

**IMPAIRED CONSENT TO THE SPLITTING OF SUPERANNUATION
CONTRIBUTIONS: ISSUES, IMPACT AND POTENTIAL SOLUTIONS**

COLLIN ONG

BACHELOR OF LAWS / BACHELOR OF PSYCHOLOGY WITH HONOURS
MURDOCH UNIVERSITY

WORD COUNT: 19, 729

*This thesis is presented for the Honours degree of
Bachelor of Laws of Murdoch University, 2016*

DECLARATION

I, Collin Ong, declare that this thesis is my own account of my research and contains its main content work, which has not previously been submitted for a degree at any tertiary educational institution.

COPYRIGHT ACKNOWLEDGMENT

I acknowledge that a copy of this thesis will be held at the Murdoch University Library. I understand that, under the provisions of s51.2 of the Copyright Act 1968, all or part of this thesis may be copied without infringement of copyright where such a reproduction is for purposes of study and research.

This statement does not signal any transfer of copyright away from the author.

.....

Degree: Bachelor of Laws / Bachelor of Psychology with Honours

Thesis Title: Impaired Consent to the Splitting of Superannuation Contributions:
Issues, Impact and Potential Solutions

Author: Collin Ong

Year: 2016

GENERAL ACKNOWLEDGEMENTS

I wish to thank my supervisor, Robyn Honey, for her constant encouragement, enthusiasm and guidance over the course of this thesis.

I also wish to thank the Treasury for providing me with the information I needed for this thesis.

Special thanks to Hannah and Jamie for going above and beyond. Lastly, thanks to my friends and family for their support throughout this process.

ABSTRACT

The Australian superannuation system seeks to ensure that individuals have income in retirement. The government implemented the superannuation contributions splitting scheme to allow spouses to share their superannuation with each other. The scheme was intended to provide low-income and non-working spouses with superannuation assets under their control. This was expected to benefit women in particular.

However, there is a risk that the scheme will operate to the detriment of spouses and jeopardise their financial position in retirement. There is a lack of safeguards to protect spouses from applying to split their contributions where their decision is not free, informed or independent. Further, imposing the scheme's application process into the superannuation system's trust structure has caused a dissociation between the legal and practical decision maker under the scheme. These issues are particularly detrimental in light of the heightened risk of vitiated consent between spouses for financial decisions.

This thesis seeks to examine these issues and their impact and propose potential solutions to prevent the scheme operating to spouses' detriment and remedy the situation where it occurs. It is argued that the scheme does not sufficiently protect spouses' interests. It is also argued that the dissociation between the legal and practical decision maker exposes trustees to potential liability and leaves spouses without a clear avenue of recourse where their contributions are transferred in circumstances of impaired consent. Thus, both the trustees and spouses are left in a difficult position under the scheme. As a result, despite the government's intentions, the contributions splitting scheme may disadvantage, rather than benefit, vulnerable spouses.

TABLE OF CONTENTS

I	INTRODUCTION	1
	A THE AUSTRALIAN SUPERANNUATION SYSTEM	2
	B A GENDERED ISSUE.....	5
	C THE NEED FOR A SOLUTION.....	6
	D STRUCTURE OF THIS THESIS	7
II	THE SUPERANNUATION CONTRIBUTIONS SPLITTING SCHEME.....	9
	A OVERVIEW OF THE CONTRIBUTIONS SPLITTING SCHEME.....	9
	B THE CONTRIBUTIONS SPLITTING SCHEME’S PRACTICAL AND LEGAL FRAMEWORK...	10
	1 <i>Practical Requirements to Split Contributions</i>	10
	2 <i>Legal Requirements to Split Contributions</i>	11
	C RISKS CREATED BY THE CONTRIBUTIONS SPLITTING SCHEME.....	15
	1 <i>The Government’s Focus on the Scheme’s Financial Aspects Instead of Safeguards</i>	15
	2 <i>Risk of Contributions Being Transferred Away from Low-income or Non-working Spouses</i>	17
	3 <i>Risk of Spouses Making Decisions that are Not Free, Informed or Independent</i>	20
	D CONCLUDING REMARKS	23
III	RECOGNISED RISKS OF VITIATED CONSENT IN SPOUSAL RELATIONSHIPS	24
	A SOCIETY’S RECOGNITION OF THE RISK OF VITIATED CONSENT	24
	B LEGAL RECOGNITION OF THE RISK OF VITIATED CONSENT.....	26
	1 <i>Legal Recognition of the Risk of Vitiating Consent in General Transactions</i>	27
	2 <i>Legal Recognition of the Risk of Vitiating Consent Specific to Spouses</i>	36
	C CONCLUDING REMARKS	42
IV	DISSOCIATION BETWEEN THE LEGAL AND PRACTICAL DECISION MAKER IN THE SUPERANNUATION CONTRIBUTIONS SPLITTING SCHEME	43
	A DISSOCIATION BETWEEN THE LEGAL AND PRACTICAL DECISION MAKING	43
	1 <i>Superannuation Trustees’ Position at Law</i>	44
	2 <i>Superannuation Trustees’ Position in Practice</i>	52
	B THE EFFECT OF THE DISSOCIATION ON BENEFICIARIES’ RIGHT TO RECOURSE	57
	1 <i>Beneficiaries’ Right to Recourse Against the Wrongdoer</i>	57

2	<i>Beneficiaries' Right to Recourse Against the Trustees</i>	60
C	CONCLUDING REMARKS	63
V	POTENTIAL PREVENTATIVE AND REMEDIAL MEASURES TO IMPLEMENT IN THE SUPERANNUATION CONTRIBUTIONS SPLITTING SCHEME	65
A	PREVENTATIVE MEASURES.....	66
1	<i>Only Allow Contributions to be Transferred to Low-income or Non-working Spouses</i>	66
2	<i>Trustees Must Meet Personally with Beneficiaries Before Accepting Applications</i>	68
3	<i>Beneficiaries Must Obtain Independent Advice Before Applying to Split Contributions</i>	70
B	REMEDIAL MEASURES.....	72
1	<i>Statutory Amendment to Allow Trustees to Act Under Dictation for the Contributions Splitting Scheme</i>	73
2	<i>Statutory Claw-back Mechanism</i>	74
C	CONCLUDING REMARKS	75
VI	CONCLUSION	77
VII	BIBLIOGRAPHY	79
VIII	APPENDICES	103

I INTRODUCTION

The superannuation contributions splitting scheme allows spouses to ‘split’ or share their superannuation contributions with each other.¹ In 2011, the Australian Law Reform Commission identified a risk that spouses subjected to domestic violence could be coerced into splitting their superannuation contributions.² It is well known that spouses may confer financial benefits due to vitiated consent and the feeling that they have no choice. This is an issue that has arisen before the courts time and time again.³ However, coercion occurring in the context of the superannuation contributions splitting scheme creates a unique and serious problem. There are currently no reported cases of coercion occurring in the contributions splitting scheme. However, this is not surprising given the scheme’s relative youth. The scheme came into effect on 1 January 2006 with the first transfer permitted on 1 July 2006.⁴ Given the long-term nature of superannuation, it is possible that issues concerning coercion and other forms of vitiated consent have already occurred in the scheme but has yet to be realised or reported.

The possibility that spouses may be coerced into splitting their superannuation contributions is complicated by the fact that spouses do not confer the financial benefits themselves. The superannuation system uses a trust mechanism, so that it is the superannuation trustees who are responsible for administering and managing the superannuation contributions.⁵ Under the contributions splitting scheme, it is the trustee who determines whether to confer the financial benefits (ie the superannuation contributions) to the other spouse.⁶ Yet, in practice,

¹ Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 3; Leslie Nielson, Parliament of Australia, *Tax Laws Amendment (Superannuation Contribution Splitting) Bill 2005*, No 68 of 2005-06, 28 November 2005, 3.

² Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011) 464.

³ See, eg, *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395; *Yerkey v Jones* (1939) 63 CLR 649; *Saintclair v Saintclair* [2015] FamCAFC 245 (21 December 2015).

⁴ Leslie Nielson, above n 1, 1; Mal Brough, ‘Splitting of Superannuation Contributions Between Couples’ (Media Release, No. 27, 10 May 2005) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2005/027.htm&pageID=003&min=mtb&Year=2005&DocType=0>>.

⁵ See *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(3)-(6) (‘SIS Act’). See also Scott Donald, *The Role of Trust Law in the Superannuation System*, Australian Prudential Regulation Authority, 3 <http://www.apra.gov.au/AboutAPRA/WorkingAtAPRA/Documents/Scott-Donald_What-contribution-does-trust-law-make-to-the-regulatory-scheme-shaping-superannuation-in-Australia.pdf>.

⁶ *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 5.45 (‘SIS Regulations’).

trustees appear simply to be following the spouses' instructions. This results in a dissociation between the legal and practical decision maker in the contributions splitting scheme.⁷ Spouses and trustees are both left in a difficult position pursuant to which trustees may be exposed to liability for breaches of trust, while spouses potentially have no clear and direct right to recourse. This situation is exacerbated by the absence of safeguards in the contributions splitting scheme.

This thesis examines the legal issues arising from the risks associated with vitiated consent to applications made under the contributions splitting scheme.

A The Australian Superannuation System

Fundamental to this thesis is the structure and importance of the Australian superannuation system. Issues concerning the superannuation contributions splitting scheme can only be understood in the context of the superannuation system and its purpose. In Australia, superannuation forms part of the retirement income system⁸ and is vital for supporting the economy and the ageing population.⁹ Superannuation enables individuals to save for their retirement and reduces reliance on the age pension.¹⁰

The Australian superannuation system is complex and is governed by statute, contract and general law. The superannuation funds examined in this thesis are largely governed by the *Superannuation Industry (Supervision) Act 1993* (Cth) ('SIS Act') and *Superannuation Industry (Supervision) Regulations 1994* (Cth) ('SIS Regulations'). Employers are required to pay a percentage of employees'

⁷ This dissociation will be discussed in Ch IV.

⁸ Australia's retirement income system comprises of three pillars: the age pension, mandatory superannuation contributions and voluntary savings. This thesis focuses on the second pillar and will not discuss the other two pillars. The age pension is a social security payment that citizens aged 65 and older can be eligible to receive based on a means test of their income and assets. The third pillar comprises of individuals' other assets, such as housing and shares. See Senate Economics References Committee, *A Husband is Not a Retirement Plan: Achieving Economic Security for Women in Retirement* (2016) 5-6; Panha Heng, Scott Niblock and Jennifer Harrison, 'Retirement Policy: A Review of the Role, Characteristics, and Contribution of the Australian Superannuation System' (2015) 29 *Asian-Pacific Economic Literature* 1, 2-3 for a further discussion on the pillars of the Australian superannuation system.

⁹ Senate Economics References Committee, above n 8, 5-6; Tony Daly, 'Work, Care, Retirement and Health: Ageing 'Agendas'' (October 2014) University of South Australia Hawke Research Institute, 4-5

<<https://unisa.edu.au/Global/EASS/HRI/CWL/publications/AA%20lit%20review%20Final.pdf>>.

¹⁰ Treasury, Australian Government, *Objective of Superannuation*, Discussion Paper (9 March 2016) 1.

remuneration into the employee's superannuation account, which is within a superannuation fund.¹¹ This money is referred to as superannuation contributions. Currently, these mandatory employer contributions are set at 9.5% minimum.¹² Employees cannot access their superannuation contributions until they reach their preservation age, which is the age when an individual can retire and access their superannuation savings without restrictions.¹³

The superannuation system employs the trust as a vehicle for the management of superannuation funds during the period between contribution and preservation age.¹⁴ Like discretionary family trusts, each superannuation trust has its own trust deed,¹⁵ which is the main source of the trustees' powers and duties.¹⁶ The employee, also referred to as a member of the trust, is a beneficiary of the superannuation trust. However, unlike discretionary family trusts, the beneficiaries are not volunteers in superannuation trusts because the superannuation contributions form part of their remuneration.¹⁷ This difference has led to the trustees' duties being modified in the superannuation context.¹⁸

¹¹ *Superannuation Guarantee (Administration) Act 1992* (Cth) s 16.

¹² *Ibid* s 19(2).

¹³ Australian Securities and Investments Commission, *Getting Your Super*, MoneySmart (17 October 2016)

<<https://www.moneysmart.gov.au/superannuation-and-retirement/how-super-works/getting-your-super>>; Kelly Cox, *Preservation Age: It's Not All About Access*, Money Management (19 March 2015)

<<http://www.moneymanagement.com.au/features/tools-guides/preservation-age-it%E2%80%99s-not-all-about-access>>.

¹⁴ *SIS Act* s 52; Australian Law Reform Commission, *Grey Area – Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012) 158-9; Scott Donald, *The Role of Trust Law in the Superannuation System*, above n 5, 3.

¹⁵ See Australian Prudential Regulatory Authority, *Trust Deeds/Governing Rules*

<<http://www.apra.gov.au/Super/Pages/super-licensing-faq-trust-deeds-governing-rules.aspx>>.

See, eg, Maritime Super, *Deed of Amendment* (27 August 2015)

<<http://www.maritimesuper.com.au/Assets/Documents/other/trust-deed-and-amendments.pdf>>;

Clough Superannuation Fund, *Deed of Variation* (30 June 2005)

<<http://www.cloughsuper.com.au/TrustDeed.pdf>>; Telstra Super, *The Trust Deed* (16 July 2013)

<http://www.telstrasuper.com.au/About_us/About_Telstra_Super/The_Trust_Deed>.

¹⁶ See *Target Holdings Ltd v Redferns* [1996] 1 AC 421, 434 (Lord Browne-Wilkinson); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 498 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); Harold Ford et al, Thomson Reuters, *Ford and Lees: The Law of Trusts* (at 12 August 2015) 9 Trustees' Duties, 'The Duty: General and Specific' [9.2010].

¹⁷ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 271 [33] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* (2016) 334 ALR 992, 711 (Bathurst CJ).

¹⁸ See, eg, *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280 [66] (French CJ, Gummow, Heydon, Crennan and Bell JJ) where the Court held that superannuation trustees have a 'more intense' duty to properly inform themselves.

However, the extent to which traditional trust law applies or is modified in the superannuation system remains unclear.¹⁹

There are different types of superannuation funds, which are regulated by different bodies. This thesis will focus on accumulation funds that are regulated by the Australian Prudential Regulatory Authority ('APRA'). This is because the contributions splitting scheme only applies to accumulation funds.²⁰ In accumulation funds, members' superannuation contributions 'accumulate' or grow due to additional contributions, the effect of compound interest²¹ and the fund's investment strategy until the members can access their superannuation savings.²² APRA regulates most accumulation funds. The main exception to this is self-managed super funds ('SMSFs'),²³ which are largely regulated by the Australian Taxation Office.²⁴ This thesis will focus on APRA-regulated funds because the issues examined in this thesis are more pertinent to these funds. In SMSFs, the trustees are also the beneficiaries and as such, there is no dissociation between the legal and practical decision makers.²⁵ Further, SMSFs can only

¹⁹ The Court in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280 [65] ultimately chose not to answer the extent to which the principles in *Karger v Paul* [1984] VR 161 (which provides the grounds on when trustees' exercise of discretion can be reviewed) applies in the superannuation system. See also Scott Donald, 'What's in a Name? Examining the Consequences of Inter-legality in Australia's Superannuation System' (2011) 33 *Sydney Law Review* 295 for a further discussion on how the application of different areas of law results in inconsistencies and challenges in the superannuation system.

²⁰ Australian Taxation Office, *Contributions Splitting for Members* (8 September 2015) <<https://www.ato.gov.au/Super/APRA-regulated-funds/Managing-member-benefits/Contributions-splitting-for-members/>>.

²¹ For more details about the impact of compound interest see: Debra Cleveland, 'Salary Sacrifice Early and Let Compound Interest do the Hard Work to Build your Super', *Australian Financial Review* (online), 1 May 2015

<<http://www.afr.com/personal-finance/budgeting/salary-sacrifice-early-and-let-compound-interest-do-the-hard-work-to-build-your-super-20150423-1mrzxn>>; UniSuper, *See the Difference Interest Can Make*

<<https://www.unisuper.com.au/learning-centre/understanding-super/see-the-difference-interest-can-make>>; Australian Investors Association, *Power of Compounding* <<http://www.investors.asn.au/education/investment-basics/power-of-compounding/>>.

²² Australian Securities and Investments Commission, *Types of Super Funds* (1 April 2016) MoneySmart

<<https://www.moneysmart.gov.au/superannuation-and-retirement/how-super-works/choosing-a-super-fund/types-of-super-funds#difference>>.

²³ Australian Prudential Regulatory Authority, *Superannuation* <<http://www.apra.gov.au/super/pages/default.aspx>>.

²⁴ Australian Taxation Office, *How Your SMSF is Regulated* (16 June 2015)

<<https://www.ato.gov.au/Super/Self-managed-super-funds/Administering-and-reporting/How-we-help-and-regulate-SMSFs/How-your-SMSF-is-regulated/>>.

²⁵ *SIS Act* s 17A. Trustees of SMSFs are also exempt from the prohibition on being subject to direction: *SIS Act* s 58(1).

consist of up to five members.²⁶ Their small size means that SMSF trustees are more likely to be aware of circumstances of vitiated consent unlike trustees in APRA-regulated funds.

