one party is transitioning to retirement and is able to convert superannuation to cash for a party who may be some time away from reaching the retirement threshold.

Essentials in Splitting Super

There are many "essential terms" relating to superannuation and practitioners would do well to pay close attention to resources such as the Commonwealth Attorney-General's Department booklet – *Superannuation Splitting Laws – Basic Terms* and *Superannuation Splitting Laws – Frequently Asked Questions* (www.ag.gov.au).

An understanding of the fundamentals of superannuation as an asset is essential. Understanding the requirements of particular funds is essential. Understanding how to value a particular fund is essential. Understanding the taxation consequences of interests and orders is essential. Drafting binding Orders that will be enforceable regardless of unforeseen changes in the balance of the superannuation fund is essential.

How to value a fund

When considering any superannuation split, determining the **value** of the superannuation interest is an essential step.

As noted above, there are two main types of funds: Defined Benefit and Accumulation Interest. Due to the differing nature of the funds, the approach relied upon to value the interests are also different.

The valuation of Accumulation Funds is uncomplicated. The balance on a member's statement is the balance at the date of the statement. That figure is the value of the member's interest. Superannuation Information Forms can be lodged with the Fund asking for the balance at a specific date (the Relevant Date).

The value of a defined benefit interest, however, is generally calculated by reference to the member's salary, years of service and sometimes other specified amounts.

Schedule 2 of the Family Law (Superannuation) Regulations outlines the formulas that are applied to this information to determine the value of defined benefit funds, except where there is a **scheme specific valuation method**. Defined Benefit Funds with scheme specific methods include:

Volume	Schedule	Part	Scheme
Volume 1	Schedule 1	Part 1	Commonwealth Superannuation Scheme
		Part 2	Public Sector Superannuation Scheme
Volume 2	Schedule 1	Part 3	Defence Force Retirement and Death Benefits scheme and Earlier and Associated Schemes
		Part 4	Military Superannuation and Benefits Scheme
Volume 3	Schedule 1	Part 5	Parliamentary Contributory Superannuation Scheme
Volume 4	Schedule 1	Part 6	Judges' Pensions Act Scheme
		Part 7	Governors-General Pension Scheme
Volume 5	Schedule 2	Part 1	Local Government Superannuation Scheme – New South Wales
		Part 5	New South Wales Police Superannuation Scheme
		Part 6	Police Association Superannuation Scheme
		Part 7	New South Wales State Authorities Superannuation Scheme
		Part 8	New South Wales State Superannuation Scheme
		Part 9	NSW State Authorities Non-Contributory Superannuation Scheme
		Part 10	New South Wales Parliamentary Contributory Superannuation Scheme
	Schedule 3	Part 1	Superannuation Scheme Established by the State Superannuation Act 1988 (Vic) – New Scheme Members
		Part 2	Superannuation Scheme Established by the State Superannuation Act 1988 (Vic) – Revised Scheme Members
		Part 3	Victorian State Employees Retirement Benefits Scheme
		Part 4	Benefits Provided under the Superannuation Benefits Act 1977 (Vic)
		Part 5	Benefits Provided under Transport Superannuation Act 1989 (Vic)
		Part 6	State Parliamentary Contributory Superannuation Fund
		Part 7	Victorian Pension Schemes – Governor, Judges, Associate Judges, Chief Magistrate, Solicitor-General, Director of Public Prosecutions and Chief Crown Prosecutor
	Schedule 4	Part 1	Superannuation Scheme Established by the Superannuation (State Public Sector) Deed 1990 (Qld)
		Part 3	Local Government Superannuation Scheme
Volume 6	Schedule 5	Part 1	Gold State Super Scheme – Western Australia
	Schedule 6	Part 1	South Australian Superannuation Fund
		Part 2	South Australian Local Government Superannuation Scheme
		Part 3	South Australian Police Superannuation Scheme
		Part 4	South Australian Parliamentary Superannuation Scheme
		Part 5	South Australian Judges' Pension Scheme
	Schedule 10	Part 22	Energy Industries Superannuation Scheme
		Part 30	Ford Superannuation Plans
		Part 35	GlaxoSmithKline Superannuation Fund
		Part 40	Hanson Australia Pty Limited as a participating employer in Sunsuper
		Part 90	RACV Superannuation Fund
		Part 105	UniSuper Superannuation Fund
		Part 110	Victorian Racing Industry Superannuation Fund
		Part 115	Woodside Superannuation Fund
		Part 116	Woolworths Group Superannuation Scheme.

