feature

The new superannuation powers of the family court

By George Brzostowski
Blackburn Chambers*

Courts that exercise jurisdiction under the *Family Law Act 1975* now have power to deal with superannuation entitlements. We see that section 90MA states that the object of the new part is to allow an allocation between the parties to a (broken) marriage of certain "splittable" payments. The part is expressed to override anything to the contrary in all other laws, whether Commonwealth, state or territorial, and "anything in any trust deed or other instrument".

Section 90MC extends the application of the definition of *matrimonial cause* in paragraph 4(ca) by saying "a superannuation interest is to be **treated as property**", although what the last three words really mean is open to argument.

Those words may mean nothing more than that superannuation may be split just like any other property may be divided. However do they also mean that the value attributed to superannuation is to be treated just like the value of any other existing property? Perhaps not, although that is what the government may have intended.

There are provisions for payment splitting and payment flagging to be achieved by agreement, and this is reinforced by section 90MO which prevents, *inter alia*, an order being made under section 79 in respect of a superannuation interest if there is in force a superannuation agreement.

While the provisions may be welcome in those cases where there is every intention of achieving a split of superannuation entitlements, what has really changed in all those cases where no split is either necessary or sought? Will the outcomes be materially different if the value of the pool of existing property is greater than the value of superannuation? What if one person wants to keep the future superannuation benefits and the other party wants to receive a greater share of existing assets?

Section 90MS is crucial. It provides -

90MS(1)

> *In proceedings under section 79 with respect to the property of spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses.*
>
> *Note 1: Although the orders are made in accordance with this Division, they will be made under section 79 . Therefore they will be generally subject to all the same provisions as other section 79 orders.*
>
> *Note 2: Sections 71A and 90MO limit the scope of section 79 .*

90MS(2)

> *A court cannot make an order under section 79 in relation to a superannuation interest except in accordance with this Part.*

Has section 75(2) changed sides?

Courts are therefore still bound by the requirements of section 79 in all material aspects. They must still make orders that are "appropriate". They are still restrained from making any order altering property interests (now including interests in superannuation) unless satisfied that it is "just and equitable to make the order".

If one casts back to the days before 28 December 2002, the Court made orders adjusting existing property in such a way that took into account the existence of a superannuation benefit(s) that either party may have had. That type of adjustment was made under the provisions of section 75(2).

Superannuation was **not** an item that was treated as "existing property" in coming to the assessment of the relevant pool of assets. It was taken "into account" as a "resource". The adjustment was reflected by making a percentage shift in the division of existing assets in favour of the party **who was not** a member of the superannuation fund (the non-member party).

Now the position is that superannuation **is** an item to be included in coming to a figure of what the pool of assets is. The courts will, however, now have to take into account the fact that an item of property is not in reality something that is "in possession". Ultimately a person may benefit from it. Ultimately there may be a split of moneys that may become payable.

In other words, the adjustment under section 75(2) may now have to be made in favour of the party **who is** a member of a superannuation fund (the member party).

Just and equitable is still the core requirement

As the orders that were made prior to the insertion new Part VIIIB and the FLSR, were required to be "just and equitable", and as the same requirement applies to the present provisions, the results should theoretically be much the same

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(except in those case where a split is required to achieve a just and equitable result).

Property is not the same as property

Already there are suggestions that one can proceed on the basis that superannuation is a "different type of property". The significance of the individual "assets" and the assessment of contributions on an "asset-by-asset" approach is likely to make a come back, but just how that will be implemented is hard to tell. The asset by asset approach was useful where one was assessing contributions to specific assets in order to arrive at an overall finding on contributions. That was easy. However how will one weigh in the "asset" represented by superannuation is unclear.

One thing is certain. Gone are the days of being able to advise clients on a "global" basis. It is now far more difficult to come to a view of what your client's entitlements may be.

New World to Explore

In part the problems may be due to -

(a) a lack of guiding jurisprudence, which deficit is likely to be filled in the future, albeit with a range of outcomes, not all of which are going to be consistent;

(b) the likelihood of challenges to the validity of some of the legislative provisions;

(c) the cost and difficulty in making calculations of the value of a superannuation interest, particularly where the funds make provision for pensions, and

(d) the artificiality caused by the fact that the values arrived at by the application of the FLSR leads to gross, rather than after tax results, combined with the difficulty in advising parties of the extent of future tax burdens, particularly in view of the history of changes even in the last 20 years.