B A Gendered Issue

While issues under the contributions splitting scheme can affect both men and women, there is a gender aspect to the problem. The Australian Law Reform Commission identified the risk of coercion in the domestic violence setting, where women are more likely to be the victims.²⁷ Further, the courts have recognised that in a spousal relationship, wives in particular have an increased risk of having their consent vitiated.²⁸ This is because women are more likely to make decisions based on emotional dependence and in order to maintain the relationship.²⁹ Spouses also repose trust and confidence in each other.³⁰ Further, it is a reality that many wives are still responsible for domestic matters while their husbands are responsible for the financial decisions in the household.³¹ These factors in conjunction mean that women have a greater risk of having their consent vitiated under the scheme.

This gendered aspect to the issues underlying the contributions splitting scheme is particularly detrimental given that women are already retiring with insufficient superannuation savings compared to men.³² This retirement savings gap is well

²⁶ Ibid s 17A(1)(a). SMSFs must also contain more than one member.

²⁷ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, above n 2, 79, 464.

²⁸ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 190-1 (Lord Browne-Wilkinson); *Yerkey v Jones* (1939) 63 CLR 649, 675, 685 (Dixon J).

²⁹ *Yerkey v Jones* (1939) 63 CLR 649, 675, 685 (Dixon J); Nicola Howell, “‘Sexually Transmitted Debt’: Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers” (1995) 4 *Australian Feminist Law Journal* 93, 107.

³⁰ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 404 [21] (Gaudron, McHugh, Gummow, Hayne JJ).

³¹ *Barclays Bank plc v O'Brien* [1993] QB 109, 139 (Scott LJ); *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 188 (Lord Browne-Wilkinson).

³² Association of Superannuation Funds of Australia, ‘Sixty Minute Super Incentive’ (Media Release, 7 March 2013)

<<http://www.superannuation.asn.au/media/media-releases/2013/media-release-7-march-2013>>; Laura De Zwaan, Mark Brimble and Jenny Stewart, ‘Engagement with Superannuation: Is There Really a Gender Gap?’ (2015) 4 *Finsia Journal of Applied Finance* 12, 12; Erica Thompson, ‘Most Baby Boomers Today Have Insufficient Superannuation Savings - Those Golden Years’, *The Courier – Mail* (Brisbane), 30 October 2006, 33.

documented and has sparked a government inquiry.³³ The contributions splitting scheme was implemented to help women in particular grow their superannuation savings when they take time off work to care for family.³⁴ However, the manner in which the scheme has been implemented has created a danger that it will frequently be used to the detriment of women – making those affected *less* financially secure in retirement.

C The Need for a Solution

It will be argued that this problem requires a legislative solution because existing mechanisms do not offer sufficient protection to vulnerable spouses. Under the *Family Law Act 1975* (Cth), spouses' superannuation contributions can be divided when they divorce or separate.³⁵ It is likely that the Family Court will take into account any contributions split between the parties when determining how to divide the contributions.³⁶ On its face, this may appear sufficient to address any issues arising from coercion or vitiated consent in the contributions splitting scheme. However, the courts have recognised that 'prevention is better than cure' in some instances.³⁷ It is important to prevent issues of vitiated consent from arising under the scheme rather than remedy it at the divorce stage. Requiring parties to wait for a formal divorce proceeding to take place before they can recover their superannuation savings can add uncertainty and can exacerbate financial dependency issues. Additionally, requiring parties to wait until divorce to recover lost superannuation contributions would be contrary to the scheme's

³³ Senate Economics References Committee, above n 8, 9-10.

³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 2005, 1 (Malcolm Brough); Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 8 [1.3]; Treasury, Australian Government, *Splitting of Superannuation Contributions Between Couples*, Consultation Paper (2002) 1; John Howard, Prime Minister of Australia, 'Superannuation and Savings Policy Launch' (Speech delivered at the Superannuation and Savings Policy Launch, Brisbane, 5 November 2001).

³⁵ *Family Law Act 1975* (Cth) ss 75(2), 79(4), 90MA.

³⁶ The Family Court considers parties' contributions to assets when determining how to divide the assets between the parties: *Family Law Act 1975* (Cth) s 79(4).

³⁷ *Re Anderson-Berry* [1928] Ch 290, 307 (Sargant LJ); *Friend v Brooker* (2009) 239 CLR 129, 152 [52] (French CJ, Gummow, Hayne and Bell JJ); *Butler v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2012] FCA 790 (29 June 2012) [34] (Jagot J).

objective of providing low-income and non-working spouses with superannuation assets under their control.³⁸

Further, the dissociation between the legal and practical decision maker arises because the trustees' role under the contributions splitting scheme is unclear. As will be discussed, this results in trustees being exposed to potential liability for breach of trust. Clarifying the trustees' role and the extent to which traditional trust laws apply to the contributions splitting scheme, and the superannuation system in general, can prevent trustees from being exposed to liability for following the contributions splitting scheme.

Lastly, in the absence of protection or a clear avenue of legal recourse, it is likely that parties will settle disputes about superannuation contributions splitting between themselves.³⁹ Women have been noted to sacrifice a share of their spouse's superannuation contributions in order to secure housing for themselves and their children in property settlements.⁴⁰ As a result, lost superannuation contributions that were split under the scheme may not be recovered and women affected may be left financially disadvantaged in retirement.

D Structure of this Thesis

This thesis will examine the risk of spouses making decisions that are not free, informed or independent under the contributions splitting scheme and how the implementation of an application process within the superannuation's trust mechanism exacerbates this issue. Chapter II provides an overview of the superannuation contributions splitting scheme and describes in detail how it creates a new situation of risk for vulnerable spouses. Chapter III explores the special risks entailed when spouses make financial decisions in relation to one

³⁸ See Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 13; Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 3.

³⁹ Parties are able to reach a property settlement between themselves after they divorce or separate: *Family Law Rules 2004* (Cth) r 10.06; Legal Aid Western Australia, *Dividing Property - Married Couples* (1 October 2015) <<http://www.legalaid.wa.gov.au/informationaboutthelaw/familyrelationshipschildren/financialmatters/pages/dividingpropertymarriedcouples.aspx>>.

⁴⁰ Juliet Behrens, 'Women and Family Law' in Patricia Eastal (ed), *Women and the Law in Australia*, (LexisNexis Butterworths, 2010) 211-2.

another. It considers the avenues of legal recourse provided to spouses to alleviate them from responsibility for undertakings made in circumstances where their consent was vitiated. Chapter IV analyses the dissociation between the legal and practical decision making under the contributions splitting scheme arising from the application process being imposed in a trust mechanism. It will be submitted that this dissociation exposes superannuation trustees to liability and diminishes (and possibly obstructs) a spouse's right to recover contributions lost pursuant to an application made in circumstances of impaired consent. Finally, Chapter V proposes possible solutions to ameliorate the operation of the superannuation contributions splitting scheme, so as to minimise the risk of harm to vulnerable spouses and to provide a remedial mechanism for the recovery of contributions that were improperly split.

II THE SUPERANNUATION CONTRIBUTIONS SPLITTING SCHEME

The superannuation contributions splitting scheme creates a risk that spouses may make uninformed or unbeneficial decisions and will be financially disadvantaged in retirement. This risk has arisen by virtue of a failure to ensure that superannuation contributions cannot be transferred by low-income or non-working spouses and also because of an absence of safeguards to protect spouses. As a result, contrary to the government's intentions, the scheme can operate to the detriment of the splitting spouse and jeopardise their financial position in retirement. This chapter provides an overview of the contributions splitting scheme and its objectives. It will outline the practical and legal requirements for splitting contributions under the scheme. Finally, this chapter will describe the risks created by the scheme in light of the scheme's deficiencies.

A Overview of the Contributions Splitting Scheme

The superannuation contributions splitting scheme allows spouses to 'split' or share the superannuation contributions they received in the previous financial year with each other. This was previously not possible unless spouses divorced.⁴¹ The contributions splitting scheme was introduced as part of measures aimed to promote a 'strong savings and investment culture' and to increase access to superannuation beyond the traditional workforce.⁴² The government also wanted to assist families and spouses who have a single income or significant disparity between their incomes.⁴³

The scheme has two objectives – first, to provide single income spouses with the same tax advantages as dual income families and secondly, to provide low income or non-working spouses with superannuation assets under their control and income in retirement.⁴⁴ It was envisaged that a spouse who works full-time or has a higher income would split their superannuation contributions with their

⁴¹ Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 3; Leslie Nielson, above n 1, 3.

⁴² John Howard, above n 34; Leslie Nielson, above n 1, 2.

⁴³ Ibid.

⁴⁴ Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 13; Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 3.

low-income or non-working spouse and receive tax advantages for doing so.⁴⁵ This would allow spouses to continue to grow their superannuation even during non-working periods.⁴⁶ The scheme was expected to benefit women in particular because they are more likely to earn a lower income or take time away from full-time work to raise a family.⁴⁷

B The Contributions Splitting Scheme's Practical and Legal Framework

1 Practical Requirements to Split Contributions

Under the scheme, the spouse splitting their superannuation contributions is referred to as the 'splitting spouse' while the spouse who receives the split contributions is the 'receiving spouse'. In practice, a splitting spouse must undertake two steps to apply for their contributions to be split. First, they must ensure that their superannuation provider offers contributions splitting.⁴⁸ If the superannuation provider does offer this service, then the splitting spouse must complete a superannuation contributions splitting application and give it to their provider.⁴⁹ The Australian Taxation Office's contributions splitting application can be found in Appendix A.⁵⁰ The application form requires the personal details of the splitting and receiving spouse (eg name, address and date of birth), their superannuation accounts details and the amount of contributions to be split.⁵¹ The receiving spouse must also declare that they satisfy the spouse and age

⁴⁵ Senate Economics References Committee, above n 8, 88 [6.79].

⁴⁶ Women's Action Alliance, Submission No 10 to Senate Standing Economics Legislation Committee, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, October 2003, 1.

⁴⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 2005, 1 (Malcolm Brough); Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 8 [1.3]; Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 1; John Howard, above n 34.

⁴⁸ *SIS Regulations* reg 6.45. See, eg, Australian Taxation Office, *Contributions Splitting* <<https://www.ato.gov.au/uploadedFiles/Content/SPR/downloads/SPR19312n15237.pdf>> 1 for the government's contributions splitting form.

⁴⁹ *Ibid.*

⁵⁰ Contributions splitting application forms vary across superannuation providers. They all however, require the same information (eg, personal details and superannuation funds' details). See, eg, SuperSA, *Application to Split Eligible Contributions* <http://www.supersa.sa.gov.au/files/import960-442_tsfm22.pdf>; Asteron, *Contributions Splitting Application Form* (30 June 2008) <http://www.asteronlife.com.au/sites/default/files/find-a-form/OPT839_Contributions_Splitting.pdf>.

⁵¹ *SIS Regulations* reg 6.44(4).

requirements discussed below.⁵² The splitting spouse is also generally required to sign the form to request the split and declare that the information provided on the form is true and correct.⁵³

Notably the splitting spouse does not have to seek financial advice to ensure that splitting contributions will provide the splitting and receiving spouse with the intended tax advantages. Further, the splitting spouse does not have to provide any reasons to split their contributions or prove that the receiving spouse is a low-income or non-working spouse. Spouses also do not need to confirm that they understand the practical implications of contributions splitting. These factors create issues that will be discussed further below.

2 *Legal Requirements to Split Contributions*

Once the splitting spouse applies for their superannuation contributions to be split, the trustee must decide whether to accept or reject the application.⁵⁴ Trustees' duties in considering contributions splitting applications will be discussed in Chapter IV. Employers do not play an active role in the contributions splitting scheme. This is because the government did not want to place any administrative burden on employers under the scheme.⁵⁵ As the contributions splitting scheme only allows contributions that were received in the previous financial year to be split, the contributions split already belong to the splitting spouse.

Trustees can only accept valid superannuation contributions splitting applications.⁵⁶ Regulation 6.44 of the SIS Regulations provides the requirements for a valid application. Each of these requirements will be discussed before outlining the consequences in practice by reference to a fictional scenario. In

⁵² Ibid reg 6.45. See, eg, Australian Taxation Office, *Contributions Splitting*, above n 48; AustralianSuper, *Split Your Super Contributions with Your Spouse* <<https://www.australiansuper.com/~media/Files/Forms/Split%20your%20super%20contributions%20with%20your%20spouse.ashx>>; UniSuper, *Super Contribution Splitting with Your Spouse* <https://www.unisuper.com.au/~media/files/forms%20and%20downloads/forms%20and%20brochures/contributing%20to%20super/unis000f34_contribution_splitting_fact_sheet_and_form.pdf>.

⁵³ See, eg, Australian Taxation Office, *Contributions Splitting*, above n 48; AustralianSuper, *Split Your Super Contributions with Your Spouse*, above n 52; UniSuper, above n 52.

⁵⁴ *SIS Regulations* reg 5.45. The trustee's role when given a valid contributions splitting application will be further discussed in Ch IV.A.

⁵⁵ Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 6.

⁵⁶ *SIS Regulations* reg 6.45(1)(a).

examining the requirements imposed, it is evident that the government was concerned with ensuring that spouses do not use the scheme to avoid fees or access their superannuation savings immediately. These requirements that the government imposed stand in contrast to the absence of regulations in respect of other risks created by the contributions splitting scheme, as will be discussed in Part C of this chapter.

(a) Frequency and Magnitude of Contributions Splitting

Applicants can make one application in each financial year to split the superannuation contributions they received in the previous financial year.⁵⁷ The maximum amount of contributions that can be split is 85% for taxed contributions⁵⁸ or 100% for untaxed contributions or the concessional contributions cap for the financial year, whichever is lesser.⁵⁹ Currently, the concessional contributions cap for the 2016/17 financial year is \$30,000 for individuals under 50 years old and \$35,000 for individuals who are at least 50 years old on 30 June 2015.⁶⁰ Spouses are thus, able to transfer a significant proportion of their superannuation contributions and can potentially keep only 0-15% of their superannuation contributions for a given financial year.

⁵⁷ Ibid reg 6.44(2)(a).

⁵⁸ Taxed splittable contributions include contributions made by an employer, salary sacrifice contributions and personal contributions that a tax deduction can be claimed for, which generally applies to contributions made by self-employed members: Australian Taxation Office, *Claiming Deductions for Personal Super Contributions* (1 September 2016) <<https://www.ato.gov.au/Individuals/Super/In-detail/Growing/Claiming-deductions-for-personal-super-contributions/>>; Australian Taxation Office, *Contribution Caps* (16 June 2015) <<https://www.ato.gov.au/Super/Self-managed-super-funds/Contributions-and-rollovers/Contribution-caps/>>; Trish Power, *Super Concessional (Before-tax) Contributions: 2016/2017 Survival Guide* (19 July 2016) SuperGuide <<http://www.superguide.com.au/boost-your-superannuation/super-concessional-contributions-survival-guide>>.

⁵⁹ *SIS Regulations* reg 6.40. See also Australian Taxation Office, *Contributions Splitting*, above n 48, 2; Vision Super, *How Super Works – Additional Guide* (7 April 2016) <<https://www.visionsuper.com.au/images/pds/2-How-super-works-Vision-Super-Saver.pdf>> 4.

⁶⁰ Australian Taxation Office, *Concessional Contributions Cap* (7 September 2016) <<https://www.ato.gov.au/Rates/Key-superannuation-rates-and-thresholds/?anchor=Concessionalcontributioncap#Concessionalcontributioncap>>. See Treasury, Australian Government, *Superannuation Reform: Reforming the Taxation of Concessional Contributions* (9 November 2016) <http://www.budget.gov.au/2016-17/content/glossies/tax_super/downloads/FS-Super/03-SFS-Reform_of_concessional_contributions-161109.pdf> 1 for the government's planned reduction of the concessional contributions cap to \$25,000.

Some superannuation providers have also imposed requirements about the minimum amount that can be split and a minimum account balance that must remain after splitting contributions. These minimum amounts differ between providers.⁶¹ These limitations on the proportion of contributions that can be split were imposed to reduce the risk of the splitting spouse having insufficient funds to cover their surcharge liability⁶² after splitting.⁶³ The government also wanted to encourage spouses to split contributions early rather than splitting a large proportion near retirement.⁶⁴ Thus, these limitations do not seek to protect splitting spouses from depleting their superannuation savings against their interests.

(b) Age Requirement

Regulation 6.44(2)(c) of the SIS Regulations provides that the receiving spouse must be under their preservation age or over their preservation age but less than 65 years old and not retired. As mentioned, preservation age is the age when an individual can retire and access their superannuation benefits without restrictions.⁶⁵ The preservation age ranges from 55 to 60 years and is dependent on when an individual was born.⁶⁶ The trustee can rely on the receiving spouse's statement about their preservation age when considering an application.⁶⁷ This age restriction was imposed to prevent receiving spouses from accessing split

⁶¹ See, eg, SunSuper, *Contribution Splitting: Is it Right for You and Your Partner?* (July 2016) <<https://www.sunsuper.com.au/documents/factsheets/sunsuper-contribution-splitting-factsheet.pdf>> 2, which requires a minimum splitting amount of \$5,000 and a minimum remaining account balance of \$5,000. Cf SuperSA, above n 50, 1, which requires a minimum splitting amount of \$50 and a minimum remaining account balance of \$1,000.

