

FAMILY LAW ACT 1975
FOR SUPERANNUATION CONSENT ORDERS

SECT 90MA

Object of this Part

The object of this Part is to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between:

- (a) the parties to a marriage; or
- (b) the parties to a de facto relationship;

either by agreement or by court order.

SECT 90MB

This Part overrides other laws, trust deeds etc.

- (1) Subject to subsection (3), this Part has effect despite anything to the contrary in any of the following instruments (whether made before or after the commencement of this Part):
 - (a) any other law of the Commonwealth;
 - (b) any law of a State or Territory;
 - (c) anything in a trust deed or other instrument.
- (2) Without limiting subsection (1), nothing done in compliance with this Part by the trustee of an eligible superannuation plan is to be treated as resulting in a contravention of a law or instrument referred to in subsection (1).
- (3) This Part has effect subject to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

SECT 90MC

Extended meanings of matrimonial cause and de facto financial cause

- (1) A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause in section 4.
- (2) A superannuation interest is to be treated as property for the purposes of paragraph (c) of the definition of *de facto financial cause* in section 4.

SECT 90MD

Definitions

In this Part, unless the contrary intention appears:

"approved deposit fund" has the same meaning as in the SIS Act.

"declaration time" , in relation to a separation declaration, means the time when the declaration was signed by a spouse (or last signed by a spouse, if both spouses have signed).

Note: If a spouse has died, the spouse's legal personal representative may sign a declaration (see subsection 90MP(2)).

"eligible superannuation plan" means any of the following:

- (a) a superannuation fund within the meaning of the SIS Act;
- (b) an approved deposit fund;
- (c) an RSA;
- (d) an account within the meaning of the *Small Superannuation Accounts Act 1995*;
- (e) a superannuation annuity (within the meaning of the *Income Tax Assessment Act 1997*).

"flagging order" means an order mentioned in subsection 90MU(1).

"flag lifting agreement" has the meaning given by section 90MN.

"in force" , in relation to an agreement, has the meaning given by section 90MG.

"interest" includes a prospective or contingent interest, and also includes an expectancy.

"marriage" includes a void marriage.

"member" , in relation to an eligible superannuation plan, includes a beneficiary (including a contingent or prospective beneficiary).

"member spouse" , in relation to a superannuation interest, means the spouse who has the superannuation interest.

"non-member spouse" , in relation to a superannuation interest, means the spouse who is not the member spouse in relation to that interest.

"operative time" :

- (a) in relation to a payment split under a superannuation agreement or flag lifting agreement--has the meaning given by section 90MI; or
- (b) in relation to a payment flag under a superannuation agreement--has the meaning given by section 90MK or paragraph 90MLA(2)(c) as appropriate; or
- (c) in relation to a payment split under a court order--means the time specified in the order.

"payment flag" means:

- (a) the application of section 90ML in relation to a superannuation interest; or
- (b) the application of a flagging order in relation to a superannuation interest.

"payment split" means:

- (a) the application of section 90MJ in relation to a splittable payment; or
- (b) the application of a splitting order in relation to a splittable payment.

"percentage-only interest" means a superannuation interest prescribed by the regulations for the purposes of this definition.

"regulated superannuation fund" has the same meaning as in the SIS Act.

"reversionary beneficiary" means a person who becomes entitled to a benefit in respect of a superannuation interest of a spouse, after the spouse dies.

"reversionary interest" has the meaning given by section 90MF.

"RSA" means a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997* .

"secondary government trustee" means a trustee that:

- (a) is the Commonwealth, a State or Territory; and
- (b) is a trustee only because of the operation of section 90MDA.

"separation declaration" has the meaning given by section 90MP.

"SIS Act" means the *Superannuation Industry (Supervision) Act 1993* .

"splittable payment" has the meaning given by section 90ME.

"splitting order" means an order mentioned in subsection 90MT(1).

"spouse" means:

- (a) a party to a marriage; or
- (b) a party to a de facto relationship.

"superannuation agreement" has the meaning given by sections 90MH and 90MHA.

"superannuation interest" means an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest.