Don't discard the former principles

One possible approach is to ignore (for the purpose of advice only) the value of the superannuation interest in coming to the value of the pool of assets. The second step may be to come to a view of how the existing assets may be distributed. The third step may be to take into account the existence of the superannuation interest that one party may receive in the future. In other words, proceed by applying the old principles.

Is DFRDB in a special category?

This is not unlike the approach taken by Justice Coleman just recently in Canberra, although the text of the decision is not available at the time of writing this article. His Honour took the view that a DFRDB pension was not "property", and it is said that he then made an adjustment under section 75(2).

Split of pension dies with death of member spouse

Another approach is to seek payment

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Personal injuries update

By Ian Morris

The Personal Injuries (Liabilities and Damages) Act 2003 was introduced in Parliament last year an was assented to by the Administrator on 18 March 2003. The Act was commenced on 1 May 2003.

The introduction of the Act says that it intends to modify (read 'limit') the law relating to the entitlement to damages in personal injury cases. It does so by introducing a regime of statutory limitations on the entitlement of damages, statutory direction as to contributory negligence and statutory limits on the award of damages.

The Act applies to all civil claims for personal injuries. That means that it will apply to claims for intentional torts, negligent torts and potentially sections of claims for nuisance and defamation.

The Act does not apply to claims under the Motor Accidents (Compensation) Act, the Work Health Act and the Crimes (Victim's Assistance) Act, save for those provisions to do with structured settlements.

The Act does not interfere with the operation of the Compensation (Fatal Injuries) Act, save for the application of the limits in the Act insofar as assessment of damage is concerned.

Strangely, the Act does not apply to claims for 'dust-related conditions'. There is not much litigation in the Northern Territory in relation to 'dust-related conditions' save for the well-known bovine variety of the condition.

Alterations to personal liability: sections 7 to 13

Four classes of people receive immunity from civil liability and they are:

* Volunteers, who perform community work for a community organisation and commit an act in good faith and without recklessness, which causes personal injury. The other side of the coin is that the community organisation for which the volunteer performs the service assumes the liability of the volunteer;
* Good Samaritans who, in good faith and without recklessness, soberly provide emergency assistance that causes personal injury;
* The occupier or owner of premises is now not liable for personal injury if the person who suffers it has entered the premises with the intention of committing an offence punishable by imprisonment; and
* People who generally injure people who are committing an offence punishable by imprisonment, if the injured person's conduct contributed materially to the risk of that injury.

The final indemnity offered by this part of the Act is that people who express regret that injury has occurred do not admit liability for the injury and the expression of regret cannot be admitted in evidence.

Although this section does not give an example of such an expression of regret the Queensland Act does and runs along the lines of (in a medical negligence case) "I am sorry that there was an adverse outcome from your operation".

Contributory negligence: sections 14 to 17

There are two aspects to this part of the Act. The first is that there is a presumption of contributory negligence if the person injured was intoxicated. That presumption might be rebutted if the injured person is able to establish that the intoxication did not materially contribute to the incident or that the intoxication was involuntary.

The second aspect is that a person who is injured is presumed to be guilty of contributory negligence if the injury was caused by a person who was intoxicated and the injured person had relied on the skill of that person. This presumption can also be rebutted if the other person's intoxication did not materially contribute to the accident or the injured person could not reasonably be expected to have avoided the risk that caused the injury

A person is intoxicated if at the time c the incident that person has a bloo alcohol reading of .08g. In the even that the presumption is not rebutted the court must decrease damages b at least 25 percent.

Damages: sections 18 to 30

The definition section prescribes the *American Medical Association Guide to the Evaluation of Permanen Impairment* as the guide to be used ir the assessment of permanen impairment.

"Impairment" does not include a psychological or psychiatric injury prescribed by the Regulations. There are no regulations that deal with this aspect at the moment and so psychological or psychiatric injuries are included in the assessment under the Guides.

Economic loss, whether past or future, is limited to three times average weekly earnings (AWE). The AWE figure represents weekly ordinary time earnings for full-time adult persons, which is currently $852.00.