⁶² The superannuation surcharge is an additional charge imposed on contributions where the individual's taxable income is over a particular threshold. The superannuation surcharge has since been abolished and no longer applies to any superannuation contributions made from 1 July 2005: Australian Taxation Office, *Superannuation Contributions Surcharge - Information for Super Funds and Professionals* (25 May 2015) <<https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/APRA-resources/Fact-sheets/Sup-erannuation-contributions-surcharge/>>; GESB Superannuation, *Superannuation Contributions Surcharge* <http://www.gesb.com.au/gesb_media/surcharge_fact_sheet.pdf>. However, the surcharge liability is still the reason for the limitations imposed on the proportion of contributions that can be split.

⁶³ Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34,11.

⁶⁴ Ibid.

⁶⁵ Australian Securities and Investments Commission, *Getting Your Super*, above n 13; Kelly Cox, above n 13.

⁶⁶ *SIS Regulations* reg 6.01.

⁶⁷ Ibid reg 6.44(3).

contributions immediately.⁶⁸ The government wanted to ensure that the contributions splitting scheme is used to accumulate superannuation savings and assist them in saving for their retirement.⁶⁹

(c) Spouse Requirement

Contributions splitting can only occur between spouses. Under the scheme, spouses include legally married spouses, de facto spouses and registered couples, whether of the same or different sex.⁷⁰

(d) Consequences in Practice

The legal requirements discussed above are best illustrated using a fictional scenario to demonstrate the practical consequences of contributions splitting:

Jane works full-time and earns the 2016 before tax average total earnings of \$81,920.80 annually.⁷¹ She received \$7,782.48 of superannuation contributions in the 2015/16 financial year as a result.⁷² Jane's superannuation fund allows members to split their superannuation contributions. The fund does not impose any additional requirements, such as a minimum amount that must be left in superannuation accounts after splitting. Jane is 40 years old while her husband, Bob, is 46 years old. Bob satisfies the preservation age requirement for contributions splitting. Jane can transfer \$6,615.04, being 85% of the superannuation contributions she received for the previous financial year, to Bob. This would leave Jane with \$1,167.44 of superannuation contributions for the previous financial year. As Jane meets the contributions splitting scheme's legal requirements, her application will be valid. Jane's superannuation fund accepts her application

⁶⁸ Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34,11.

⁶⁹ Ibid.

⁷⁰ *SIS Act* s 10.

⁷¹ Australian Bureau of Statistics, *Average Weekly Earnings, Australia, May 2016* (18 August 2016)

<<http://www.abs.gov.au/ausstats/abs@.nsf/0/7F76D15354BB25D5CA2575BC001D5866?OpenDocument>>.

⁷² This is 9.5% of the worker's annual salary, the compulsory contributions rate imposed on employers. See Australian Securities and Investments Commission, *Employer Contributions Calculator* (1 September 2016) MoneySmart

<<https://www.moneysmart.gov.au/tools-and-resources/calculators-and-apps/employer-contribution-calculator>>.

and transfers her contributions to Bob's superannuation account within 30 days. Those superannuation contributions now belong to Bob.

In the above scenario, the contributions Jane transferred to Bob will be invested by his superannuation fund and will accumulate over time. Jane will not feel the impact of her transfer until she reaches preservation age, which will not occur for decades after the transfer. At that stage, it will be too late for Jane to recover financially and her retirement position will be negatively impacted as a result.

C Risks Created by the Contributions Splitting Scheme

There is a risk that low-income or non-working spouses' retirement positions may be worsened under the superannuation contributions splitting scheme. While the government intended to benefit low-income and non-working spouses, the government was largely focused on the scheme's financial aspects, such as the costs of implementing the scheme and ensuring that spouses do not avoid any surcharge liabilities. In contrast to the requirements discussed above, there are no regulations that implement safeguards to prevent the scheme from operating to the detriment of low-income and non-working spouses. The scheme's failure to implement such safeguards has created a risk that superannuation contributions will be transferred away from low-income and non-working spouses and additionally, a risk that spouses may make decisions that are not free, informed or independent under the scheme. As a result, spouses are at risk of negative outcomes in retirement. The absence of regulations to address these risks reveals a lack of consideration for the interests of vulnerable individuals under the scheme.

1 The Government's Focus on the Scheme's Financial Aspects Instead of Safeguards

When implementing the scheme, the government was largely concerned with the scheme's financial aspects and administrative concerns for superannuation providers. In focusing on these factors, the legislators ignored other important considerations, such as the need to implement safeguards to protect splitting spouses. As a result, the legislators failed to consult important stakeholders, such

as women and parties involved in protecting the financial interests of vulnerable individuals. The legislators' focus on the financial aspects of the scheme is evident from the following factors. First, the Treasury conducted the scheme's 2002 consultation.⁷³ The Treasury is a department that focuses on analysing policies from an economic perspective.⁷⁴ No other department appears to have been involved. Secondly, the submissions made to the 2002 consultation largely focused on the practical financial and administrative costs and issues involved in implementing the scheme.⁷⁵ The submissions made unfortunately could not be obtained because they are confidential.⁷⁶ However, the Treasury provided a de-identified summary of the submissions made to the 2002 consultation, which outlines the key points made by each commenting entity in their submission.⁷⁷ As the document was de-identified, it cannot be ascertained whether parties representing women's rights and interests made a submission. However, the submissions did not mention the possibility that contributions could be transferred to a high-income spouse contrary to the second objective.

Lastly, the scheme was later referred to the Senate Economics Legislation Committee for an inquiry.⁷⁸ The Committee noted that there was a 'potential for fraud in annual splitting arrangements' but did not discuss this issue further.⁷⁹ The Association of Superannuation Funds of Australia raised this concern and stated:

Some thought should be given as well to the potential for both increased administrative risk and exposure to possible fraud that naturally arises from

⁷³ See Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, iii, 2.

⁷⁴ Treasury, *Our Department* <<http://www.treasury.gov.au/About-Treasury/OurDepartment>>.

⁷⁵ See Appendix B where only 6 of the 30 Commenting Entities (Commenting Entities 1, 6, 10, 12, 19 and 30) did not mention the financial and administrative costs and issues of the scheme.

⁷⁶ A Freedom of Information request was sent to the Treasury to obtain the relevant submissions. However, the request was rejected due to the number of documents involved: see Appendix C. In a follow-up email however, the Treasury noted that the relevant documents were confidential and therefore could not be provided: Email from The Treasury Retirement Income Policy Division to Collin Ong, 18 October 2016; see Appendix D.

⁷⁷ *Ibid.*

⁷⁸ Senate Selection of Bills Committee, Parliament of Australia, *Report No 11 of 2003* (2003) [2].

⁷⁹ Economics Legislation Committee, Senate, *Provisions of the Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003 and Associated Regulations* (2003) 12.

increased transaction volumes within the scheme.⁸⁰

While the risk of fraud was mentioned, the Committee and government did not consider it further or implement any safeguards to address the issue. The government was thus, aware of the potential risks to splitting spouses but appears to have disregarded them. No other parties, including the Women's Action Alliance who aims to encourage and promote women's rights,⁸¹ raised any similar concerns or considered the possibility of the scheme being used contrary to the second objective.⁸²

These factors in conjunction indicate that the legislators were focused on the financial aspects of the scheme when implementing it. As a result, other considerations such as potential safeguards to protect spouses were not considered. This created the risks that the scheme may operate to splitting spouses' detriment.

2 Risk of Contributions Being Transferred Away from Low-income or Non-working Spouses

The way the contributions splitting scheme is implemented creates a risk that the scheme will operate to the low-income or non-working spouse's detriment because superannuation contributions can be transferred away from them. The government intended high-income spouses to transfer their superannuation contributions to their low-income or non-working spouses, and thus provide them with superannuation assets under their control as per the scheme's second objective. Despite this intention, there is no statutory requirement to ensure that superannuation contributions will flow from a high-income spouse to a low-income or non-working spouse.

⁸⁰ Association of Superannuation Funds of Australia, Submission No 6 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, October 2003, 8.

⁸¹ Ibid. See Women's Action Alliance, above n 46, 1.

⁸² See Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003* (14 November 2003)

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2002-04/super_splitting/submissions/sublist> for the 17 submissions made to the Senate Inquiry. See Ch II.A for a discussion on the scheme's objectives.

Instead, the government appears to assume that contributions will be transferred in this direction due to the taxation incentives provided. The government did not discuss specifically how the second objective would be achieved. When considering the scheme's impact on spouses, the government only considered whether spouses would receive the intended taxation incentives and benefits and the financial costs of splitting which spouses would incur.⁸³ Thus, beyond these taxation incentives, there are no safeguards implemented to prevent contributions from being transferred away from low-income or non-working spouses.

(a) Taxation Incentives to Encourage Contributions Being Transferred to Low-income or Non-working Spouses

The contributions splitting scheme provides taxation incentives to encourage higher income earners to split their superannuation contributions with their low-income or non-working spouse. Specifically, splitting contributions in this manner will provide spouses with access to two low-rate thresholds, as is the case with dual income families.⁸⁴ The scheme also originally provided spouses with access to two reasonable benefit limits (RBL)⁸⁵ but this has since been abolished.⁸⁶ As RBL is no longer an incentive to split contributions, it will not be discussed in this thesis. These taxation incentives only apply at retirement and as such, there is a possibility that spouses will not receive the taxation benefits intended.⁸⁷

The low-rate threshold is the amount of superannuation contributions that parties can withdraw tax-free after reaching their preservation age but before turning 60 years old. Parties generally must pay tax on any amounts withdrawn above the low-rate threshold unless they withdraw their savings after turning 60 years old.⁸⁸

⁸³ Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 7-10.

⁸⁴ *Ibid* 3.

⁸⁵ RBL refers to the maximum amount of retirement and termination of employment benefits that can be received over an individual's lifetime at a concessional tax rate. Amounts in excess of the RBL were subjected to a higher tax rate. See House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Improving the Superannuation Savings of People under 40* (2006) 71, [4.47] for more information on RBL.

⁸⁶ Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth) 10 [1.11].

⁸⁷ See Appendix B, Commenting Entity 15.

⁸⁸ See Australian Taxation Office, *How Tax Applies to Your Super* (1 September 2016)

<<https://www.ato.gov.au/individuals/super/in-detail/withdrawing-and-paying-tax/withdrawing-you>

For example, if a high-income spouse splits contributions with a non-working spouse, they will both be able to withdraw \$195,000, being the low-rate threshold for the 2016/17 financial year, as a tax-free lump sum. This will allow them to withdraw \$390,000 superannuation savings for their family in total. If the high-income spouse did not split their contributions, only the high-income spouse would have contributions to withdraw. That spouse would be limited to withdrawing \$195,000 tax-free. This potential benefit forms the incentive to split superannuation contributions to a low-income or non-working spouse. Certainly this is one of the uses of the scheme envisaged by financial advisers, as evident from their articles about the scheme to their members.⁸⁹

(b) Lack of Safeguards to Prevent Contributions Being Transferred Away From Low-income or Non-working Spouses

The issue lies in the fact that, notwithstanding these taxation incentives, it is possible for a low-income spouse to transfer their superannuation contributions to their high-income spouse.⁹⁰ Indeed, financial advisers have noted that it may be beneficial to transfer superannuation contributions to an older spouse in order to access the superannuation savings earlier – regardless of which of them is the higher earner.⁹¹ This incentive for splitting is not dependent on the income gap between the spouses but focuses instead on the spouses' age. In its submission to the 2002 consultation, Commenting Entity 15 suggested that the government should implement means testing to prevent spouses from splitting their

r-super-and-paying-tax/?page=3> for a more detailed explanation on how superannuation savings are taxed. See also Trish Power, *Retiring Before the Age of 60: The Tax Deal* (23 August 2016) SuperGuide

<<http://www.superguide.com.au/accessing-superannuation/retiring-before-the-age-of-60-the-tax-deal>>; Macquarie, *Superannuation Technical Information Booklet* (1 October 2016), 9

<<http://www.macquarie.com.au/dafiles/Internet/mgl/au/docs/yourwrap/supertech.pdf>>.

⁸⁹ See, eg, Rosanne Joyce, *Why It Pays to Split Up: The Benefit of a Contributions Splitting Strategy* (30 September 2015) The Private Practice

<http://theprivatepractice.com.au/_blog/Articles/post/why-it-pays-to-split-up-the-benefits-of-a-contributions-splitting-strategy/>; Dixon Advisory, *Spouse Splitting Contributions May Have Benefits* (1 January 2014)

<<https://www.dixon.com.au/news/news-article/01-01-14/spouse-splitting-contributions-may-have-benefits>>.

⁹⁰ See, eg, Cavendish Superannuation, 'Splitting Under the Knife' [2006] (April) *Cavendish Superannuation: Technical Updates*, 1, 10 where it was noted that contributions can be transferred either way between two eligible spouses and is not limited to low-income or non-working spouses.

⁹¹ See, eg, Clough Superannuation Fund, *Contribution Splitting*

<http://www.cloughsuper.com.au/contribution_splitting.pdf>; NKH Knight, *Super Contributions Splitting* <<https://www.nkhknight.com.au/blog/super-contributions-splitting/>>.

contributions where they earn less than a specific amount, such as three times the average weekly earnings.⁹² This safeguard would help prevent superannuation contributions from being transferred away from low-income or non-working spouses. However, the government did not implement this safeguard.

Thus, in the previous fictional scenario involving Jane and Bob, Bob's income is irrelevant. Jane will be able to transfer her superannuation contributions to Bob even if he earns more than she does. As a result, the manner in which the contributions splitting scheme was implemented means that there is a risk that it will not operate as intended. Insofar as superannuation contributions can be transferred to higher income spouses, the scheme's operation is contrary to its second objective. It may result in some low-income spouses becoming *more* financially dependent on their partner in retirement. This risk falls disproportionately upon women because wives usually have a lower income. Thus, there is an opportunity for low-income or non-working spouses' retirement positions to be worsened under the contributions splitting scheme.

3 Risk of Spouses Making Decisions that are Not Free, Informed or Independent

Furthermore, this risk is exacerbated by the fact that legislators failed to build into the scheme safeguards to protect splitting spouses. As we have seen, the regulations provide criteria that must be met for an individual to be eligible to split contributions.⁹³ However, instead of considering protective factors, the government appeared to have largely focused on the financial aspects of the scheme. It does not provide or suggest that the criteria that trustees should consider includes the fact that splitting would be in the splitting spouse's financial interest. Nor is it a requirement that the application has been made as a result of a free, informed or independent decision. Indeed, there are no safeguards to prevent spouses from applying to split their contributions as a result of coercion, undue influence or misrepresentation by the receiving spouse. There is thus a real risk

⁹² Appendix B, Commenting Entity 15.

⁹³ *SIS Regulations* reg 6.45.

that spouses may split their contributions to their detriment or without understanding the implications involved.

(a) Lack of Safeguards to Prevent Uninformed Decisions

The scheme does not implement safeguards to protect spouses from making uninformed decisions. Trustees are not required to ensure that splitting spouses have received financial advice or understand the practical implications of contributions splitting. Trustees have only to ensure that applications are valid.⁹⁴ While some application forms recommend that spouses obtain financial advice,⁹⁵ this is not a requirement for making an application. Nor does the absence of advice present a bar to contributions splitting. The superannuation system and the scheme's end benefit taxation rules are complex. This is why submissions during the scheme's implementation process highlighted the need to educate splitting spouses about the scheme.⁹⁶ Yet, spouses are able to apply to split their contributions without actually understanding its implications or being sure that splitting will benefit them.

Thus, in the above fictional scenario, Jane did not need to obtain financial advice in order to apply to split her contributions. It is possible that splitting contributions will not result in any additional benefits to Jane and Bob. Further, Jane does not have to actually understand the practical implications of splitting. For example, she may not understand that the contributions will belong to Bob after the transfer and she will not be able to get it back. Therefore, the lack of these safeguards in the contributions splitting scheme means that there is a risk

⁹⁴ Ibid reg 6.45(1)(a).

⁹⁵ See, eg, Catholic Super, *Splitting Super Contributions*, 1 <<http://csf.com.au/documents/forms/ContributionsSplittingApplication.pdf>>; Media Super, *Splitting Super Contributions*, 1 <https://www.mediasuper.com.au/sites/mediasuper.com.au/files/splitting_super_contributions_jul_16.pdf>; First Super, *Contribution Splitting* <http://www.firstsuper.com.au/wp-content/uploads/2015/03/75_fir003-contribution-splittingv2-ed5413d4-6db6-42db-95f1-814b7ef3fa0f-0_4ea266.pdf>.

⁹⁶ Appendix B, Commenting Entity 13, Commenting Entity 15; Association of Superannuation Funds of Australia, Submission No 6, above n 80, 8; Women's Action Alliance, above n 46, 4; Financial Planning Association of Australia, Submission No 16 to Senate Standing Economics Legislation Committee, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 2003, 4.

that splitting spouses will make uninformed decisions or will make decisions that are not in their best interests financially.⁹⁷

(b) Lack of Safeguards to Prevent Decisions that are Not Free or Independent

The scheme also does not implement safeguards to ensure that spouses are making free and independent decisions. Trustees are not required to check that the splitting spouse consents to contributions splitting. The splitting spouse's consent appears instead to be assumed from the signature on the application form. A signature does indicate at law that the signor has read, understood and consents to the document's contents.⁹⁸ Nonetheless there are situations where the signor's signature was improperly obtained and their decision was not free or independent.⁹⁹ As will be discussed in Chapter III, the law recognises that there is a heightened risk of a spouse's consent being improperly obtained, particularly for financial transactions. The government's failure to implement safeguards to protect against vitiated consent is particularly problematic given that the scheme only applies to spouses.