"trustee" , in relation to an eligible superannuation plan, means:

- (a) if the plan is a fund that has a trustee (within the ordinary meaning of that word)--the trustee of the plan; or
- (b) if paragraph (a) does not apply and a person is identified in accordance with the regulations as the trustee of the plan for the purposes of this definition--the person identified in accordance with the regulations; or
- (c) in any other case--the person who manages the plan.

"unflaggable interest" means a superannuation interest prescribed by the regulations for the purposes of this definition.

"unsplittable interest" means a superannuation interest prescribed by the regulations for the purposes of this definition.

SECT 90MDA

Extended meaning of trustee

If a person who is not the trustee of an eligible superannuation plan nevertheless has the power to make payments to members of the plan, then references in this Part to the trustee of the plan include references to that person.

SECT 90ME

Splittable payments

- (1) Each of the following payments in respect of a superannuation interest of a spouse is a *splittable payment* :
 - (a) a payment to the spouse;
 - (b) a payment to another person for the benefit of the spouse;
 - (c) a payment to the legal personal representative of the spouse, after the death of the spouse;
 - (d) a payment to a reversionary beneficiary, after the death of the spouse;
 - (e) a payment to the legal personal representative of a reversionary beneficiary covered by paragraph (d), after the death of the reversionary beneficiary.
- (2) A payment is not a splittable payment if it is prescribed by the regulations for the purposes of this subsection. The regulations may prescribe a payment either:
 - (a) generally (that is, for the purposes of all payment splits in respect of a superannuation interest); or
 - (b) only for the purposes of applying this Part to a particular payment split in respect of a superannuation interest.
- (3) If a payment is made to another person for the benefit of 2 or more persons who include the spouse, then the payment is nevertheless a splittable payment, to the extent to which it is paid for the benefit of the spouse.

SECT 90MF

Reversionary interest

For the purposes of this Part, a person's interest in an eligible superannuation plan is a *reversionary interest* at any time while the person's entitlement to benefits in respect of the interest is conditional on the death of another person who is still living.

SECT 90MG

Meaning of in force

- (1) A financial agreement is *in force* at any time when it is binding on the parties in accordance with section 90G.
- (1A) A Part VIIIAB financial agreement is *in force* at any time when it is binding on the parties in accordance with section 90UJ.

- (2) A superannuation agreement is *in force* at any time when the relevant financial agreement, or relevant Part VIIIAB financial agreement, is in force.
- (3) A flag lifting agreement is *in force* if, and only if:
 - (a) it meets the requirements set out in subsection 90MN(3); and
 - (b) it has not been set aside by a court and has not been terminated.

SECT 90MH

Superannuation agreement to be included in financial agreement if about a marriage

- (1) A financial agreement under Part VIIIA may include an agreement that deals with superannuation interests of either or both of the spouse parties to the agreement as if those interests were property. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made.
- (2) The part of the financial agreement that deals with superannuation interests is a *superannuation agreement* for the purposes of this Part.
- (3) A superannuation agreement has effect only in accordance with this Part. In particular, it cannot be enforced under Part VIIIA.
- (4) A superannuation agreement that is included in a financial agreement under section 90B (in contemplation of marriage) has no effect unless and until the spouse parties marry.
- (5) In applying sections 90B, 90C and 90D for the purposes of this Division, a superannuation interest of a spouse party to a financial agreement is treated as being acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest.

SECT 90MHA

Superannuation agreement to be included in Part VIIIAB financial agreement if about a de facto relationship

- (1) A Part VIIIAB financial agreement may include an agreement that deals with superannuation interests of either or both of the spouse parties to the agreement as if those interests were property. It does not matter whether or not the superannuation interests are in existence at the time the agreement is made.
- (2) The part of the Part VIIIAB financial agreement that deals with superannuation interests is a *superannuation agreement* for the purposes of this Part.

- (3) A superannuation agreement has effect only in accordance with this Part. In particular, it cannot be enforced under Part VIIIAB.
- (4) A superannuation agreement that is included in a Part VIIIAB financial agreement under section 90UB (in contemplation of a de facto relationship) has no effect unless and until the spouse parties enter into that de facto relationship.
- (5) In applying sections 90UB, 90UC, 90UD and 90UE for the purposes of this Division, a superannuation interest of a spouse party to a Part VIIIAB financial agreement is treated as being acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest.