There is legislative direction that the award in respect to future economic loss can only be based on the injured person's most likely future circumstance (the common-law situation) and there is also now legislative direction for a discount for "contingencies". Both the assumptions and the contingencies must be identified in a judgment by the court.

The discount rate for future economic loss has been set at five per cent, and that will result in smaller amounts for future economic loss awards.

Gratuitous services can only be awarded if they meet the threshold of six hours or more per week for at least six months.

No more than the amount of AWE for a

quarter may be awarded in respect of gratuitous services.

Gratuitous services must be reduced by any benefit obtained by the person providing the service. It is assumed that this is directed to payments received from the Department of Social Security.

Pain and suffering are to be determined by reference to the Guides. The Court must make its assessment on the basis of evidence produced in accordance with the assessment performed by a medical practitioner of the degree of permanent impairment in accordance with the Guide.

The Act provides for procedures relating to the assessment of permanent impairment to be prescribed by regulation. No such regulations are as yet available.

There is a cap on awards for pain and suffering of $350,000, which will change with the AWE.

There is a threshold for the award of pain and suffering set at five per cent permanent impairment of the whole person. An assessment of 85 per cent or more will permit an assessment of 100 per cent; the assessment of between 15 and 84 per cent will receive the percentage assessed; and for between five and 14 per cent there is a sliding scale of associated percentages.

The important aspect of this section is that injuries which result in disabilities that are not permanent will not be compensated by award of pain and suffering, loss of amenities and enjoyment of life. There are a host of such injuries (such as food poisoning, fractures and ripped muscles and tendons, failed cosmetic surgery and burns) that will now not result in an award of damages because the economic loss and medical expenses component of those injuries can sometimes be very small.

Interest can no longer be awarded by the court for non-economic loss or gratuitous services. Interest can be awarded on the basis of the Commonwealth Government ten-year benchmark bond rate to the loss from the day of the loss until the day on which the court assesses the damages.

Structured settlements

The court is now empowered with the consent of the parties and not of its own volition to make an order for a structured settlement.

There has to be some enabling legislation brought in by the Commonwealth to allow this to go ahead and as yet that legislation has not been promulgated.

Actual case studies from the American Medical Association

Case Study One (Public Liability):
A 12 year old boy suffered a major brain injury, multiple hemorrhages in the brain, in a coma, fractured base of skull, fractured nose and face, scaring and disfigurement of the eye.
Prior to the accident, the boy had above average academic achievement and was a school leader. He now requires a teaching aid at school, his academic performance has significantly decreased, memory concentration impaired and personality changes - aggressive, easily distracted and balance problems.
AMA Assessment seven per cent.

Case Study Two (Medical Negligence):
A patient presents to hospital with a positive pregnancy test and abdominal pain.
Assumption made by the hospital that the patient has an ectopic pregnancy.
No ultrasound is performed as a technician not available. The client is not referred to another hospital.
Patient has a laparoscopy performed. In fact patient is 12 weeks pregnant (pregnancy could have been palpated in uterus by clinical examination but this was not done). During laparoscopy patient's uterus is perforated. Loss of amniotic fluid. Over next two to three weeks continual loss of amniotic fluid and at 14½ week's gestation fetus dies.
Patient attends hospital for induction of labour. Induction agent administered and patient told it will take several hours to act. Patient goes to toilet and passes fetus in toilet. Helped back to bed by nurse with fetus hanging out of vagina by umbilical cord. Taken to surgery for D&C.
Patient has psychiatric reaction and is diagnosed with post traumatic stress disorder which resolves after 12 months. Patient subsequently has another pregnancy which because of past perforation is classified as a high risk pregnancy.
No permanent impairment, no entitlement to compensation under AMA guidelines.

Case Study Three (Medical Negligence)
Three year old patient with a facial haemangioma on upper lip. Prior to removal of the large haemangioma the hospital decides to reduce blood flow to the lesion by injecting it with ethanol. The first (and last) time the technique is ever tried at this hospital. The ethanol extravasates from the lesion throughout the facial tissue. Causes severe necrosis of the skin over cheeks, lips and chin. Upper lip drops off. Multiple skin grafts required. The patient is left with extremely severe facial scarring over 60 per cent of face and will require further surgery as a teenager but otherwise requires no day to day care. Scarring has caused a grossly disfigured mouth but other than an inability to lick ice-cream the patient (who is now eight) has no functional impairment.
As the injury requires no day-to-day care and does not impinge on function to any great degree would probably have a zero per cent impairment under AMA guidelines.