While it is likely that consent will not be vitiated and the scheme will not be abused in most circumstances, the risk should nonetheless be considered. Certainly the possibility of misconduct is considered in other legal frameworks despite an underlying assumption of lawful conduct. For example, it is assumed that most businesses will comply with the Australian consumer law.¹⁰⁰ However, penalties and offences are nonetheless imposed in order to deter misconduct and

⁹⁷ See Institute of Chartered Accountants in Australia, Submission No 4 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 17 October 2003, 2; Cbus, Submission No 9 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 2003, 3.

⁹⁸ *McLaughlin v Daily Telegraph Newspaper Co Ltd* (1904) 1 CLR 243, 274 (Griffith CJ, Barton and O'Connor JJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 186-93, (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

⁹⁹ *McLaughlin v Daily Telegraph Newspaper Co Ltd* (1904) 1 CLR 243, 274 (Griffith CJ, Barton and O'Connor JJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 186-93, (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

¹⁰⁰ See Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Businesses Think about the Costs of Compliance with the Trade Practices Act' (2008) 32(2) *Melbourne University Law Review* 554, 555; Australian Government, *Australian Consumer Survey* (2011), viii
<http://consumerlaw.gov.au/files/2015/09/Australian_Consumer_Survey_Report.pdf>.

protect consumers.¹⁰¹ The superannuation contributions splitting scheme however, lacks such safeguards.

D Concluding Remarks

It is clear that the government implemented the contributions splitting scheme with the intention to benefit single income families and women in particular. However, the government was largely concerned with the financial costs and benefits of implementing the scheme. In doing so, the government failed to consider the risks involved and the need to protect spouses from these risks. The government failed to implement safeguards to prevent the contributions splitting scheme from being used in a manner contrary to its intentions. The government also failed to implement safeguards to ensure that parties seeking to split their contributions have received financial advice, understand the practical implications of contributions splitting and truly consent to splitting their contributions.

These failures are particularly problematic in light of the complexities of the superannuation system, its importance in retirement and the heightened risk of vitiated consent between spouses, to whom the scheme applies. By creating the contributions splitting scheme with these failures, there is a real risk that low-income or non-working spouses' retirement position will be worsened by the scheme. It also creates the risk of spouses splitting their superannuation contributions to their detriment or without understanding the implications involved. These failures also mean that women, whom the scheme was specifically expected to benefit, may be worse off as a result. Thus, the government has created a new situation where spouses are at risk of making financially unbeneficial decisions that are not free, informed or independent. The impact of these risks will not be felt for many years and may be disastrous in that it becomes apparent at a time when it will be too late for victims to make a financial recovery due to their age.

¹⁰¹ See Australian Consumer Law, *Compliance and Enforcement: How Regulators Enforce the Australian Consumer Law* (2010), 7
<http://consumerlaw.gov.au/files/2015/06/compliance_enforcement_guide.pdf>; Jing Jian Xiao, *Consumer Economic Wellbeing* (Springer, 2015) 67.

III RECOGNISED RISKS OF VITIATED CONSENT IN SPOUSAL RELATIONSHIPS

The lack of safeguards in the superannuation contributions splitting scheme creates a risk that splitting spouses may apply to split their contributions without making a free, informed or independent decision. There are currently no cases involving this issue in the scheme. However, it is well recognised in society and at law that spouses, by virtue of their relationship, may make decisions, particularly financial decisions, that are not free, informed or independent (ie their consent is vitiated). This possibility of vitiated consent is problematic given that parties should only be bound to obligations that they voluntarily assume.¹⁰² This chapter will discuss the societal and legal recognition of the real risk of vitiated consent between spouses. It will first discuss society's recognition that spouses' consent may be vitiated in domestic violence relationships. This chapter will then discuss the legal recognition of this issue by outlining the protection offered to innocent parties and then spouses specifically when their consent is vitiated.

A Society's Recognition of the Risk of Vitiating Consent

Consent may be vitiated between spouses in domestic violence relationships.¹⁰³ This was the context in which the Australian Law Reform Commission identified the risk of coercion in the contributions splitting scheme.¹⁰⁴ Studies show that majority of domestic violence victims are women though victims can be male or female.¹⁰⁵ Domestic violence may involve physical, sexual, financial or psychological abuse.¹⁰⁶ In Australia, one in three women have experienced

¹⁰² *Astley v Austrust Ltd* (1999) 197 CLR 1, 36 [84] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424, 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

¹⁰³ See, eg, Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (September 2015) Women's Legal Service Victoria, 16 <<http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report.pdf>> where women were left with debt that was accrued without their consent.

¹⁰⁴ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, above n 2, 464 [19.24].

¹⁰⁵ Angela Taft, Kelsey Hegarty and Michael Flood, 'Are Men and Women Equally Violent to Intimate Partners?' (2001) 25 *Australian and New Zealand Journal of Public Health* 498, 500; Australian Bureau of Statistics, *Personal Safety, Australia, 2012* (11 December 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>>; Emma Smallwood, above n 103, 6. This may be due in part to the fact that domestic violence against men is often unreported. For a more detailed discussion on this see One in Three, *Male Victims of Family Violence: Barriers to Disclosing* <<http://www.oneinthree.com.au/malevictims>>.

¹⁰⁶ K D O'Leary, 'Psychological Abuse: A Variable Deserving Critical Attention in Domestic Violence' (1999) 14(1) *Violence and Victims* 3, 14; Clare Murphy, *Domestic Violence is Much*

physical abuse and one in four women have experienced psychological abuse since the age of 15.¹⁰⁷ The different forms of abuse can occur concurrently.¹⁰⁸ This thesis will specifically focus on psychological and financial abuse due to their relevance to the risk of vitiated consent for financial decisions.

Psychological abuse is the systematic destruction of the victim's self-esteem or sense of safety in order to exert control over the victim.¹⁰⁹ It can include behaviour that intimidates, harasses or torments the victim.¹¹⁰ This can involve criticising, belittling or degrading the victim, terrorising the victim through threats and telling the victim that they are useless or inferior.¹¹¹ Psychological abuse is equally, if not more, detrimental to a victim's mental health than physical abuse.¹¹² To cope with psychological abuse, victims often change their behaviour and comply with the abuser's demands to avoid provoking the abuser.¹¹³ Thus, psychologically abused victims may not make free or independent decisions and instead, will behave according to the abuser's demands.

More than Physical Violence (27 January 2009) Speak Out Loud

<<https://speakoutloud.net/helping-victims-survivors/physical-violence/coercive-control-3>>.

¹⁰⁷ Janet Phillips and Malcolm Park, 'Measuring Domestic Violence and Sexual Assault Against Women: A Review of the Literature and Statistics', (E-Brief, Parliamentary Library, Parliament of Australia, 2006); Australia's National Research Organisation for Women's Safety, *Violence Against Women: Key Statistics*, 1

<<http://anrows.org.au/sites/default/files/Violence-Against-Australian-Women-Key-Statistics.pdf>>;

Our Watch, *Understanding Violence: Facts and Figures*

<<http://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>>.

¹⁰⁸ Anthony Morgan and Hannah Chadwick, 'Key Issues in Domestic Violence' (Research in Practice No 07, Australian Institute of Criminology, Australian Government, 2009) 1-2; Domestic Violence and Sexual Assault Services, *What is Domestic Violence*

<<http://dvsas.org/get-informed/types-of-abuse/>>.

¹⁰⁹ Deborah Doherty and Dorothy Berglund, *Psychological Abuse: A Discussion Paper* (26 July 2012) Public Health Agency of Canada

<<http://www.phac-aspc.gc.ca/sfv-avf/sources/fv/fv-psych-abus/index-eng.php>>; Diane R Follingstad and Dana D DeHart, 'Defining Psychological Abuse of Husbands Toward Wives: Contexts, Behaviors, and Typologies' (2000) 15 *Journal of Interpersonal Violence* 891, 895-6.

¹¹⁰ Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010) 198 [5.37]; Follingstad and DeHart, above n 109, 895-6.

¹¹¹ Doherty and Berglund, above n 109; Follingstad and DeHart, above n 109, 895-6.

¹¹² Maria A Pico-Alfonso et al, 'The Impact of Physical, Psychological, and Sexual Intimate Male Partner Violence on Women's Mental Health: Depressive Symptoms, Posttraumatic Stress Disorder, State Anxiety, and Suicide' (2006) 15 *Journal of Women's Health* 599, 608; Amanda Robinson, 'Domestic Violence' in Fiona Brookman et al (eds), *Handbook on Crime* (Willan Publishing, 2010) 245, 250.

¹¹³ Lisa Goodman et al, 'The Intimate Partner Violence Strategies Index: Development and Application' (2003) 9 *Violence Against Women* 163, 166-7; Mary Barnish, *Domestic Violence: A Literature Review* (September 2004) *Her Majesty's Inspectorate of Probation*, 58 <<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/inspectors/hmi-probaton/docs/thematic-dv-literaturereview-rps.pdf>>.

Financial abuse involves the abuser controlling or limiting the victim's ability to obtain, use or maintain financial resources.¹¹⁴ Financial abuse serves to make the victim financially dependent on the abuser and diminishes the victim's financial capability and security.¹¹⁵ The abuse can include behaviours such as denying the victim access to money, making the victim responsible for debt and preventing the victim from participating in financial decisions that affects the victim.¹¹⁶ For example, the abuser may accrue debt against the victim's name without their knowledge or consent.¹¹⁷ The impact of financial abuse is particularly detrimental because it creates financial dependence, which is a key factor in preventing victims from leaving abusive relationships.¹¹⁸ Many women who do leave abusive relationships end up homeless or living in poverty due to financial abuse.¹¹⁹ Therefore, financially abused victims may be unable to consent to financial decisions.

Thus, in domestic violence relationships, victims have a diminished ability to make free, informed and independent decisions, particularly in relation to financial decisions.

B Legal Recognition of the Risk of Vitiating Consent

There is legal recognition that the spousal relationship can affect a spouse's ability to make free, informed and independent decisions. The law generally provides protection to parties where their consent is vitiating, regardless of the nature of their relationship. Both the United Kingdom and Australia however, have specifically recognised that there is a heightened risk of vitiating consent between spouses. The legal recognition of the risk of vitiating consent between parties in

¹¹⁴ Australian Law Reform Commission, *Family Violence – A National Legal Response*, above n 110, 196-7 [5.32]-[5.33]; Tanya Corrie and Magdalena McGuire, *Searching for Solutions: A Spotlight on Economic Abuse Research Report* (Good Shepherd Youth & Family Service and Kildonan UnitingCare, 2013) 7-8.

¹¹⁵ Adrienne E Adams et al, 'Development of the Scale of Economic Abuse' (2008) 14 *Violence Against Women* 563, 564; Diddy Antai et al, 'The Effect of Economic, Physical, and Psychological Abuse on Mental Health: A Population-Based Study of Women in the Philippines' (2014) 2014 *International Journal of Family Medicine* 1, 2 [2.3].

¹¹⁶ Corrie and McGuire, above n 114, 7-8; Australian Law Reform Commission, *Family Violence – A National Legal Response*, above n 110, 196-7 [5.32]-[5.33].

¹¹⁷ See, eg, Emma Smallwood, above n 103, 16 where this was the case for 25% of women who had debt after leaving a violent relationship.

¹¹⁸ Corrie and McGuire, above n 114, 14, 36; Emma Smallwood, above n 103, 6.

¹¹⁹ Adrienne E Adams et al, above n 115, 568; Diddy Antai et al, above n 115, 1 [1.1].

general and between spouses specifically will be examined with reference to fictional scenarios to highlight an innocent party's right to recourse.

1 *Legal Recognition of the Risk of Vitiating Consent in General Transactions*

Parties can seek to set aside transactions procured by vitiated consent.¹²⁰ This is because freedom of contract is the cornerstone of contract law.¹²¹ Central to this notion is the fact that contractual obligations are voluntarily assumed, with individuals being able to choose whom they contract with, the terms they contract under and the rights and obligations that will be altered by the contract.¹²² Therefore, the courts will allow a party to avoid legal obligations where they do not make a free, informed or independent decision when entering into a transaction.¹²³ Such transactions can be contracts or gifts.¹²⁴

(a) *What Happens When the Decision is Not Made Freely?*

Where parties did not freely assume legal obligations, they may rely on duress or actual undue influence to avoid the transaction.

(i) *Duress*

The doctrine of duress allows contracts to be set aside when a party's consent was procured by illegitimate pressure.¹²⁵ The pressure can be directed towards a

¹²⁰ See *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, 384 (Lord Diplock); *Pao On v Lau Yiu Long* [1980] AC 614, 635 (Lord Scarman).

¹²¹ G Dal Pont, 'The Varying Shades of "Unconscionable" Conduct – Same Term, Different Meaning' (2000) 19 *Australian Bar Review* 135, 135.

¹²² *Astley v Austrust Ltd* (1999) 197 CLR 1, 36 [84] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424, 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ). See also Jeannie Paterson, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934, 937-8.

¹²³ See, eg, *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ), 134 (Dixon J); *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 54 (Starke J); *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 575 (Gillard J); *Hart v Burbidge* [2013] EQHC 1628 (Ch) (12 June 2013) [124] (Sir Blackburne).

¹²⁴ *Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573, 574 (Gillard J); *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ), 134 (Dixon J); *Louth v Diprose* (1992) 175 CLR 621, 630 (Brennan J). See also J W Carter, *Carter on Contract* (LexisNexis Butterworths, 6th ed, 2012 [24-001].

¹²⁵ *Barton v Armstrong* [1976] AC 104, 121 (Lord Wilberforce and Lord Simon); *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, 400 (Lord Scarman); *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267, 288 (Kiefel J).

person or goods or be economic in nature.¹²⁶ Illegitimate pressures include threats of physical violence.¹²⁷ The illegitimate pressure must amount to a compulsion of the party's will and coerce the party into entering the agreement.¹²⁸ If the innocent party is able to show that the wrongdoer applied the illegitimate pressure to induce the innocent party into the contract, the onus shifts to the wrongdoer to show that the pressure did not contribute to the innocent party's decision to enter the contract.¹²⁹ A party can apply to rescind the contract if duress is established.¹³⁰ However, parties are not entitled to rescission as of right because it is a discretionary equitable remedy.¹³¹

Consider the following scenario:

Jane has been married to Bob for 20 years and they have two children together. Jane inherits her parents' house after they died. Bob finds out about her inheritance and tells Jane to transfer the house into his name. He repeatedly threatens to beat her. Due to fear of Bob's threats, Jane transfers ownership of the house to Bob.

In this scenario, Jane's decision to transfer the house was due to Bob's threats and was not freely made. Jane can seek recourse under duress by arguing that Bob illegitimately pressured her with threats of physical violence in order to procure the transfer. As a result, Bob will bear the onus of proving that Jane did not

¹²⁶ *Skeate v Beale* (1841) 113 ER 688, 690 (Lord Denman CJ); *Mason v New South Wales* (1959) 102 CLR 108, 144 (Windeyer J); *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 45-6 (McHugh JA). See also LexisNexis, *Halsbury's Law of Australia* (at 6 October 2004) 110 Contract, '4 Vitiating Factors' [110-5695]; Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd ed, 2012) 100-8.

¹²⁷ *Skeate v Beale* (1841) 113 ER 688, 690 (Lord Denman CJ); LexisNexis, *Halsbury's Law of Australia*, above n 126, [110-5700].

¹²⁸ *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, 400 (Lord Scarman); *Magnacrete Ltd v Douglas-Hill* (1988) 48 SASR 565, 591 (Perry J).

¹²⁹ *Barton v Armstrong* [1976] AC 104, 120 (Lord Chelsea); *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 46 (McHugh JA); *Peanut Marketing Board v Cuda* (1984) 79 FLR 368, 378 (Campbell J).

¹³⁰ *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, 385 (Lord Diplock); *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [1992] 2 AC 152, 165 (Lord Goff); *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* [2013] WASCA 36 (20 February 2013) [201] (Murphy JA).

¹³¹ *Maguire v Makaronis* (1997) 188 CLR 449, 493-4 (Kirby J); *Kokos International Pty Ltd v Libra Motors Pty Ltd (No 3)* [2007] WASC 301 (10 December 2007) [87] (Johnson J).

transfer him the house due to the threats he made. If Bob cannot discharge this burden, the Court may allow Jane to rescind the transfer and get the house back.

(ii) Actual Undue Influence

Undue influence arises when a wrongdoer possesses influence over an innocent party and unconscientiously abuses this influence to procure a benefit.¹³² This impairs the innocent party's will or freedom of judgment so that their decisions are not made freely.¹³³ Undue influence focuses on the quality of the innocent party's consent¹³⁴ and can be actual or presumed.¹³⁵ The law regarding presumed undue influence will be discussed further below. To rely on actual undue influence, the innocent party must prove that the wrongdoer did influence them to the extent that the innocent party was unable to exercise their will freely.¹³⁶ An innocent party can apply and seek rescission in such circumstances.¹³⁷

Consider this scenario:

Bob and Jane have an abusive relationship where Bob often beats Jane when he is unhappy with her. Bob tells Jane to transfer the house she inherited to him. Jane transfers the house to Bob.