Where parties have interests in these funds, the formula in the Family Law Regulations will not apply. Regardless of whether the standard or a scheme specific formula is relevant, its application will be affected by the personal circumstances of the benefit, and specifically:

- Whether the benefit is in the growth or payment phase
- Whether the benefit can be paid as a lump sum or a pension
- What type of pension the benefit will be paid as

With respect to retail, corporate, industry and public sector funds all of information required to answer these questions can be obtained from the Superannuation Fund on the lodgement of the appropriate Superannuation Information Request Form.

There is no prescribed method for valuing interests in SMSFs. This means parties can essentially agree as to value or will need to put before the Court, evidence to support the specific value. This will involve a review of the individual assets and liabilities of the Fund and determining their value at the relevant date.

Superannuation Information Form

As noted above, the superannuation information form (SIF), provides specific factors relevant to the members benefit that along with the prescribed valuation method and factors, calculate the value of the member's superannuation.

An example of using the information contained on a SIF to determine the value of an interest in a Defined Benefit Fund follows.

Step 1 – Identify the Superannuation Fund and whether there is a Scheme specific method and factors

Refer to the SIF, to determine the Superannuation Plan. The example shown indicates that the member has an interest in a PSS.

Dear [redacted]

Re: Your request for information under the Family Law Act about the superannuation interest of a Public Sector Superannuation Scheme.

I refer to your recent request under the Family Law Act for information about the superannuation interest of [redacted] a member of the Public Sector Superannuation Scheme (PSS).

Please find attached the information needed to undertake a valuation of this person's superannuation interest in the PSS. We do not currently provide valuations, but may reconsider this position at some point in the future.

The SIF Form indicates that the PSS has scheme specific methods and factors:

17	The Attorney-General has approved methods and factors specifically for valuing PSS superannuation interests. The formal instrument is known as the Family Law (Superannuation) (Methods and factors for valuing particular superannuation interests) Approval 2003 (Volume	A copy of the instrument can be obtained from the ComLaw website www.comlaw.gov.au

The relevant document referred to is the Family Law (Superannuation) (Methods and factors for valuing particular superannuation interests) Approval 2003. Part 2 of the Methods and Factors Approval deals with methods and factors for interests of members in a PSS.

Step 2 – Growth Phase or Payment Phase

Growth phase is the situation where the member is a contributor or is a person to whom a preserved benefit may become payable in the future. Payment phase is the situation where the member is in receipt of a pension from the CSS or PSS.

Refer to the SIF, to determine the Phase. The example shown indicates that the member's interest is in the Growth Phase.

FAMILY LAW INFORMATION

SUPERANNUATION INTEREST IN GROWTH PHASE

About the PSS:

Name of the superannuation plan	Public Sector Superannuation Scheme (PSS)

Step 3 – Determine the Method or Factor

In our example, the member has an interest in the Growth Phase. Detailed below are the four (4) items that may apply to an interest in the growth phase as detailed in the Methods and Factors Approval:

Item 1 – An interest that a person has as a member of the PSS Scheme.

Item 2 – An interest that a person has in the PSS Scheme if:

a The person is a preserved benefit member; and

b The person is eligible to receive a benefit under paragraph 8.2.1(A) of the Rules.

Item 3 – An interest that a person has in the PSS Scheme if:

a The person is a preserved benefit member; and

b The person is not eligible to receive a benefit under paragraph 8.2.1(A) of the Rules.

Item 4 – An interest that a person has in the PSS Scheme if the person is entitled to an associate preserved benefit under Division 3 of Part 15 of the Rules.

Refer to the SIF to determine the appropriate item to apply. In our example, Item 2 is appropriate:

> The information below is being provided in accordance with:
>
> Item 2 of the growth phase table in the Provision of Information Determination,* and
> Item 2 of the PSS table in the Methods and Factors Approval.*
>
> * these terms are explained in the covering letter and in the glossary.