SECT 90MI

Operative time for payment split

- (1) The *operative time* for a payment split under a superannuation agreement or 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, accompanied by:
 - (a) if the parties are divorced--a copy of the divorce order that has terminated the marriage; and
 - (aa) if, in the case of a payment split under a superannuation agreement:
 - (i) the parties are not divorced; and
 - (ii) a separation declaration is not part of the superannuation agreement;
a separation declaration; and
 - (b) if the agreement specifies a method for calculating a base amount--a document setting out the amount calculated using that method; and
 - (c) if a form of declaration is prescribed for the purposes of this paragraph--a declaration in that form.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

- (2) For the purposes of subsection (1), the separation declaration must have a declaration time that is not more than 28 days before the service on the trustee.

SECT 90MJ

Payment split under superannuation agreement or flag lifting agreement

- (1) This section applies to a superannuation interest if:
 - (a) the interest is identified in a superannuation agreement or flag lifting agreement; and
 - (b) if the interest is a percentage-only interest--the agreement does one of the following:
 - (i) it specifies a percentage that is to apply for the purposes of this subparagraph;
 - (ii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
 - (c) if the interest is not a percentage-only interest--the agreement does one of the following:
 - (i) it specifies an amount as a base amount in relation to the interest for the purposes of this Part;
 - (ii) it specifies a method by which such a base amount can be calculated at the time when the agreement is served on the trustee under section 90MI;
 - (iii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
 - (d) the agreement is in force at the operative time; and
 - (da) if the agreement relates to a marriage--the marriage is broken down at the operative time; and
 - (db) if the agreement relates to a de facto relationship--the de facto relationship is broken down at the operative time; and
 - (e) the interest is not an unsplitable interest.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

- (2) The following provisions begin to apply to the interest at the operative time.
- (3) Whenever a splittable payment becomes payable in respect of the interest:
 - (a) the non-member spouse is entitled to be paid the amount (if any) that is calculated under subsection (4); and
 - (b) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the payment split.

- (4) The amount is calculated as follows:
- (a) if the agreement specifies a percentage as mentioned in subparagraph (1)(b)(ii) or subparagraph (1)(c)(iii)--the amount is calculated by applying the specified percentage to the splittable payment; or
 - (b) otherwise--the amount is calculated in accordance with the regulations.
- (5) Subject to section 90MV, this section continues to apply to the superannuation interest even if the agreement referred to in subsection (1) later ceases to be in force.

SECT 90MK

Operative time for payment flag

- (1) The *operative time* for a payment flag under a superannuation agreement is:
- (a) the service time, if the eligible superannuation plan is a self-managed superannuation fund; or
 - (b) otherwise, the beginning of the fourth business day after the day on which the service time occurs.
- (2) In this section:

"self-managed superannuation fund" has the same meaning as in the SIS Act.

"service time" means the time when a copy of the agreement is served on the trustee, accompanied by:

- (a) if the parties are divorced--a copy of the divorce order that has terminated the marriage; and
- (aa) if the parties are not divorced--a separation declaration with a declaration time that is not more than 28 days before the service on the trustee; and
- (b) if a form of declaration is prescribed for the purposes of this paragraph--a declaration in that form.

SECT 90ML

Payment flag

- (1) This section applies to a superannuation interest if:

- (a) the interest is identified in a superannuation agreement; and
 - (b) the agreement provides that the interest is to be subject to a payment flag under this Part; and
 - (c) the agreement is in force at the operative time; and
 - (d) the interest is not an unflaggable interest.
- (2) A payment flag starts to operate on the superannuation interest at the operative time and continues to operate until either:
- (a) a court terminates the operation of the payment flag by an order mentioned in section 90MM; or
 - (b) a flag lifting agreement is served on the trustee as mentioned in section 90MI in respect of the superannuation interest.
- (3) If a payment flag ceases to operate because of paragraph (2)(b), the cessation is not affected by a later termination of the flag lifting agreement.
- (4) While a payment flag is operating on a superannuation interest, the trustee must not make any splittable payment to any person in respect of the interest.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

(4A) Subsection (4) does not apply if the splittable payment is made in circumstances in which section 90MLA applies.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4A) (see subsection 13.3(3) of the *Criminal Code*).