In this scenario, Bob and Jane's long-term abusive relationship provides Bob with influence over Jane. If Jane can prove that she transferred the house to Bob

¹³² *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ), 134 (Dixon J); *Bridgewater v Leahy* (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ); Lawbook, *The Laws of Australia* (at 1 February 2014) 35 Unfair Dealing, '8 Undue Influence' [35.8.10].

¹³³ *Union Bank of Australia v Whitelaw* [1906] VLR 711, 720 (Hodges J); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 794-5 [6]-[7] (Lord Nicholls); *Farmers' Co-operative Executors & Trustees Ltd v Perks* (1989) 52 SASR 399, 417-8 (Duggan J).

¹³⁴ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J); *Union Bank of Australia Ltd v Whitelaw* [1906] VLR 711, 720 (Hodges J); *Watkins v Combes* (1922) 30 CLR 180, 193-4 (Isaacs J).

¹³⁵ *Allcard v Skinner* (1887) 36 Ch D 145, 171 (Cotton LJ); *Louth v Diprose* (1992) 175 CLR 621, 628-9 (Brennan J); *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 797 [17] (Lord Nicholls); *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 953 (Slade LJ).

¹³⁶ *Louth v Diprose* (1992) 175 CLR 621, 628 (Brennan J); *National Westminster Bank plc v Morgan* [1985] AC 686, 703-4 (Lord Scarman); *Allcard v Skinner* (1887) 36 Ch D 145, 171-2 (Cotton LJ).

¹³⁷ *National Westminster Bank plc v Morgan* [1985] AC 686, 705 (Lord Scarman); *Cockburn v Gio Finance Ltd (No 2)* (2001) 51 NSWLW 624, 634 (Mason J); Lawbook, *The Laws of Australia*, '8 Undue Influence', above n 132, [35.8.1090].

because she felt that she had no choice and Bob would beat her otherwise, then she can rely on the doctrine of actual undue influence. Jane can seek to have the transfer rescinded and have it deemed voidable in equity, even if the transfer is valid at law.

(b) What Happens When the Decision is Not Informed?

Where an innocent party makes a decision that is not informed, they may be able to rely on non est factum or misrepresentation to set the decision aside.

(i) Non est Factum

The doctrine of non est factum¹³⁸ voids contracts when an innocent party shows that they did not intend to execute the document and was not careless in doing so.¹³⁹ This may arise where the innocent party believed the document's effect would be fundamentally different from its actual effect.¹⁴⁰ The innocent party's failure to read and understand the relevant document must not be due to negligence or carelessness.¹⁴¹ A plea of non est factum is available to:

those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.¹⁴²

In such circumstances, the innocent party will not be bound by the contract because 'the mind of the signer did not accompany the signature'.¹⁴³ At law, the contract will be void ab initio.¹⁴⁴

¹³⁸ Meaning 'it is not my deed': *Ramsay Health Care Australia Pty Limited v Adrian Compton* [2015] NSWSC 163 (6 March 2015) [58] (Hammerschlag J).

¹³⁹ *Petelin v Cullen* (1975) 132 CLR 355, 359-60 (Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ); *Bridgewater v Leahy* (1998) 194 CLR 457, 475-6 (Gaudron, Gummow and Kirby JJ); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 182-3 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

¹⁴⁰ *Petelin v Cullen* (1975) 132 CLR 355, 359-60 (Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ); *Saunders v Anglia Building Society* [1971] AC 1004, 1017 (Lord Reid).

¹⁴¹ *Muskham Finance Ltd v Howard* [1963] 1 QB 904, 912 (Donovan LJ); *Ford v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42, 53-4 [38] (Allsop P and Young JA). This is because the two competing policy considerations of not holding people to bargains that they did not bring a consenting mind to and the necessity of holding people to the terms they signed must be balanced: *Petelin v Cullen* (1975) 132 CLR 355, 359-61 (Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ).

¹⁴² *Saunders v Anglia Building Society* [1971] AC 1004, 1016 (Lord Reid).

¹⁴³ *Foster v Mackinnon* (1869) LR 4 CP 704, 711 (Byle J).

Consider the following scenario:

Bob gives Jane a document to sign and tells her it is a lease agreement for the house she inherited from her parents. They had previously discussed leasing that house to a couple for additional income. Jane is illiterate and signed the document without reading it. She later discovers that the document she signed was not a lease and instead, transferred the house to Bob.

In this scenario, Jane was not aware that she was giving Bob the house. Her decision to do so was not informed because she did not know the rights she was altering by signing the document. The document she signed was fundamentally different in effect to the lease agreement she thought she was signing. Jane did not read and understand the contract because she is illiterate and trusted Bob. She was, therefore, not negligent or careless in signing the contract. Thus, Jane is legally entitled to void the transfer on the basis of non est factum.

(ii) Misrepresentation

Misrepresentation occurs when the wrongdoer makes a false statement about a material fact in order to induce the innocent party into entering a contract.¹⁴⁵ Misrepresentation can occur when the wrongdoer made the statement knowing it was false or where the wrongdoer had reasonable grounds to believe the statement was true.¹⁴⁶ Where misrepresentation is established, the contract will be voidable and the innocent party may apply for rescission.¹⁴⁷

¹⁴⁴ *Saunders v Anglia Building Society* [1971] AC 1004, 1026 (Lord Wilberforce); *Gibbons v Wright* (1954) 91 CLR 423, 441 (Dixon CJ, Kitto and Taylor JJ).

¹⁴⁵ *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 554 (Toohey J); Lawbook, *The Laws of Australia* (at 1 February 2014) 35 Unfair Dealing, '2 Misrepresentation' [35.2.10].

¹⁴⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 485-6 (Lord Reid); *Arkwright v Newbold* (1881) 17 Ch D 301, 317-8 (James LJ); *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26, 39 (Deane, Toohey, Gaudron and McHugh JJ).

¹⁴⁷ *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J); *Sharpley v Louth* (1876) 2 Ch D 663, 685 (James LJ); *Civil Service Co-operative Society of Victoria Ltd v Blyth* (1914) 17 CLR 601, 608 (Griffith CJ); *Emhill Pty Ltd v Bonsoc Pty Ltd (No 2)* [2007] VSCA 108 (31 May 2007) [35] (Warren CJ).

Consider if in the previous scenario, Jane did sign the document intending to transfer ownership of the house to Bob. However, she only intended to transfer 50% of the house and was told that was what the contract provided. The contract, however, transferred the house wholly to Bob. Bob knowingly misled Jane as to the percentage of the house that was being transferred in order to get her to sign the contract. Jane could, therefore, rely on misrepresentation and seek to rescind the contract.

(c) *What Happens When the Decision is Not Made Independently?*

Where a decision is not made independently, the innocent party may be able to rely on presumed undue influence. Similar to actual undue influence, presumed undue influence involves the wrongdoer improperly using their influence over the innocent party to gain a benefit.¹⁴⁸ However, unlike actual undue influence, the innocent party can rely on a presumption that there was undue influence.¹⁴⁹ The wrongdoer will bear the burden of rebutting this presumption by showing that the innocent party made the decision independently.¹⁵⁰ The courts will automatically presume that a benefit was procured by undue influence in certain relationships, such as doctors and patients, and solicitors and clients.¹⁵¹ These relationships are characterised by trust and confidence and involve a heightened risk of abuse.¹⁵²

The spousal relationship does not give rise to this automatic presumption.¹⁵³ However, ‘undue influence may be more easily proved in the case of husband and

¹⁴⁸ *Watkins v Combes* (1922) 30 CLR 180, 194 (Isaacs J); *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ), 134 (Dixon J); *Bridgewater v Leahy* (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ).

¹⁴⁹ *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 953 (Slade LJ); *Louth v Diprose* (1992) 175 CLR 621, 628-9 (Brennan J); *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ).

¹⁵⁰ *Winefield v Clarke* [2008] NSWSC 882 (29 August 2008) [27] (Barrett J); *Louth v Diprose* (1992) 175 CLR 621, 628 (Brennan J); *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ).

¹⁵¹ *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ). Other established relationships that attract the presumption of undue influence includes solicitors and clients: *Haywood v Roadknight* [1927] VLR 512; parent and child: *West v Public Trustee* [1942] SASR 109; *Brown v The NSW Trustee* [2011] NSWSC 1203 (23 September 2011); and religious leader and follower: *Allcard v Skinner* (1887) 36 Ch D 145; *Khan v Khan* (2004) 62 NSWLR 229.

¹⁵² *Louth v Diprose* (1992) 175 CLR 621, 628 (Brennan J); *Bester v Perpetual Trustee Company Ltd* [1970] 3 NSW 30, 34 (Street J); *Saintclair v Saintclair* [2015] FamCAFC 245 (21 December 2015) [16] (Strickland, Murphy & Kent JJ).

¹⁵³ *Yerkey v Jones* (1939) 63 CLR 649, 675 (Dixon J); *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, 953 (Slade LJ); *National Westminster Bank plc v Morgan* [1985]

wife than in cases where no special relationship exists between the parties'.¹⁵⁴ This is because 'there is nothing unusual or strange in a wife from motives of affection or even prudence conferring a large proprietary or pecuniary benefit upon her husband'.¹⁵⁵

Relationships that do not attract an automatic presumption can nonetheless rely on the presumption by showing the de facto existence of a relationship where the innocent party reposed trust and confidence in the wrongdoer.¹⁵⁶ In such relationships, the innocent party may be so dependent on the wrongdoer that the innocent party is incapable of protecting their own interests.¹⁵⁷ This commonly occurs in the spousal relationship despite recent social developments. As noted by Scott LJ:

the tendency in households for business decisions to be left to the husband and for the wife, whether or not she is a joint owner of the matrimonial home and whether or not she has a separate job, to have the main domestic responsibilities still persists. And in the culturally and ethnically mixed community in which we live, the degree of emancipation of women is uneven.¹⁵⁸

Where a de facto relationship of trust and confidence is established, the wrongdoer will bear the onus of proving that the innocent party's actions were based on their independent will.¹⁵⁹ This is commonly done by showing that the innocent party received independent and informed advice before conferring the

AC 686, 703 (Lord Scarman); *Mavaddat v HSBC Bank Australia Ltd (No 2)* [2016] WASCA 94 (9 June 2016) [6] (McLure P).

¹⁵⁴ *Yerkey v Jones* (1939) 63 CLR 649, 659 (Latham CJ).

¹⁵⁵ *Ibid* 675 (Dixon J). This lack of suspicion that confidence is being abused when gifts are made between parties is also the reason why parents are not presumed to be unduly influenced by their children: *Permanent Mortgagees Pty Ltd v Vandenberg* (2010) 41 WAR 353, 389 [173] (Murphy JA).

¹⁵⁶ *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ); *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189 (Lord Browne-Wilkinson).

¹⁵⁷ *Johnson v Buttress* (1936) 56 CLR 113, 134-5 (Dixon J); *Tulloch (deceased) v Braybon (No 2)* [2010] NSWSC 650 (17 June 2010) [51] (Brereton J).

¹⁵⁸ *Barclays Bank plc v O'Brien* [1993] QB 109, 139 (Scott LJ). See also *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 188 (Lord Browne-Wilkinson).

¹⁵⁹ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 822 [106]-[107] (Lord Hobhouse); *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189 (Lord Browne-Wilkinson).

benefit.¹⁶⁰ If the wrongdoer cannot rebut the presumption, the innocent party may be able to rescind the contract.¹⁶¹

Therefore, referring back to the example on page 33, in the absence of a presumption of undue influence, Jane must prove on balance that her decision to transfer the house was caused by Bob's influence and not as a result of her own free will. This can be very difficult. Her own evidence will appear to be self-serving. However, the doctrine of presumed undue influence means that if Jane can prove that this was a relationship of influence (ie that she typically deferred to Bob's judgment instead of exercising her own judgment), then the onus will pass to Bob to prove that that was not the case in this instance. Jane will be able to seek to rescind the transfer unless Bob can prove that she made a free and independent decision to transfer the house.

This presumption is particularly important where the circumstances are not as clear cut as the example used above. Consider another scenario:

Bob has a gambling problem and over time, has incurred a debt of \$50,000. Jane has sold the house she inherited for \$400,000. Bob tells Jane to give him \$50,000 from the sale proceeds in order to pay off his debts. He tells her that this would be better for their family because he would owe more money if he took out a bank loan. Jane gives Bob the money to repay his debts.

In this scenario, it might be very difficult for Jane to prove that she did not freely decide to give the money to Bob. After all, it is plausible that she did so to avoid family embarrassment or because she believed that it was in the family's best interest – especially if Bob is the 'breadwinner'.

¹⁶⁰ *Johnson v Buttress* (1936) 56 CLR 113, 120 (Latham CJ); *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189 (Lord Browne-Wilkinson); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 828 [119]-[122] (Lord Hobhouse); *Yerkey v Jones* (1939) 63 CLR 649, 684 (Dixon J).

¹⁶¹ *Yerkey v Jones* (1939) 63 CLR 649, 659 (Latham CJ); *National Westminster Bank plc v Morgan* [1985] AC 686, 705 (Lord Scarman).

Jane and Bob's relationship does not automatically attract the presumption. However, Jane will be able to rely on the presumption of undue influence if she shows that their relationship is a de facto relationship of trust and confidence. For instance, if Bob has always made the financial decisions in their household and Jane typically defers to his judgment, then Jane might succeed in accessing the benefit of her presumption of undue influence. In this situation, Jane could rescind the transfer and recover the money, on the basis that she did not give Bob the money based on an independent decision after considering her own interests. Instead, she gave Bob the money because she trusted Bob and simply 'went along' with his decision. In this situation, whether Jane received independent advice will be an important consideration. If she did receive advice, then Bob might be able to use this evidence to assist him to rebut the presumption.

This trust and confidence present between spouses is well recognised and was highlighted in *Royal Bank of Scotland plc v Etridge (No 2)* when Lord Hobhouse stated:

I would assume in every case in which a wife and husband are living together that there is a reciprocal trust and confidence between them. In the fairly common circumstance that the financial and business decisions of the family are primarily taken by the husband, I would assume that the wife would have trust and confidence in his ability to do so and would support his decisions.¹⁶²

If the presumption applies, Bob will have to show that Jane made the decision to give him the money out of her independent will. If Bob is unable to rebut the presumption, then Jane may be able to rescind the transaction and get the money back from Bob.

From the above scenarios, it is clear that parties will generally only be bound where they assumed the relevant obligations freely, independently and with informed consent. Where this is not the case and a party's consent is vitiated, the law will allow that party to avoid those obligations. These situations of vitiated consent can arise between parties of any relationships and are not limited to

¹⁶² [2002] 2 AC 773, 842 [159] (Lord Hobhouse).

spouses. However, it is legally recognised that there are heightened risks of vitiated consent in transactions involving spouses specifically.

2 *Legal Recognition of the Risk of Vitiating Consent Specific to Spouses*

In addition to the above legal protections provided to parties when their consent is vitiated, the law has recognised the particular risk of vitiated consent that is created by the spousal relationship.¹⁶³ This recognition is clearest in the context of third party guarantees. In a third party guarantee situation, a third party secures a debtor's loan from the creditor by a guarantee.¹⁶⁴ Generally, this situation appears before the court where a wife guarantees her husband's debt by using the family home. The wife becomes liable for her husband's debt if he defaults on the loan.¹⁶⁵ Such transactions are known as sexually transmitted debt because the guarantor accepts legal responsibility for the debt based on the emotional dependence and ties between the parties rather than an appreciation of the legal reality of the contract.¹⁶⁶

Spouses may make decisions for the good of the family unit and for the purposes of maintaining the spousal relationship rather than because of their personal interests or an appreciation of the legal consequences involved.¹⁶⁷ When examining the reasons why women adopt sexually transmitted debt, Nicola Howell stated:

¹⁶³ See, eg, *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 190-1 (Lord Browne-Wilkinson); *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 404 (Gaudron, McHugh, Gummow and Hayne JJ).

¹⁶⁴ *Citisecurities Limited v Commissioner of Stamp Duties* [1995] QCA 317 (28 July 1995) (Davies, Pincus JJA and Shepherdson J). See also Claudio Bozzi, 'Contracts of Guarantee' in Dilan Thamapillai et al, *Australian Commercial Law* (Cambridge University Press, 2015) 239, 275.

¹⁶⁵ See, eg, *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773; *Yerkey v Jones* (1939) 63 CLR 649; *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395.

¹⁶⁶ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 190-1 (Lord Browne-Wilkinson). See also James Edelman and Elise Bant, 'Setting Aside Contracts of Suretyship: The Theory and Practice of Both Limbs of *Yerkey v Jones*' (2004) 15 *Journal of Banking and Finance Law and Practice* 5, 9; Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69 (1994) pt 2, [13.4].

¹⁶⁷ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 190-1 (Lord Browne-Wilkinson). See, eg, *Saintclair v Saintclair* [2015] FamCAFC 245 (21 December 2015) [105] (Strickland, Murphy & Kent JJ). See also James O'Donovan, 'The Retreat from *Yerkey v Jones*: From Status Back to Contract' (1996) 26 *Western Australian Law Review* 309, 326; Janine Pascoe, *Women Directors who Guarantee Company Debts: Resolving the Conundrum of Protection Versus Liability* (Lawbook, 2004) 112.