The valuation method for an Item 2 interest in the growth phase of a PSS, as set out in the Methods and Factors Approval is as follows:

Public sector superannuation plans — Commonwealth — Schedule 1
Public Sector Superannuation Scheme — Part 2

Item	Interest in the growth phase	Method or factor
2	An interest that a person has in the PSS Scheme if: (a) the person is a preserved benefit member; and (b) the person is eligible to receive a benefit under paragraph 8.2.1 (A) of the Rules.	$UDB \times UDBF_{y+m} + FDB \times FDBF_{y+m} + ATA - ERDA$ where: ***UDB*** is the unfunded preserved benefit included in the preserved benefit which, under rule 8.6.2 of the Rules, increases in line with movements in the consumer price index, as at the relevant date.

Step 4 – Assess the value of the interest

As noted above, in our example we have determined that the following method is appropriate to value the interest:

Method or factor

$$UDB \times UDBF_{y+m} + FDB \times FDBF_{y+m} + ATA - ERDA$$

Based on the definitions provided in the Methods and Factors Approval and the information contained in the SIF, we attribute values to each component, as follows:

UDB

UDB is the unfunded preserved benefit included in the preserved benefit which, under rule 8.6.2 of the Rules, increases in line with movements in the consumer price index, as at the relevant date.

The SIF provides the value of the UDB:

1	The **untaxed preserved benefit** (UDB) is:	$78,799.63

$UDBFy_{+m}$

The $UDBFy_{+m}$ is the factor calculated in accordance with the following formula:

Where:

$$\frac{UDBF_y \times (12 - m) + UDBF_{y+1} \times m}{12}$$

$UDBF_y$ is the unfunded valuation factor mentioned in Table 4 that applies at the person's age in completed years at the relevant date, for the person's gender.

The relevant date (or appropriate date) is detailed on the SIF form, as follows:

The **appropriate date** that was used for the provision of this information is:	5 Oct 2015

Further, the member's date of birth is detailed on the SIF form. For the purposes of our example, we shall assume that the member's date of birth is 20 December 1964.

4	The persons date of birth is:	

Thus, at the relevant date (5 October 2015) the member was 50 years of age.

Detailed below is an extract of Table 4 as detailed in the Methods and Factors approval, and the UBDF for a male aged 50 years is 0.85161:

Table 4 Valuation factors — preserved benefit members with option to take pension

	Unfunded Factors (UDBF)		Funded Factors (FDBF)	
Age	Males	Females	Males	Females
18	0.25959	0.26278	1.29589	1.31181
19	0.26957	0.27289	1.29515	1.31110
49	0.82163	0.83582	1.25186	1.27349
50	0.85161	0.86672	1.24882	1.27098
51	0.87961	0.89876	1.24143	1.26846

m is the number of complete months of the person's age, at the relevant date, that are not included in the person's completed years of age.

The member was born in December, and the relevant date is October. Thus, there has been nine (9) completed months.

$UDBF_{y+1}$ is the unfunded valuation factor mentioned in Table 4, that would apply if the person's age in completed years at the relevant date were 1 year more than it is.

The relevant date (or appropriate date) is detailed on the SIF form, as follows:

At the relevant date (5 October 2015) the member was 50 years of age.

Detailed below is an extract of Table 4 as detailed in the Methods and Factors approval, and the UBDF $_{y+1}$ for a male aged 51 years is 0.87961:

Table 4 Valuation factors — preserved benefit members with option to take pension

Age	Unfunded Factors (UDBF)		Funded Factors (FDBF)	
	Males	Females	Males	Females
18	0.25959	0.26278	1.29589	1.31181
19	0.26957	0.27289	1.29515	1.31110
49	0.82163	0.83582	1.25186	1.27349
50	0.85161	0.86672	1.24882	1.27098
51	0.87961	0.89876	1.24143	1.26846

By bringing together the above components, we assess a value of UDBFy+m as follows:

$$\frac{UDBF_y \times (12 - m) + UDBF_{y+1} \times m}{12}$$

$$\frac{0.85161 \times (12-9) + 0.87961 \times 9}{12}$$

0.8726

FDB

FDB is the sum of the accumulated member contributions and the accumulated productivity contributions included in the preserved benefit which, under rule 8.6.1 of the Rules, increases in line with the fund crediting rate, as at the relevant date.