Motor Accidents (Compensation) Act

Late last year an amendment to the MACA Act came into effect.

The stated intention for the introduction to the Motor Accidents (Compensation) Amendment Act 2002 is to confirm the manner in which section 13 of the MACA Act had been administered by the Territory Insurance Office was correct prior to what is refered to as: "doubt arising as a result of the decision in Collman V TIO".

In fact, there was no doubt which arose as a result of that decision as the basis on which the Territory Insurance Office was to have administered section 13 had been laid down by the Supreme Court since, at the very latest, 1991.

The Department of Justice on remand prisoners

A new proposal to house remand prisoners with sentenced prisoners to help combat overcrowding has been met with some criticism from elements of the legal profession. The Department of Justice is seeking to clarify its stance on the issue.

Richard Coates, Chief Executive Officer for the Department of Justice asked that we make public an explanation of the proposal.

Prior to a decision being made, the issues were discussed with the Director of the North Australian Aboriginal Legal Aid Service (NAALAS), the Northern Territory Legal Aid Commission (NTLAC) and the President of the Criminal Lawyers Association.

There was broad support from the director of NAALAS, provided the program only be applied to those remandees who had previously been incarcerated and freely consented to a move.

Under the initiative, remand prisoners can (at their request) be transferred to a sentenced block providing they have been previously incarcerated with an appropriate security classification and have been given an opportunity to obtain legal advice on the issue.

The Superintendent of the Prison has also undertaken not to transfer any remand prisoner, without first notifying the prisoner's lawyer of the proposed move.

"I accept that this interim measure to deal with the unprecedented number of remand prisoners in Darwin is less than perfect, however I believe it was preferable to the other short term options of either increased lockdowns, or the larger scale transfer of Top End prisoners to Alice Springs," Mr Coates said.

"I have asked Correctional Services to provide me with options for more appropriate longer term strategies for remand, but do not believe that a stand alone purpose built remand facility, such as exists in Melbourne and Sydney is necessarily the best or only solution for the Territory.

"Apart from being extremely expensive, I would suggest that a maximum security, single cell environment would not be suitable for many of our indigenous prisoners," he said.

A review of the current arrangements will be held within three months and Mr Coates invites Law Society members to submit their views on the situation. Comment can be made to the Law Society or directly to the Department of Justice. ①

Federal Court appointments

The Hon Justice Bruce Thomas Lander has been appointed as a judge of the Federal Court of Australia and four new federal magistrates have also been announced.

Justice Lander will start his appointment in July, replacing the Hon Justice John von Doussa, who has been appointed as President of the Human Rights and Equal Opportunity Commission.

The four new federal magistrates will service Newcastle, south-east Queensland, Adelaide and Melbourne to help deliver cheaper, quicker and more efficient access to the Australian legal system.

The new appointments will be funded from within existing family law resources by appointing new magistrates rather than replacing former Family Court judges in Adelaide and Melbourne.①

Organ donation in the Territory

Letter from Helen Stewart, NT Donor Coordinator, LifeNet NT

Organ donation can affect all of us. It may be as a friend or family member of an organ donor, or knowing someone who has received an organ transplant. As the Northern Territory has the highest incidence of kidney disease, the likelihood of meeting someone that needs or has had a kidney transplant is extremely high.

There are approximately 2,000 people Australia-wide waiting for an organ transplant each year, many of whom will die before ever receiving a suitable organ.

Despite transplant success rates being amongst the best in the world, Australia has one of the lowest organ donation rates within developed countries. For Australians suffering a life-threatening or serious illness, receiving a generous gift of an organ or tissue donation may mean a second chance at life, or improved quality of life.

Currently there are 5,931 Territorians (2.96 per cent of the population) who have signed onto the Australian Organ Donor Register, making a formal decision to be an organ donor if they were to suffered a severe head injury causing death.

Transplantation surgery is not performed in the Northern Territory for those who are ill enough to require a new organ, at present. Although Royal Darwin and Alice Springs hospitals have been participating in fulfilling the wishes of those who desire to donate their loved ones organs to give the greatest gift of life.