Women give their signatures to these contractual documents for a variety of reasons, some of which are recognised by law and some of which are not. They sign because of emotional pressure. They sign because they are expected to sign. They sign because the nature of the document is misrepresented to them. They sign because they believe that their relationship with their partner obliges them to do all they can to help him. They sign because they have been educated to believe that they, and therefore their signatures, do not count for much. They sign because they value their relationship with their partner and do not want to create a situation that may adversely affect that relationship.¹⁶⁸

This statement is further supported by Millbank and Lovric's study, which found that 75% of guarantors, who were mostly wives, guaranteed a loan because they trusted the borrower.¹⁶⁹ The guarantors did not assess the risk of the guarantee due to their trust in the borrower.¹⁷⁰ This heightened risk of spouses' consent being vitiated when signing a guarantee has been recognised in both the United Kingdom and Australia with the two jurisdictions adopting different approaches to address the issue.¹⁷¹

(a) The United Kingdom's Approach

The courts in the United Kingdom have accepted spouses' vulnerability to each other and the risk of vitiated consent that may arise due to their relationship.¹⁷² The courts have held that wives who implicitly rely on their husband should be protected when the husband abuses the trust and confidence reposed in them.¹⁷³ In relation to this underlying vulnerability, Lord Browne-Wilkinson noted that:

¹⁶⁸ Nicola Howell, above n 29, 107.

¹⁶⁹ Jenny Millbank and Jenny Lovric, 'Darling, Please Sign This Form: Relationship Debt and Guarantees' (2003) 28 *Alternative Law Journal* 282, 283.

¹⁷⁰ *Ibid.*

¹⁷¹ See *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 for the English position. Cf *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395 for the Australian position.

¹⁷² *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 191 (Lord Browne-Wilkinson). See also *Padden v Bevan Ashford Solicitors* [2012] 1 WLR 1759, 1767 [29] (Lord Neuberger MR); Peter Goodrich, 'Gender and Contracts' in Anne Bottomley (ed) *Feminist Perspectives on The Foundational Subjects of Law* (Cavendish Publishing Limited, 1996) 17, 42.

¹⁷³ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 188 (Lord Browne-Wilkinson). Certainly protecting parties when their trust and confidence is abused forms the underlying basis for the doctrine of undue influence: *Johnson v Buttress* (1936) 56 CLR 113, 119 (Latham CJ), 134 (Dixon J); *Bridgewater v Leahy* (1998) 194 CLR 457, 478 (Gaudron, Gummow and Kirby JJ).

the sexual and emotional ties between the parties provide a ready weapon for undue influence: a wife's true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband if she opposes his wishes. ...the risk of undue influence affecting a voluntary disposition by a wife in favour of a husband is greater than in the ordinary run of cases where no sexual or emotional ties affect the free exercise of the individual's will.¹⁷⁴

In relation to third party guarantees, the need to protect spouses has to be balanced against the public interest of ensuring that family homes can be used as security for loans.¹⁷⁵ Creditors are placed on constructive notice if a wife¹⁷⁶ guarantees her husband's debt in a transaction that is not advantageous to her and there is a substantial risk that her consent was procured by a legal or equitable wrong.¹⁷⁷ Creditors who seek to rely on the guarantee should take reasonable steps to satisfy itself that the wife understands the practical implications of the transaction.¹⁷⁸ In *Royal Bank of Scotland plc v Etridge (No 2)*, the Court allowed creditors to discharge this obligation by obtaining a solicitor's certificate stating that the wife has been advised about the implications of the transaction.¹⁷⁹ This shifted the burden of ensuring that the wife was adequately advised to solicitors.¹⁸⁰

Consider the following:

Bob and Jane have equal ownership of the house they currently live in.
Bob is seeking to borrow money from the bank in order to start a business

¹⁷⁴ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 190-1 (Lord Browne-Wilkinson).

¹⁷⁵ *Ibid* 188 (Lord Browne-Wilkinson). See also *Niersmans v Pesticcio* [2004] EWCA Civ 372 (1 April 2004) [4] (Mummery LJ).

¹⁷⁶ Note however that the English position applies to other relationships where there is an emotional relationship between the parties. See *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 198 (Lord Browne-Wilkinson); *Padden v Bevan Ashford Solicitors* [2012] 1 WLR 1759, 1767 [30] (Lord Neuberger MR); *HSBC Bank plc v Brown* [2015] EWHC 359 (Ch) (17 February 2015) [40] (Barker QC).

¹⁷⁷ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 196 (Lord Browne-Wilkinson); *Macklin v Dowsett* [2004] EWCA Civ 904 (14 June 2004) (Auld LJ); *HSBC Bank plc v Brown* [2015] EWHC 359 (Ch) (17 February 2015) [45] (Barker QC).

¹⁷⁸ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 196-8 (Lord Browne-Wilkinson); *Darjan Estate Co plc v Hurley* [2012] 1 WLR 1782, 1790 [30] (Andrews QC).

¹⁷⁹ [2002] 2 AC 773, 828-9 [119]-[122] (Lord Hobhouse). See also *Padden v Bevan Ashford Solicitors* [2012] 1 WLR 1759, 1766-67 [28]-[29] (Lord Neuberger MR); *Randall v Randall* [2004] EWHC 2258 (Ch) (30 July 2004) [35], [38] (Jones QC).

¹⁸⁰ See John Phillips, 'Setting Aside Guarantees: Another Approach' (2002) 2 *Oxford University Commonwealth Law Journal* 47, 60; James O'Donovan, above n 167, 328.

venture in the technology industry. The bank tells Bob that they will only provide him with the loan for his business venture if he and his wife secure the loan using the house. At home, Bob tells Jane about this and assures her that his business venture will definitely succeed. He tells her that they will earn the money back within six months. Jane agrees to guarantee Bob's loan. Bob defaults on the loan and the bank is now seeking to enforce the guarantee.

In this scenario, because Bob and Jane are in a 'non-commercial relationship' and Jane is a volunteer, the bank is fixed with constructive notice of any legal or equitable wrong (eg duress, undue influence or misrepresentation) that was employed to procure her consent. The bank will only be able to enforce the guarantee if it took reasonable steps to ensure that Jane appreciated the legal consequences of signing the guarantee. The bank could discharge this burden by insisting on receipt of a solicitor's certificate stating that Jane has received independent legal advice. If the bank takes this step, then Jane will not be able to argue that the guarantee should not be enforced even if Bob did coerce, unduly influence or deceive her into signing the guarantee.

(b) Australia's Approach

In Australia, the courts have recognised that a husband, by virtue of his position, has the opportunity to abuse the confidence his wife may place in him.¹⁸¹ The doctrine of wife's special equity is premised on this recognised issue with the High Court stating that:

The marriage relationship is such that one, often the woman, may well leave many, perhaps all, business judgments to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with only the most abbreviated explanation of their purport or effect. Sometimes, with not the slightest hint of bad faith, the explanation of a particular transaction given by one to the other will be imperfect and incomplete, if not

¹⁸¹ *Yerkey v Jones* (1939) 63 CLR 649, 675, 685 (Dixon J); *Schultz v Bank of Queensland Ltd* [2015] QCA 208 (27 October 2015) [9] (Boddice J). See also Angela Stavrianou, 'Expanding the Equitable Doctrine of Wife's Special Equity' (2007) 18 *Journal of Banking and Finance Law and Practice* 105, 108.

simply wrong. That that is so is not always attributable to intended deception, to any imbalance of power between the parties, or, even, the vulnerability of one to exploitation because of emotional involvement. It is, at its core, often a reflection of no more or less than the trust and confidence each has in the other.¹⁸²

The doctrine of wife's special equity invalidates guarantees made by volunteer wives¹⁸³ who did not understand the transaction or was unduly influenced into signing the guarantee.¹⁸⁴ The doctrine consists of two limbs. The first limb deals with the situation where the wife's decision to sign the guarantee is not free or independent. Where a wife's consent is procured by her husband's undue influence, she is entitled to have the guarantee set aside.¹⁸⁵ The wife does not need to prove that the creditor had actual or constructive knowledge of undue influence.¹⁸⁶ The creditor will only be able to rely on the guarantee where it can show that the wife received independent legal advice.¹⁸⁷

The second limb of the doctrine deals with situations where the wife's decision to sign the guarantee is not informed. It applies where the husband does not unduly influence the wife but the wife does not understand the effect and legal

¹⁸² *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 404 [21] (Gaudron, McHugh, Gummow, Hayne JJ).

¹⁸³ It remains debated whether this doctrine applies to spousal relationships other than legal marriage and heterosexual spousal relationships. This issue was left open by the majority in *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 404 [22] (Gaudron, McHugh, Gummow, Hayne JJ). See *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 435 [83] (Kirby J); *Agripay Pty Limited v Byrne* [2011] QCA 85 (3 May 2011) [4] (McMurdo P) where it was proposed that the doctrine should apply to all vulnerable parties in personal relationships, not just wives. See, eg, *State Bank of New South Wales Ltd v Lanyoun* [2001] NSWSC 113 (9 March 2001) where the doctrine was applied to parents who mortgaged their house under the influence of their son. Cf *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 442 [109] (Callinan J); *State Bank of New South Wales v Hibbert* [2000] NSWSC 628 (6 July 2000) [60] (Bryson J) where an expansion of the doctrine to other relationships was not supported.

¹⁸⁴ *Yerkey v Jones* (1939) 63 CLR 649, 683 (Dixon J); *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 408-9 (Gaudron, McHugh, Gummow, Hayne JJ). See also *Schultz v Bank of Queensland Ltd* [2015] QCA 208 (27 October 2015) [37] (Boddice J); *McIvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012) [13] (Applegarth J).

¹⁸⁵ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 408 (Gaudron, McHugh, Gummow, Hayne JJ); *McIvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012) [12] (Applegarth J).

¹⁸⁶ See *ANZ Banking Group Ltd v Alirezai* [2004] QCA 6 (6 February 2004) [37]-[40] (McMurdo P); *McIvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012) [21] (Applegarth J). See also Angela Stavrianou, above n 181, 106.

¹⁸⁷ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 406-7 (Gaudron, McHugh, Gummow, Hayne JJ); *State Bank of New South Wales v Hibbert* [2000] NSWSC 628 (6 July 2000) [55] (Bryson J); *McIvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012) [21] (Applegarth J).

implications of the guarantee.¹⁸⁸ This limb recognises that the wife may not question her husband or assess the transaction due to her trust in him.¹⁸⁹ In this situation, the creditor will be able to rely on the guarantee if it takes steps to inform the wife of the transaction and reasonably supposes that she sufficiently understands its nature and effect.¹⁹⁰ This is because it would be unconscionable for the creditor to enforce the guarantee without taking steps to explain the transaction when it knows that the wife is a volunteer and may repose trust and confidence in her husband.¹⁹¹

Under the Australian approach in the previous fictional scenario, because Jane and Bob are a married couple, if Jane can establish that Bob unduly influenced her into the transaction, then she can rely on the first limb of wife's special equity. Jane will be able to seek to set the guarantee aside unless the bank can show that it took steps to alleviate Jane from Bob's ascendancy – such as by ensuring that she received independent legal advice before signing the guarantee. Even if Jane simply did not understand the effect and implications of signing the guarantee, the bank will be able to enforce it as long as it took steps to explain the transaction to Jane or reasonably believed that she understood it.

If however, Jane simply did not understand the guarantee's effect and practical implications, then the bank will be able to enforce it as long as the bank took steps to explain the transaction to Jane. The important thing to note is that this special equity exists because equity recognised the risk inherent to spousal relationships, being that spouses will make business decisions with little consultation with each other, and based on incomplete or incorrect explanation.¹⁹² In light of this

¹⁸⁸ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 409 [31] (Gaudron, McHugh, Gummow, Hayne JJ); *McIvor v Westpac Banking Corporation* [2012] QSC 404 (14 December 2012) [13] (Applegarth J); *State Bank of New South Wales v Hibbert* [2000] NSWSC 628 (6 July 2000) [56] (Bryson J).

¹⁸⁹ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 409 [31] (Gaudron, McHugh, Gummow, Hayne JJ). See also Charles Chew, 'Rethinking the Special Equity Rule for Wives: Post Garcia, Quo Vadis, Where to From Here?' (2007) 19 *Bond Law Review* 61, 69.

¹⁹⁰ *Yerkey v Jones* (1939) 63 CLR 649, 684 (Dixon J); *ANZ Banking Group Ltd v Alirezai* [2004] QCA 6 (6 February 2004) [42] (McMurdo P).

¹⁹¹ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 409 [31] (Gaudron, McHugh, Gummow, Hayne JJ).

¹⁹² *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 404 [21] (Gaudron, McHugh, Gummow, Hayne JJ).

obvious risk, it would be unconscionable for the creditor to enforce its rights having lent without taking steps to neutralise the risk to the wife.¹⁹³

C Concluding Remarks

The law generally allows parties to avoid legal obligations where the decision to enter a transaction was not free, informed or independent (ie their consent was vitiated). Legal doctrines have been developed to protect parties in such situations. Where spouses are involved, it is well recognised in society and at law that there is a heightened risk of consent being vitiated, particularly in relation to financial decisions. This is because of the trust and confidence reposed in a spouse and the potential for undue influence and financial abuse to occur.

This heightened risk of vitiated consent between spouses when making financial decisions is particularly problematic in light of the danger created by the superannuation contributions splitting scheme as discussed in Chapter II. Given that issues involving vitiated consent are occurring between spouses in other financial contexts, it is possible that such issues will be present in the contributions splitting scheme. However, there is no mechanism currently in place to deal with these potential problems despite the scheme applying specifically to spouses, who have a greater risk of vitiated consent than other relationships. Unlike the situation with third party guarantees, there is no requirement for a spouse to obtain independent advice and for trustees to ensure the spouse understands the legal implications of splitting contributions. This risk is exacerbated by the implementation of an application process in the contributions splitting scheme in the superannuation system's trust mechanism. As will be discussed in the next chapter, the application process means that the trustees are the decision makers under the scheme. This complicates a spouse's right to recourse where their consent was vitiated.

¹⁹³ Ibid 408-9 [31] (Gaudron, McHugh, Gummow, Hayne JJ).

IV DISSOCIATION BETWEEN THE LEGAL AND PRACTICAL DECISION MAKER IN
THE SUPERANNUATION CONTRIBUTIONS SPLITTING SCHEME

The contributions splitting scheme creates a dissociation between the legal and practical decision maker by implementing an application process into the superannuation system's trust structure. This exacerbates the risks arising from the lack of safeguards in the scheme discussed in Chapter II. This chapter will discuss this issue and its effect on beneficiaries' right to recourse as well as trustees' liability.

A Dissociation Between the Legal and Practical Decision Making

Who decides that superannuation contributions will be split? Is it the splitting spouse (ie the beneficiary of the superannuation trust)? Or is it the superannuation trustee? This is important because legal doctrines that relieve a person from responsibility for undertakings made in circumstances of impaired consent, as discussed in Chapter III, are not directly apposite unless the decision to split is made by the spouse who relinquishes her superannuation contributions. However, the manner in which the scheme was implemented creates a disjoin between the practical decision to split and the legal means by which the decision to split takes place. In other words, there is a dissociation in the contributions splitting scheme between who the decision maker is at law and in practice. This is evident from the trustee's role and duties in considering contributions splitting applications. As discussed previously, the superannuation system uses a trust mechanism and each superannuation fund has their own trust deed.¹⁹⁴ Thus, superannuation trustees are subject to duties under statute, contract and general law when performing their functions under the contributions splitting scheme.

A trustee's most fundamental duty is to obey the express duties in the trust deed, which may modify a trustee's other duties.¹⁹⁵ The SIS Act provides covenants that are taken to be included in the trust deed.¹⁹⁶ Inter alia, these covenants require the superannuation trustee to act honestly, perform their duties and

¹⁹⁴ See Ch I.A for a discussion on the superannuation system.

¹⁹⁵ *Breen v Williams* (1996) 186 CLR 71, 137 (Gummow J); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 498 [32] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

¹⁹⁶ *SIS Act* s 52(1).

exercise their powers in the best interest of the beneficiaries and exercise the same degree of care, skill and diligence as a prudent superannuation trustee.¹⁹⁷ The SIS Act does not expand the trustees' duties under general law,¹⁹⁸ except for the higher standard of care imposed on superannuation trustees.¹⁹⁹ In discussing the dissociation between the legal and practical decision maker in the contributions splitting scheme, it is relevant to discuss the trustees' duties to exercise discretion, exercise the requisite standard of care and act in the beneficiaries' best interests.

1 *Superannuation Trustees' Position at Law*

Under the SIS Act, superannuation trustees are the legal decision makers under the scheme. Trustees have the discretion to accept or reject a valid contributions splitting application.²⁰⁰ This is evident from regulation 5.45 of the SIS Regulations, which provides that trustees 'may' accept contributions splitting applications. Where an Act or regulation²⁰¹ states that 'a person, court or body may do a particular act or thing, and the word *may* is used, the act or thing may be done at the discretion of the person, court or body'.²⁰² This interpretation is supported by the fact that applicants 'request' for their contributions to be split.²⁰³ This position is not altered by contract. Trust deeds usually state that the trustee may accept an application to split contributions 'in its absolute discretion'.²⁰⁴ Therefore, under the contributions splitting scheme, superannuation trustees must exercise their discretion and do so with the same degree of care, skill and

¹⁹⁷ Ibid s 52(2)(a)-(c).