The SIF provides the value of the FDB:

2	The sum of the **accumulated member contributions and the accumulated productivity contributions** (FDB) is:	$37,972.81

$FDBF_{y+m}$

The $FDBF_{y+m}$ is the factor calculated in accordance with the following formula:

Where:

$$\frac{FDBF_y \times (12 - m) + FDBF_{y+1} \times m}{12}$$

$FDBF_y$ is the funded valuation factor mentioned in Table 4 that applies at the person's age in completed years at the relevant date, for the person's gender.

At the relevant date (5 October 2015) the member was 50 years of age.

Detailed below is an extract of Table 4 as detailed in the Methods and Factors approval, and the FDBF for a male aged 50 years is 1.24882:

Table 4 Valuation factors — preserved benefit members with option to take pension

Age	Unfunded Factors (UDBF)		Funded Factors (FDBF)	
	Males	Females	Males	Females
18	0.25959	0.26278	1.29589	1.31181
19	0.26957	0.27289	1.29515	1.31110
49	0.82163	0.83582	1.25186	1.27349
50	0.85161	0.86672	1.24882	1.27098
51	0.87961	0.89876	1.24143	1.26846

m is the number of complete months of the person's age, at the relevant date, that are not included in the person's completed years of age.

The member was born in December, and the relevant date is October. Thus, there has been nine (9) completed months.

$FDBF_{y+1}$ is the funded valuation factor mentioned in Table 4, that would apply if the person's age in completed years at the relevant date were 1 year more than it is.

The relevant date (or appropriate date) is detailed on the SIF form, as follows:

At the relevant date (5 October 2015) the member was 50 years of age.

Detailed below is an extract of Table 4 as detailed in the Methods and Factors approval, and the $FBDF_{y+1}$ for a male aged 51 years is 1.24143:

Table 4 Valuation factors — preserved benefit members with option to take pension

Age	Unfunded Factors (UDBF)		Funded Factors (FDBF)	
	Males	Females	Males	Females
18	0.25959	0.26278	1.29589	1.31181
19	0.26957	0.27289	1.29515	1.31110
49	0.82163	0.83582	1.25186	1.27349
50	0.85161	0.86672	1.24882	1.27098
51	0.87961	0.89876	1.24143	1.26846

By bringing together the above components, we assess a value of FDBFy+m as follows:

$$\frac{FDBF_y \times (12 - m) + FDBF_{y+1} \times m}{12}$$

$$\frac{1.24882 \times (12-9) + 1.24143 \times 9}{12}$$

1.2433

ATA

ATA is the accumulated transfer amount, or if there are 2 or more such amounts, the sum of those amounts, in respect of the person at the relevant date.

The SIF provides the value of the ATA:

3 The **accumulated transfer amounts** (ATA) is: $0.00

ERDA

ERDA is the person's early release deduction amount at the relevant date.

The SIF provides the value of the ERDA:

6 The early release deduction amount (ERDA) is $0.00

Conclusion

By bringing together all of the above components, we assess a value of the member's interest as follows

Method or factor

$$UDB \times UDBF_{y+m} + FDB \times FDBF_{y+m} + ATA - ERDA$$

78,799.63 x 0.8726 + 37,972.81 x 1.2433 + 0 - 0

115,972.09

If you need convincing that you should use an expert to value a fund, read the preceding 4 pages again and try to explain them to another person, your client for example.

Valuing a SMSF

As indicated above there is no prescribed method to value the members' benefits in a SMSF and the individual assets and liabilities of the Fund will needed to reviewed and their value assessed to determine the value of specific member interests.

While each fund will produce audited financial accounts, and these accounts will state the member's benefits at year end, they will only be a starting point.

While the financial accounts will be audited the assurance that can be obtained from this is relative to the expertise of the auditor and the work completed.

The table below outlines the average audit fees paid by SMSF:

SMSF auditor fees	2009	2010	2011	2012	2013
Average auditor fee	$659	$619	$592	$568	$729

Based on these average fees (and the quantum of work they suggest) reliance on values contained in the audited financial accounts should be limited.

From a valuation perspective members also should not rely solely on values documented in the financial accounts because:

- The financial accounts are prepared at year end: the value at that date might not be relevant or appropriate
- The financial accounts may not include assets at their market value. While listed securities are generally easy and cost effective to revalue, assets such as unlisted investments, real property and plant and equipment may not be
- The financial accounts may contain reserves, resulting in part of the Fund's assets not being allocated to members

Detailed below is an example of how the current value of a SMSF might be determined.