(5) If a splittable payment becomes payable in respect of a superannuation interest while a payment flag is operating, the trustee must, within 14 days after it became payable, give written notice to the member spouse and the non-member spouse.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

(6) Subsection (5) does not apply if the trustee has previously given a notice under that subsection, for an earlier splittable payment, in respect of the payment flag.

(7) If either spouse dies while a payment flag is operating:

- (a) the payment flag nevertheless continues to operate; and

- (b) the legal personal representative of the deceased spouse has all the rights the deceased spouse would have had in respect of the payment flag.

Note: The rights of the legal personal representative under paragraph (b) include the right to enter into a flag lifting agreement under section 90MN.

SECT 90MLA

Some splittable payments payable if payment flag operating

- (1) This section applies if:
 - (a) a superannuation interest (*original interest*) a person has in an eligible superannuation plan (*old ESP*) is identified in a superannuation agreement; and
 - (b) a payment flag under section 90ML is operating on the original interest; and
 - (c) a splittable payment is made by the trustee of the old ESP to the trustee of another eligible superannuation plan (*new ESP*) in respect of the original interest as part of a successor fund transfer.
- (2) If this section applies, then:
 - (a) the new interest in the new ESP is taken to be the original interest identified in the superannuation agreement; and
 - (b) the payment flag operates on the new interest; and
 - (c) despite section 90MK, the operative time for the payment flag in respect of the new interest is the time that the payment to the trustee of the new ESP is made.
- (3) In this section:

"successor fund transfer" means the transfer of a person's superannuation interest in the old ESP in circumstances where:

- (a) the new ESP confers on the person, in relation to the new interest, equivalent rights to the rights the person had in relation to the original interest; and
- (b) before the transfer, the trustee of the new ESP had agreed with the trustee of the old ESP to the conferral of such rights.

SECT 90MM

Payment flag may be terminated by court

- (1) If a court makes an order under section 90K setting aside a financial agreement in respect of which a payment flag is operating, the court may also make an order terminating the operation of the flag.

Note: Under section 90MH, a superannuation agreement must be part of a financial agreement. Therefore, setting aside the financial agreement also has the effect of setting aside the superannuation agreement.

- (2) If a court makes an order under section 90UM setting aside a Part VIIIAB financial agreement in respect of which a payment flag is operating, the court may also make an order terminating the operation of the flag.

Note: Under section 90MHA, a superannuation agreement relating to a de facto relationship must be part of a Part VIIIAB financial agreement. Therefore, setting aside the financial agreement also has the effect of setting aside the superannuation agreement.

SECT 90MN

Flag lifting agreement etc.

- (1) At any time when a payment flag is operating on a superannuation interest, the spouses may make an agreement (a ***flag lifting agreement***) that either:
 - (a) provides that the flag is to cease operating without any payment split; or
 - (b) specifies an amount, method or percentage in accordance with subsection 90MJ(1).
- (2) If the flag lifting agreement provides for a payment split, the spouses may at any time make an agreement (a ***termination agreement***) that terminates the flag lifting agreement.
- (3) A flag lifting agreement or termination agreement has no effect unless it complies with the following requirements:
 - (a) the agreement must be signed by both spouses;
 - (b) for each spouse, the agreement must contain a statement that the spouse has been provided with independent legal advice from a legal practitioner as to the legal effect of the agreement;
 - (c) a certificate must be attached to the agreement, signed by the person who provided the legal advice and stating that the advice was provided;
 - (d) after the agreement is signed by the spouses, each spouse must be provided with a copy of the agreement.

- (4) A court may make an order setting aside a flag lifting agreement or termination agreement if, and only if, the court is satisfied as to:
 - (a) if the spouses are parties to a marriage--any of the grounds set out in subsection 90K(1) (other than paragraph 90K(1)(f)); or
 - (b) if the spouses are parties to a de facto relationship--any of the grounds set out in subsection 90UM(1) (other than paragraph 90UM(1)(i)).
- (5) An order setting aside a flag lifting agreement also operates to set aside the related financial agreement or Part VIIIAB financial agreement.
- (6) An order under section 90K setting aside a financial agreement also operates to set aside the related flag lifting agreement.
- (7) An order under section 90UM setting aside a Part VIIIAB financial agreement also operates to set aside the related flag lifting agreement.