¹⁹⁸ *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* (2011) 282 ALR 167, 191 [119]-[120] (Giles JA); *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* (2016) 334 ALR 692, 719 [136] (Bathurst CJ).

¹⁹⁹ Under general law the necessary standard of care is that of a reasonably prudent businessperson: *Speight v Grant* (1883) 9 App Cas 1, 19 (Lord Blackburn); *Austin v Austin* (1906) 3 CLR 516, 525 (Griffith CJ, Barton and O'Connor JJ). This increased standard of care under the *SIS Act* is in line with state legislations concerning professional trustees' standard of care: Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth) 20 [1.62].

²⁰⁰ *SIS Regulations* reg 6.45(1).

²⁰¹ *Acts Interpretation Act 1901* (Cth) s 46(1); see also *Legislation Act 2003* (Cth) s 13(1).

²⁰² *Acts Interpretation Act 1901* (Cth) s 33(2A).

²⁰³ See, eg, Australian Taxation Office, *Contributions Splitting*, above n 48, 9.

²⁰⁴ See, eg, AustralianSuper, *AustralianSuper Trust Deed*, cl 22.3

<[https://www.australiansuper.com/~media/Files/BoardGovernance/201111/AustralianSuper%20Trust%20Deed.ashx](https://www.australiansuper.com/~/media/Files/BoardGovernance/201111/AustralianSuper%20Trust%20Deed.ashx)>; UniSuper, *Consolidated Trust Deed* (1 November 2016), cl 22

<<https://www.unisuper.com.au/~media/FEBF4351CBA54329963C429D50EFD1CE.pdf>>; Intrust Super, *Intrust Super Fund Deed of Variation* (22 September 2016), cl 10.31

<<http://www.intrustsuper.com.au/wp-content/uploads/Trust-Deed-2016.pdf>>.

diligence as a prudent superannuation trustee and in the best interests of the beneficiary.

(a) Trustees Must Exercise Discretion

Under general law, trustees must use their own judgment in exercising their discretion.²⁰⁵ Trustees must not delegate their authority unless permitted by the trust deed, statute or where delegation is necessary and relates to ministerial acts.²⁰⁶ The duty to exercise discretion requires trustees to not act under dictation and to make genuine considerations.²⁰⁷

(i) Duty to not act under dictation

Under general law, trustees must not act under dictation.²⁰⁸ This means that trustees must not blindly follow instructions of others or rubber-stamp their decisions.²⁰⁹ This includes acting under the beneficiaries' instructions because 'a trustee is not the pawn of a beneficiary'.²¹⁰ In *Re Brockbank*,²¹¹ it was held that beneficiaries (even if they all concur) cannot control and direct the trustee's exercise of discretionary powers.²¹² Trustees who breach the duty to not act under dictation may be liable to compensate for the loss arising from the breach.²¹³

²⁰⁵ *McMillan v McMillan* (1891) 17 VLR 33, 38-9 (Hodges J); *Rose v Piscopo* [2010] FMCA 948 (14 December 2010) [62] (Lloyd-Jones FM).

²⁰⁶ *Trustees of the Kean Memorial Trust Fund v Attorney-General (SA)* (2003) 86 SASR 449, 471 [96] (Besanko J). See also Harold Ford et al, Thomson Reuters, *Ford and Lees: The Law of Trusts* (at 12 August 2015) 9 Trustees' Duties, 'Duty to Act Personally' [9.11010]; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2013) 501.

²⁰⁷ *Partridge v Equity Trustees Executors & Agency Co Ltd* (1947) 75 CLR 149, 164 (Starke, Dixon and Williams JJ); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 428 (Mahoney JA).

²⁰⁸ *Quinton v Proctor* [1998] 4 VR 469 (25 May 1998) 471 (Kellam J); *Walker v Willis* [1969] VR 778 (1 January 1969) 782 (Lush J).

²⁰⁹ *Avery v Saree Holdings Ltd* [2012] NSWSC 938 (10 August 2012) [26] (Slattery J); *Application of Scali* [2010] NSWSC 1254 (6 October 2010) [14] (Brereton J).

²¹⁰ *Kowalski v MMAL Staff Superannuation Fund Pty Ltd (No 3)* [2009] FCA 53 (5 February 2009) [83] (Finn J).

²¹¹ [1948] Ch 206.

²¹² *Ibid* 208-9 (Vaisey J).

²¹³ *Wickstead v Browne* (1992) 30 NSWLR 1, 14 (Handley and Cripps JJA); *Carruthers v Carruthers* [1896] AC 659, 665-6 (Lord Herschell).

Trustees may act under the beneficiaries' instructions when the trust deed permits it.²¹⁴ The SIS Act prohibits trustees from acting under dictation unless an express exception applies.²¹⁵ Any terms in a superannuation trust deed that enables trustees to be subject to direction in the exercise of their powers outside these exceptions will be invalid.²¹⁶ Importantly, there are no exceptions that permit trustees to be subject to the beneficiary's directions for contributions splitting. Additionally, the wording of the scheme indicates that trustees have discretion and are not acting as the beneficiary's agent under the contributions splitting scheme.²¹⁷ Therefore, it seems that, as a matter of law, it is the trustee who decides whether or not to split a beneficiary's superannuation contributions. The splitting spouse may make the decision to submit an application to split their superannuation contributions, but it is the trustee who decides whether to accept or reject that application. Trustees are not obliged to split contributions simply because the beneficiaries instruct them to do so. Superannuation trustees may not simply 'process' applications; they may not simply accept validly made applications as a matter of course without applying their independent judgment. Indeed, doing so may breach their duty to not act under dictation.

(ii) Duty to make genuine considerations

The principles of trust law require that the trustee does more than merely determine whether the contributions splitting application was validly made (ie whether it complies with the statutory requirements outlined in Chapter II). The trustee must consider what is in the beneficiary's best interests and exercise its discretion accordingly. Under general law, trustees must genuinely consider an issue in exercising their discretion by considering the options available before making a decision.²¹⁸ As stated in *Jacobs Law of Trusts in Australia*:

²¹⁴ *Kowalski v MMAL Staff Superannuation Fund Pty Ltd (No 3)* [2009] FCA 53 (5 February 2009) [83] (Finn J); *Harb v Harb* [2010] NSWSC 1251 (5 October 2010) [13] (Brereton J).

²¹⁵ *SIS Act* s 58(2). Permitted directions by beneficiaries relate to benefits payable to those beneficiaries, allocating amounts to particular investment options and debt surcharge payments to the Commissioner of Taxation: *SIS Act* s 58(2)(c)-(da), (g). See also *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) s15(8B).

²¹⁶ *SIS Act* s 58(3). However, this does not apply to SMSFs: *SIS Act* s 58(1).

²¹⁷ See *SIS Regulations* reg 6.45(1). See also the above discussion at Ch IV.A.1.

²¹⁸ *Kennon v Spry* (2008) 238 CLR 366, 394 [77]-[78] (French CJ), 408 [125] (Gummow and Hayne JJ); *Curwen v Vanbreck Pty Ltd* (2009) 26 VR 335, 350-1 [34] (Redlich, Bongiorno JJA and Hansen AJA).

Trustees commit a breach of trust if they neglect to give any consideration to the question whether they should make a payment to A, if they refrain from making a payment because of some improper motive, or if they make the payment to A as of course, without considering whether they should do so or not.²¹⁹

Trustees may need to make inquiries to properly inform themselves rather than only relying on the information provided to them.²²⁰ A consideration will not be genuine if it is not properly informed.²²¹ The SIS Act and the SIS Regulations do not address trustees' duty to inquire or make a genuine consideration for the superannuation contributions splitting scheme. Examples of trust deeds also do not address these duties and importantly, do not exclude trustees from having to make inquiries unlike with other application processes.²²²

The duty to make genuine considerations does not require trustees to endlessly pursue 'perfect information in order to make a perfect decision'.²²³ Instead, trustees must make further inquiries where the material before them is insufficient to give an application proper consideration.²²⁴ This may arise where there are conflicting materials that must be resolved or a lack of material before the trustee.²²⁵ When determining whether the trustees have properly considered the

²¹⁹ J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 326 [16-06]. See also *Fay v Moramba Services Pty Ltd* [2009] NSWSC 1428 (16 December 2009) [33] (Brereton J); *Karger v Paul* [1984] VR 161, 163-4 (McGarvie J).

²²⁰ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280 [66] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *Karger v Paul* [1984] VR 161, 163-4 (McGarvie J); *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* [1999] 1 VR 144, 157 [42]-[43] (Beach J); *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 (13 November 2003) [59]-[60] (Bryson J).

²²¹ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280 [66] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 633 [59] (Nettle JA).

²²² See, eg, AustralianSuper, *AustralianSuper Trust Deed*, above n 204, cl 22 cf cl 30.7 which excludes the duty to inquire for applications to transfer retirement credit to an approved benefit arrangement. See generally HOSTPLUS, *Trust Deed for the HOSTPLUS Superannuation Fund* (5 April 2013)

<<https://hostplus.com.au/-/media/Files/Hostplus/Documents/About-Us/hostplus-trust-deed.pdf>>; UniSuper, *Consolidated Trust Deed*, above n 204.

²²³ *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 633 [60] (Nettle JA).

²²⁴ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280-1 [66] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *Attorney-General v Kowalski* [2015] SASC 123 (19 August 2015) [84] (Blue J).

²²⁵ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280 [66] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 629-30 [47] (Nettle JA); *Folan v United Super Pty Ltd* [2014] NSWSC 343 (27 March 2014) [73] (Nicholas AJ).

exercise of their power, ‘it is relevant to look at evidence of the inquiries which were made by the trustees, the information they had and the reasons for, and manner of, their exercising their discretion’.²²⁶ In *Finch v Telstra Super Pty Ltd*, the High Court unanimously held that the trustees’ duty to inform themselves properly is more intense in superannuation trusts than discretionary family trusts.²²⁷ This is because of the public and social significance of superannuation and the fact that beneficiaries are not volunteers.²²⁸

There have been no cases about the application of the duty to make a genuine consideration in the context of the contributions splitting scheme. Cases on this duty in the superannuation context have focused on trustees’ duties when considering an application for a death or total and permanent disablement benefit.²²⁹ When considering such applications, trustees must analyse the information before them against the criteria outlined in the trust deed and decide whether there are missing information or unresolved issues in the application. Trustees should make inquiries where there is insufficient or conflicting information.²³⁰ Trustees who breach their duty to make genuine considerations may be liable to pay compensation.²³¹

²²⁶ *Karger v Paul* [1984] VR 161, 163-4 (McGarvie J). Whether the principles in *Karger v Paul* apply in the superannuation context remains debated. The High Court chose to not deal with this question but stated that the duty to make a properly informed consideration applies in the superannuation context: *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280 [65] (French CJ, Gummow, Heydon, Crennan and Bell JJ). See Rhys Bower, ‘*Finch v Telstra Super*: The High Court declines to move on from *Karger v Paul*’ (2011) 5 *Journal of Equity* 151 for a further discussion on this.

²²⁷ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 280 [66] (French CJ, Gummow, Heydon, Crennan and Bell JJ). See also *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 632 [57] (Nettle JA); *Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd* [2015] NSWCA 104 (22 April 2015) [8] (Basten JA).

²²⁸ *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 271 [33] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck* (2016) 334 ALR 992, 711 (Bathurst CJ); *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 633 [59] (Nettle JA).

²²⁹ See, eg, *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; *Sharp v Maritime Super Pty Ltd* [2012] NSWSC 1350 (7 November 2012); *Miljevic v Holden Employee Superannuation Fund Pty Ltd* [2016] FCA 718 (17 June 2016); *Edington v Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QSC 245 (21 August 2015).

²³⁰ *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618, 633 [60] (Nettle JA); *Attorney-General v Kowalski* [2015] SASC 123 (19 August 2015) [84] (Blue J). See also Scott Charaneka and Stanley Drummond, *Superannuation Trustees’ Proactive Duty to Investigate TPD Claims* (December 2011) *Norton Rose Fulbright* <<http://www.nortonrosefulbright.com/knowledge/publications/61021/superannuation-trustees-proactive-duty-to-investigate-tpd-claims>>. Note however, that the High Court has provided that beneficiaries are entitled to such benefits when they satisfy the relevant criteria. As such, trustees are forming an opinion on whether the criteria have been met and not exercising a discretionary

Therefore, trustees do not have specific factors that they must consider when exercising their discretion, such as the beneficiary's reason for splitting contributions or whether contributions are being split to a low-income or non-working spouse. No such factors are provided by the SIS Act or SIS Regulations. Nor do the trust deeds themselves indicate what factors, if any, that trustees will consider on contributions splitting application forms.

(b) Trustees Must Act with the Requisite Standard of Care

The SIS Act requires superannuation trustees to exercise the same degree of care, skill and diligence as a prudent superannuation trustee.²³² This requires trustees to act as a careful and cautious superannuation trustee would when exercising their discretionary powers. Industry practice can indicate what is reasonable conduct in a particular activity.²³³

In the contributions splitting context, it appears to be industry practice that trustees do not investigate whether beneficiaries were pressured into applying to split their superannuation contributions. In their submission to the Australian Law Reform Commission, the Association of Superannuation Funds of Australia, the peak research and advocacy body for the Australian superannuation industry²³⁴ stated:

As requests for contribution splits are made in writing, a trustee has no capacity to know whether or not the spouse is being coerced into making the request

power: *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 270 [29]-[30] (French CJ, Gummow, Heydon, Crennan and Bell JJ). In contrast, beneficiaries do not appear to be entitled to split their contributions under the contributions splitting scheme.

²³¹ *Wickstead v Browne* (1992) 30 NSWLR 1, 14 (Handley and Cripps JJA). The courts may also set aside the trustee's decision made where appropriate: *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, 269 [28] (French CJ, Gummow, Heydon, Crennan and Bell JJ).

²³² *SIS Act* s 52(2)(b).

²³³ *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 482 [73] (McHugh J). See *Maelor Jones Investments (Noarlunga) Pty Ltd v Heywood-Smith* (1989) 54 SASR 285, 295 (Olssen J); *Australian Securities and Investments Commission v Edwards* [2006] NSWSC 376 (5 May 2006) [10] (Barrett J).

²³⁴ Association of Superannuation Funds of Australia, *About ASFA* <<http://www.superannuation.asn.au/about-asfa/who-is-asfa>>.

ASFA does not consider it practical to expect the trustee to make enquiries about family violence before actioning a split.²³⁵

As the scheme does not require trustees to take any particular factors into account when considering contributions splitting applications, it is arguable that trustees do exercise the requisite standard of care when they follow the industry practice and act as the scheme seems to have intended them to do.

(c) Trustees Must Act in Beneficiaries' Best Interests

Under the SIS Act, superannuation trustees must perform their duties and exercise their powers in the best interests of the beneficiaries.²³⁶ This does not extend the general law duty to act in the beneficiaries' best interests.²³⁷ This duty underlies and qualifies trustees' other duties so that trustees must perform their other duties in the beneficiaries' best interests.²³⁸ The SIS Act provides that the interests of the beneficiaries are to be given priority over the interests of other persons where there is a conflict.²³⁹

In construing the best interests duty in the superannuation context, the courts have taken a process-focused approach – requiring only that trustees make the best effort to pursue what they reasonably believe to be the best outcome in their decision making process.²⁴⁰ The courts will look objectively at the trustee's effort, diligence and process in making its decision and the reasonableness of the

²³⁵ Association of Superannuation Funds of Australia, Submission No 24 to Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, 7 April 2011, 2.

²³⁶ *SIS Act* s 52(2)(c).

²³⁷ *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* (2011) 282 ALR 167, 191 [121] (Giles JA); *Mercer Superannuation (Australia) Limited v Billinghamurst* [2016] FCA 1274 (28 October 2016) [78] (Moshinsky J).

²³⁸ *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (rec and mgr apptd) (in liq) (Controllers apptd) (No 3)* [2013] FCA 1342 (12 December 2013) [481] (Murphy J); Heydon and Leeming, above n 219, 326 [16-06]; Geraint W Thomas, 'The Duty of Trustees to Act in the 'Best Interests' of their Beneficiaries' (2008) 2 *Journal of Equity* 177, 194.

²³⁹ *SIS Act* s 52(2)(d).