Example:
The Husband and Wife have an interest in a self managed superannuation fund which holds, cash, shares in listed companies and real property. The Husband and Wife are the only two members.

Each of the assets of the fund is reviewed and a consideration is made as to what their market value would be.

For many assets this is a relatively simple task, the current value of listed shares or managed investments are published regularly. Real property can be valued by a property valuer.

More time consuming investments to value would include investments in unlisted unrelated third parties – those assets for which there is no exchange where the value can be easily realised. Such assets would include an investment in a property syndicate or a private enterprise. These investments would need to be valued in a more traditional way through an Accountant.

A comparison of the balance sheet of the fund that would be contained in the financial statements with its assets adjusted to market value is contained below.

Given the nature of the Fund's assets the listed shares and the real property will be required to be valued in order to determine its market value.

One further complexity exists in that the fund has a reserve, which consists of income generated in prior years that has not been allocated to a specific member. This reserve would need to be allocated in order to properly consider each members benefit.

Each of the adjustments made is noted below.

The Superannuation Fund

	Notes	Balance Sheet Year Ended 30 June 2015 $	Adjusted Value $
Current Assets			
Shares in Listed Companies	3	1,684,350	1,850,168
Cash at Bank		250,000	250,000
Land & Buildings	2	1,250,000	1,850,000
Less: Accumulated depreciation	2	(13,938)	0
Total Current Assets		3,170,412	3,950,168
Current Liabilities			
Income Tax Payable		47,444	47,444
GST Payable Control Account		2,724	2,724
Total Current Liabilities		50,168	50,168
Total Net Assets		3,120,244	3,900,000
Reserves	1	125,000	
Husband's Benefit		1,946,909	
Wife's Benefit		1,048,336	
Total Member Funds		3,120,244	

Summary		Husband $	Wife $	Total $
Closing Balances at 30 June 2015				
Member's Fund		1,946,909	1,048,336	2,995,244
Unallocated Reserves	1	81,250	43,750	125,000
		2,028,159	1,092,086	3,120,244
Add allocation of increase in Net Assets		506,841	272,915	779,756
Projected Balance		2,535,000	1,365,000	3,900,000

Note 1 – Unallocated Reserve
The financial accounts for the year ended 30 June 2015 include a Reserve of unallocated prior year earnings. I have allocated the reserve to the Members based on the members' balances at 30 June 2015.

Note 2 - Land & Buildings
The value of the property has been adjusted in accordance with the valuation conducted by A Valuers dated 27 May 2015. The cost base of the property is $1,250,000.

Note 3 - Shares in Listed Companies
The listed shares held by the superannuation fund are listed below together with their value at 2 February 2016. The current value is multiplied by the number of shares held to determine the shares holdings value.

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Company	Number of Shares Held	Current Share Price $	Total Current Value $	Cost of Shares $
Listed Shares				
Group One				
BHP Billiton	5,000	42	207,500	110,000
Commonwealth	3,200	53	170,912	67,200
Lend Lease	1,500	9	14,010	11,250
Alchemia Limited	667,000	1	453,560	400,200
National Bank	2,700	26	69,930	59,400
Sub-Total Group One			915,912	648,050
Group Two				
Paridian Property Development Fund Ltd	30,000	1	16,800	22,500
Australian Education Trust	22,000	0	10,560	16,500
Sigma Pharmaceuticals Ltd	200,000	1	184,000	200,000
Telecom NZ	5,000	2	9,375	22,500
Telstra	12,500	3	42,125	75,000
Ten Network	50,000	2	80,000	110,000
Wesfarmers	18,000	27	491,400	504,000
Woolworths	3,900	26	99,996	85,800
Sub-Total Group Two			934,256	1,036,300
Total			**1,850,168**	**1,684,350**

Issues to consider when splitting

Assuming the Parties agree to split the Fund equally, they could:

- Sell sufficient assets to payout the departing spouse
- The shares and the property are relatively similar in value, one party could take the property and the other the share portfolio
- A combination of the two

Selling the assets

While certainly easier from an administrative point of view it comes with some downside, in that any inherent capital gain tax attaching to the asset will be realised which will diminish the total member benefits.

Generally assuming the assets are quality asset san investor would be reluctant to dispose of the assets earlier than intended and realise the taxation consequences.