In the last 22 years, 31 members of the community in the Territory have given the gift of life and health to over 70 Australians.

In providing education to the community, the perception of some people towards organ donation involves placing their intended wish to donate in their Last Will and Testament. Unfortunately by the time many wills are read, a period of weeks may go by, and this will have been too late for a person's intentions to be honoured. The most important thing is for families to discuss this issue amongst themselves. If they wish to make their intention more formal they should consider signing onto the Australian Organ Donor Register.

This information obviously needs to be relayed to clients who are seeking the services of those within the Law Society to produce their Last Will and Testament and are keen to donate their organs and/or tissues if they die.

Deciding to be an organ donor involves thinking and talking about organ donation with your family. The next step is to make your intention known by joining the Australian Organ Donor Registry.

This can occur in several ways:-

* Calling LifeNet NT (8922 8786) - the Northern Territory Organ Donation Agency (who can provide you with registration forms for your clients);
* Obtaining a registration form at any Medicare office or a Motor Vehicle Registry Office;
* Telephoning the toll free number **1800 777 203** during business hours; or
* Visiting the Health Insurance Commission website: www.hic.gov.au/ ①

New copyright protection for Indigenous communities

Proposed amendments to the Coyright Act will enable Indigenous communities to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material.

The amendments, which will be introduced into Federal Parliament later this year, will give Indigenous communities legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom.

The moral rights provisions of the Copyright Act give individual authors the right to be identified as the author or artist of their work and to take action to prevent false identification of the author or derogatory treatment of these copyright works and films.

However, Indigenous communities do not currently have legal standing to bring moral rights court actions regarding the treatment of Indigenous material.

This legislation would introduce Indigenous communal moral rights in relation to artistic works, based on an agreement between the author/ artist and the Indigenous community. These rights could be independently exercised by the community and would mirror the nature and scope of authors' moral rights as far as possible.

The legislation aims to provide a simple, workable and practical scheme for Indigenous communities, artists, galleries and the public. ①

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splits. It is impossible in a paper of this length to address the various ramifications of split orders, but I must warn of one aspect that may catch some people by surprise.

For instance, it may seem fair to divide what is "here and now" and then to divide what comes into possession in the future. That seems fine in principle, and some would think it is fair to split each payment of the pension benefit as it is made. NOT SO.

If the member spouse dies without having a reversionary beneficiary, or if the scheme does not provide for payment to any reversionary beneficiaries, the pension split also dies. The fund trustees cannot have imposed on them a duty beyond that which they do not have already - that is to pay a pension for the life of a member.

There is however an argument based on the words of section 90ME dealing with payments being made to reversionary beneficiaries, that such payments are also splittable. If so, the "splittable" payment will be much reduced, as all reversionary pensions are. Therefore the outcome will be very different to what a client may have expected. If the former non-member spouse still happens to be the reversionary beneficiary, presumably she or he will take as such beneficiary, and presumably any split order will lapse.

The fact that section 90ME says that payments to a reversionary beneficiary are "splittable" is not in doubt. What is debatable is whether parts of that section survive any challenge.

Long wait

A related issue is that unless a new interest is created in certain accumulation schemes, a former non-member spouse will have to wait for the actual retirement of the member spouse before she or he can expect to receive payments under the splitting orders. Where the age discrepancy is significant, and the non-member spouse is older than the member spouse, the non-member will have to wait to a much older age before receiving any split payments. No one can be forced to retire earlier than required to do so by the relevant fund rules.

Other aspects of the new scheme will have to await further discussion at a later date. ①

A move towards global legislation?

A recent survey has found that the Australian legal profession, along with their international colleagues, share strong views that certain aspects of law would benefit from international standardisation.

The survey was sponsored by LexisNexis and conducted by the International Bar Association (IBA) on its members in Australia, Canada, France, Germany, United Kingdom and the United States.

Globally, respondents identified laws governing money transmission and 'laundering' as the most important area of law that need internation standardisation.

Terrorism and security, trade and investment and environmental protection were also identified as important areas.

In Australia, 71 per cent of legal professionals ranked laws governing terrorism and security as the next highest priority for standisation and a third of respondents felt Australia's legal system was inadequately equipped to deal with international terrorism. ①

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