Splitting the assets

Where the Parties could agree to roll over specific assets into a new Fund the problem of realising the tax would be resolved.

However the tax inherent to the asset doesn't go away, assuming the asset retains its value that tax will be incurred at a point in the future. Where the time horizon to realisation is close the choice of the asset will become an issue.

In the example above, the property and the share portfolio have a similar value but would generate a different after tax outcome.

The inherent gain in the property is $600,000, being the difference between its market value and its cost base. While the inherent gain in the share portfolio is $165,818.

While the quality of the underlying asset and how it fits into the Parties retirement plans is a more important consideration the extent to which an asset sis pregnant with CGT is something the client will want to be made aware.

Another issue that may arise is the investment strategy of the Parties' Fund, in the example above if one party took the real property, they would hold their whole superannuation in one essentially one asset.

This could create an issue from both compliance and an investment perspective. Holding the majority of your superannuation in one asset is something that should be contemplated in the Fund's investment strategy and from an investment perspective does it make sense to hold all your retirement eggs in the one basket?

An important step at this juncture is to ensure that your client has also received some financial investment advice and that decisions are being made with such advice in mind.

Initial steps with SMSF

Below is a short list of the must do tasks when you have a client with significant stake in superannuation:

i Have a copy of the Deed:
This will be important for later when you need to determine whether the Super Fund can do what is proposed, particularly around splitting the Parties benefits and rolling them out.

ii Understand the Structure:
Is it just a super fund or does the fund have an interest in other related party structures (eg Unit Trust)?

Super and non-super assets may be dealt with differently as part of the property settlement, knowing which is which could influence decisions and impact the manner in which certain assets can be dealt with.

iii Understand the assets of the Fund:
What are the underlying assets? Are the readily realisable? Are there investments in related or unrelated unlisted investments?

Understanding the assets in the funds gives insight into:

- The quality of those assets and their relative risk – blue chip shares v unlisted property syndicates
- Compliance issues – assets that might not be held for the sole purposes of providing retirement benefits, for example wine or assets proving benefits to members – such as loans to members.

iv Review the financial accounts:
From the financial accounts the reader can review the funds historical financial performance and its financial position.

They will give insight in to the importance attached to compliance by the members. For example have the financials been audited? A lack of an audit is a worrying sign.

The attached Auditors Report will also specifically identify any other areas of compliance that might be of concern.

Understanding these might help identify issues, for example does they fund have substantial cash assets, and do the members have a history of lax compliance and borrowing from the Fund. If such a situation was identified then you might put in place steps to secure the super funds cash so that it can't be misused.

v Understand the tax position:As articulated above the extent to which an asset is pregnant with CGT might influence decisions.

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Other points

Operative time

Although, in practice, many Orders make reference to an operative time that is 4 days after the date of service on the trustee of the superannuation fund, the Family Law Act makes no specific reference to a minimum (or maximum) operative time for superannuation splits pursuant to court orders.

Section 90MI(1) of the Act provides that "the ***operative time*** for a payment split under a superannuation **agreement** or a flag lifting **agreement** is the beginning of the fourth business day after the day on which a copy of the **agreement** is served on the trustee" (emphasis added). The section, and the 4 business day reference, relates only with superannuation agreements. There is no reference to superannuation splitting orders in that section and, there is no prescribed operative time in Division 3 (which deals with court orders).

The absence of a prescribed operative time in superannuation orders means that great opportunity lies in careful consideration of the operative time to be adopted. There is nothing preventing superannuation splitting orders referring to a retrospective operative time. An operative time on a date which *predates* the date of the Orders may be advantageous where it is desirable to preserve the quantum of the amount to be split when the value of the fund has deteriorated between the date of separation or the date of reaching of an agreement and the date of the actual split.

Conclusion

Superannuation splitting has increased the capacity of courts to make orders that better adjust the interests of all parties in the entire asset pool and also presents many opportunities for parties to negotiate a creative division of the asset pool. There are, by association, many opportunities for practitioners to fall foul of a collection of complicated rules and regulations and the changing nature of superannuation means that variations in the value of the asset are constant and cannot be ignored.

Practitioners should, always, engage expert assistance when contemplating superannuation splits of SMSFs and of public funds where there is any degree of complexity.

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Sources of information

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