²⁴⁰ *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (rec and mgr apptd) (in liq) (Controllers apptd) (No 3)* [2013] FCA 1342 (12 December 2013) [465]-[475] (Murphy J); Scott Donald, "'Best' Interests?" (2008) 2 *Journal of Equity* 245, 246; Michelle Levy, *Unravelling: The Best Interests Duties – Process or Outcome?* (5 February 2015) Allens <<http://www.allens.com.au/pubs/fsr/150205-unravelling-02.htm>>.

trustees' judgment.²⁴¹ This is because an outcome-focused approach, which would require trustees to further or fulfil the purpose of the trust by maximising retirement income for beneficiaries,²⁴² would be impractical. Certainly, trustees are not held liable for decisions simply because they were unbeneficial in retrospect given that they do not have the benefit of hindsight.²⁴³

In the contributions splitting context, superannuation trustees must exercise their discretion to accept or reject a splitting application in the beneficiaries' best interests. At first blush, the best interests duty appears to conflict with the contributions splitting scheme. Given that the scheme involves transferring ownership over what can be a significant portion of contributions received in a financial year to a spouse,²⁴⁴ the decision to accept an application would likely be contrary to the member's best interests as an individual. The scheme's tax incentives may not negate the loss arising from the transfer. This is particularly as trustees are not required to ensure that members have received financial advice and will likely benefit from splitting their contributions as discussed above. The Institute of Chartered Accountants in Australia raised this concern in their submission to the Senate Inquiry, stating that the scheme:

assumes members understand the end benefit taxation rules as well as having the skills to compare the costs of splitting with the tax benefit available. Those couples that find this too hard may choose to either split contributions just in case or not split at all. Each situation could result in a negative outcome.²⁴⁵

Further, Commenting Entity 3 to the 2002 consultation also noted the discrepancy between the scheme and the beneficiaries' best interests:

²⁴¹ See *VBN v Australian Prudential Regulation Authority* (2006) 92 ALD 259, 343-5 (Forge DP and Senior Member Pascoe); *Cowan v Scargill* [1985] Ch 270, 295 (Megarry VC); *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 198 FLR 302, 324 [107] (Byrne J). See also Geraint W Thomas, above n 238, 202.

²⁴² This is the purpose of superannuation trusts: Charter Group, Parliament of Australia, *A Super Charter: Fewer Changes, Better Outcomes* (2013) 21.

²⁴³ AMP, Submission to Treasury, *Exposure Draft of the Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012*, January 2012, [1.3]; Paul Collins, 'The Best Interests Duty and the Standard of Care for Superannuation Trustees' (2014) 88 *Australian Law Journal* 632, 634.

²⁴⁴ Beneficiaries are able to split up to 85% of the concessional contributions they received or the contributions cap for the previous financial year: *SIS Regulations* reg 6.40.

²⁴⁵ Institute of Chartered Accountants in Australia, above n 97, 2. See also Cbus, above n 97, 3.

It [is] convinced that Government lost sight [of] the major reason for having superannuation, that is to provide the highest level of superannuation entitlements for the member of the fund. This policy is [being] pursu[ed] because there was an election commitment.²⁴⁶

Certainly, the scheme focuses on benefiting the receiving spouse as part of a couple rather than the individual beneficiary who is seeking to split their contributions. Some submissions during the implementation process acknowledged this.²⁴⁷ For example, Commenting Entity 13 noted that the ‘[p]olicy intent of the splitting of super accounts is to treat the individual as part of the family unit for taxation purpose’.²⁴⁸ The scheme’s focus on the receiving spouse’s interests may explain why trustees do consider factors such as whether there should be a minimum contributions amount transferred²⁴⁹ but not factors that go to the beneficiary’s best interests, such as whether the beneficiary has received financial advice. This position raises the question of whether trustees who accept splitting applications are breaching their duties, given that it is the beneficiaries’ best interests, and not the couple or receiving spouses’ best interests, that trustees must consider when exercising their discretion. This could potentially expose trustees to allegations of breach of duties for following the scheme. Unfortunately, when implementing the scheme, the government did not consider the difficult position in which trustees are placed due to the mismatch between the objectives of the scheme and the objectives of trust laws.

2 *Superannuation Trustees’ Position in Practice*

It is clear that trustees are legally the decision makers and have the discretion to accept or reject a valid contributions splitting application.²⁵⁰ However, despite this, in practice trustees do not appear to undertake processes to exercise their

²⁴⁶ Appendix B, Commenting Entity 3.

²⁴⁷ Appendix B, Commenting Entity 13; Mercer Human Resource Consulting, Submission No 2 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 16 October 2003, 1; CPA Australia, Submission No 8 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 17 October 2003, 3; Women’s Action Alliance, above n 46, 1.

²⁴⁸ Appendix B, Commenting Entity 13.

²⁴⁹ See, eg, SuperSA, above n 50, 1, which imposes a minimum splitting amount of \$50 and a minimum remaining account balance of \$1,000.

²⁵⁰ See Ch IV.A.1 for the discussion on the trustees’ discretion.

discretion. In practice, it appears to be the beneficiaries who are the decision makers in this process. The splitting spouse makes the decision to split contributions by submitting an application. Nothing in the scheme's implementation legislation or in its operation indicates that the trustee has any role in deciding whether a valid application ought to be accepted.

First, the legislation does not provide any process that a trustee must undertake when considering a valid application. It does not require or provide any opportunity for the trustee to meet personally or correspond with an applicant beneficiary in order to determine whether the beneficiary has received financial advice, understands the nature and legal implications of the scheme and consents to the transfer. There is also no obligation or opportunity for the trustee to ascertain that the contributions are to be transferred from a higher earning spouse to a lower earning or non-earning spouse as the legislators envisaged. This is significant because transfers from a low-income earner to a higher income earner would ostensibly raise questions about whether splitting is in the applicant's best interest. Nor do the application forms or trust deeds provide any process by which the trustee might evaluate, assess or otherwise exercise judgment in relation to a valid application.²⁵¹

If it is truly the trustee who exercises a discretion in deciding to accept or reject an application to split contributions, then one would expect that these factors would be considered in order to ascertain whether contributions splitting would be in the beneficiary's best interests. This is particularly as the Australian superannuation system is complex and beneficiaries may not make informed decisions because they do not understand the taxation rules involved in the scheme.²⁵² Furthermore, the heightened risks of vitiated consent in dealings between spouses means that there is a real risk that the splitting spouse made the application without informed consent. Yet, neither the legislation nor the manner in which the scheme is implemented provides any mechanism by which the information necessary to make such a decision can be gathered.

²⁵¹ See, eg, Australian Taxation Office, *Contributions Splitting*, above n 48; UniSuper, *Consolidated Trust Deed*, above n 204, cl 22 which do not provide any processes that the trustee must undertake before accepting or rejecting a contributions splitting application.

²⁵² Institute of Chartered Accountants in Australia, above n 97, 2; Cbus, above n 97, 3.

Indeed, contributions splitting application forms require beneficiaries to provide information sufficient only to establish that the application is valid²⁵³ and to enable the practical transfer of contributions to the receiving spouse's superannuation account. Furthermore, notwithstanding the risks inherent in financial dealings between spouses, the scheme appears to impose on trustees a low level of obligation to inquire. For example, regulation 6.44(3) of the SIS Regulations states that in assessing the *validity* of an application, the trustee is permitted to rely on the information provided about the receiving spouse without investigating whether it is true.²⁵⁴

No superannuation trustees were interviewed for this thesis. Therefore, it must be stated that further empirical research is required to determine whether any superannuation trustees do in fact undertake a process of inquiry. However, public statements made by stakeholders would seem to suggest that they do not. The Association of Superannuation Funds of Australia has stated that trustees do not inquire about vitiated consent arising from duress when considering an application. In their submission to the Australian Law Reform Commission on the issue of splitting applications made under duress, they stated:

As requests for contribution splits are made in writing, a trustee has no capacity to know whether or not the spouse is being coerced into making the request. ASFA does not consider it practical to expect the trustee to make enquiries about family violence before actioning a split... ASFA considers that the fund trustee should not be expected or required to consider competing arguments between the spouses. This is not their role, and investigating the bone fides of both arguments raises the significant question of who should meet the cost of such enquiries.²⁵⁵

They also stated that trustees would only consider the issue of duress if the beneficiaries told the trustees about it.²⁵⁶ This seems to indicate that beneficiaries are the practical decision makers under the scheme. Beneficiaries who tell the

²⁵³ In that it meets the legislative requirements. See Ch II.B.2 for a discussion on the legislative requirements of contributions splitting.

²⁵⁴ *SIS Regulations* reg 6.44(3).

²⁵⁵ Association of Superannuation Funds of Australia, Submission No 24 to Australian Law Reform Commission, above n 235, 2.

²⁵⁶ *Ibid.*

trustees that their consent was vitiated are essentially telling the trustees that they did not want to split their contributions. Beneficiaries in that circumstance could be said to be telling the trustees to reject the application.

Additionally, the comments made to the 2002 consultation indicate that the trustees consider that the decision to split contributions is a matter for the beneficiary. For example, Commenting Entity 1 stated that ‘all of the splitting options should be available with spouses choosing the most appropriate one for them’.²⁵⁷ Commenting Entity 15 also suggested that beneficiaries should only need to make one application and ‘splitting should proceed until the member notifies otherwise’.²⁵⁸ These comments indicate that it is the beneficiaries’ choice to split contributions, rather than a matter for the trustees’ discretion.

In conjunction, these factors indicate that, in practice, trustees do not use their own judgment to consider a contributions splitting application. Instead, the trustees’ role is simply to ensure that the contributions splitting application is valid and to transfer the contributions as requested. It is the beneficiary who, by submitting an application, makes the decision to split the contributions. This view of the facts is consistent with the tenor of superannuation contributions splitting forms, such as the one used by CareSuper, which provides: ‘If you are eligible to split your contributions, please allow up to 3 business days for the transfer to take place’.²⁵⁹ This indicates that CareSuper’s trustees accept valid applications as a matter of course and do not exercise any discretion in relation to contributions splitting.

The dissociation between the legal and practical decision making under the contributions splitting scheme has arisen because of the scheme’s implementation without consideration of traditional trust laws. The mismatch of the two areas in some respects results in difficulties in determining the extent to which superannuation trustees’ duties are modified. The uncertainties and ambiguities

²⁵⁷ Appendix B, Commenting Entity One.

²⁵⁸ Ibid Commenting Entity 13, 12.

²⁵⁹ CARE Super Pty Ltd, *Contribution Splitting Form*, 3
<<https://www.caresuper.com.au/download.php?node=1970>>.

arising from this mismatch in the superannuation context were discussed in *Retail Employees Superannuation Pty Ltd v Pain*.²⁶⁰ Justice Blue stated:

given the contractual or quasi-contractual nature of the relationship between a trustee and members, there will be many provisions of governing rules of regulated superannuation entities that enable members to give instructions to the trustee exercisable as of right which it cannot have been the intention of sections 58 and 59 to preclude. Examples are instructions by a member to change from REST Super to REST Select, to rollover his or her interest to another superannuation fund or, if he or she has reached retirement age, to cash his or her benefit. Literally, these instructions are directions by a person to the trustee in contravention of subsection 58(1). It cannot have been the legislature's intention that subsections 58(1) or 59(1) would apply to such instructions. ...sections 58 and 59 should be interpreted such that they do not apply when the governing rules give to a member a right and impose on the trustee a corresponding duty such that the trustee has no power or discretion not to give effect to the right.²⁶¹

His Honour noted that legislative reform in this area would be desirable to resolve these uncertainties and ambiguities.²⁶²

While his observations were obiter, it would be interesting to see how his Honour's remarks would apply to the superannuation contributions splitting scheme. Importantly, beneficiaries do not have a right to split their contributions under the scheme. As discussed above, the SIS Regulations provide trustees with the discretion to accept or reject valid contributions splitting applications.²⁶³ As such, it cannot be said that trustees do not have any power or discretion under the contributions splitting scheme. Accordingly, his Honour's observations are unlikely to apply to the superannuation contributions splitting scheme. However, this position is difficult to reconcile with the legislators' intention and trustees' actions in practice. This highlights the difficulties and uncertainties that arise from how the contributions splitting scheme has been implemented.

²⁶⁰ [2016] SASC 121 (8 August 2016).

²⁶¹ Ibid [488] (Blue J).

²⁶² Ibid [512]-[515] (Blue J).

²⁶³ See Ch IV.A.1 for a further discussion on this point.

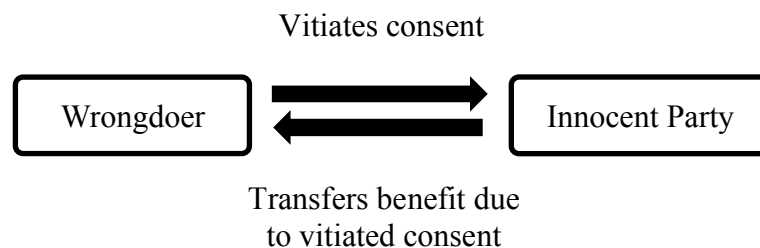
B The Effect of the Dissociation on Beneficiaries' Right to Recourse

The dissociation between the legal and practical decision maker in the contributions splitting scheme affects beneficiaries' right to recourse against the wrongdoers and trustees. Trustees' liability may also be affected as a result.

1 Beneficiaries' Right to Recourse Against the Wrongdoer

The fact that the superannuation trustees are the legal decision makers removes the beneficiaries' right to recourse against the wrongdoer. As discussed in Chapter III, innocent parties generally have a right to recourse against wrongdoers when their consent is vitiated through the doctrines of duress, undue influence, misrepresentation and non est factum. However, these doctrines serve to void transactions between the innocent party and the wrongdoer where the innocent party's consent to the transaction was vitiated.²⁶⁴ As highlighted by Chapter III, this occurs when the innocent party decides to give the wrongdoer a benefit because of the wrongdoer's actions. This direct relationship between the improper act and the benefit obtained is depicted in Figure 1.

Figure 1. Direct relationship between the wrongdoer's act and the benefit obtained in a general transaction.

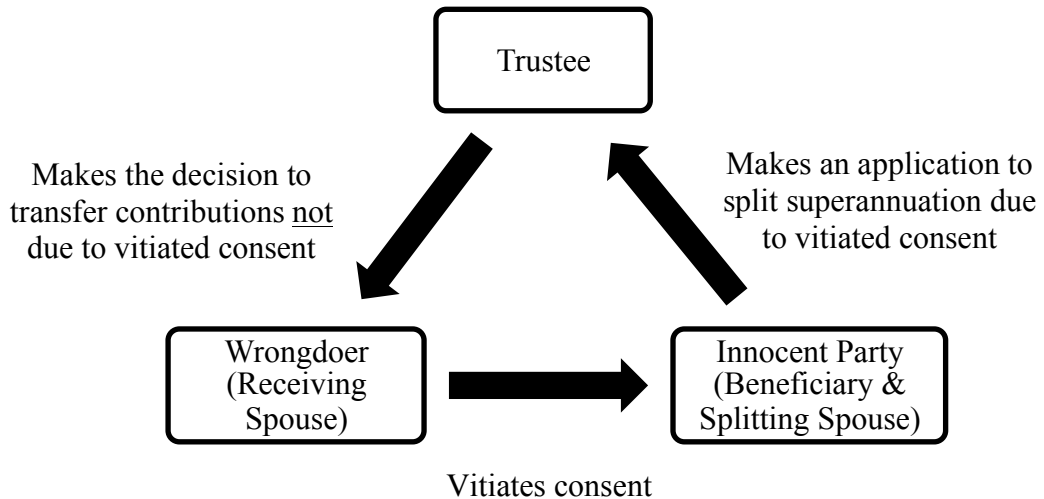


However, this is not the case with contributions splitting. The scheme's application process means that the wrongdoer's actions only vitiated the innocent party's decision to make an application and request for their contributions to be split. As the superannuation trustee is the legal decision maker, it is the trustee's decision, not the innocent party's decision, to transfer the benefit to the

²⁶⁴ See *Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366, 384 (Lord Diplock); *Pao On v Lau Yiu Long* [1980] AC 614, 635 (Lord Scarman).

wrongdoer. This non-direct relationship between the improper act and the benefit obtained is depicted in Figure 2.²⁶⁵

Figure 2. Non-direct relationship between the wrongdoer's act and the benefit obtained in the contributions splitting context.



The non-direct relationship arising from the scheme's application process imposed into the superannuation system's trust structure may cause difficulties when seeking recourse. Take for example the fictional duress scenario discussed in Chapter III but in the contributions splitting context:

Jane received \$7,782.48 of superannuation contributions over the 2015/16 financial year. Bob discovers that contributions can be split between spouses. He tells Jane to transfer 85% of the contributions she received, being the maximum amount that she can split, to him. Bob threatens to beat Jane unless she makes the application to transfer her superannuation contributions. Due to fear of Bob's threats, Jane submits an application electronically to her superannuation fund in accordance with the application form's instructions. The trustee of her superannuation account receives the application, checks that it is valid against the statutory criteria

²⁶⁵ This is not merely the absence of a direct relationship. It is clear that there is a relationship between an improper act and the benefit causally derived from it. However, legally, that relationship is not direct.

and decides to accept the application. The trustee transfers \$6,615.04 of Jane's superannuation contributions to Bob's superannuation account.

In this scenario, Jane's decision to submit the contributions splitting application was not freely made. However, it is the trustee who made the decision to accept the application and transfer the contributions to Bob. As Jane did not legally make the decision to transfer her contributions to Bob, Jane is unlikely to be able to rely on the doctrine of duress to seek rescission. The trustee also cannot seek recourse against Bob for vitiated consent because Bob did not threaten the trustee. This same issue applies to the doctrines of undue influence, misrepresentation and non est factum. Therefore, as a result of the scheme's application process being imposed into the superannuation system's trust mechanism, the legal protections provided in situations of vitiated consent in other transactions would not apply to protect innocent parties in the contributions splitting context. Therefore, innocent parties who request to split their superannuation contributions due to vitiated consent will struggle in seeking recourse against the wrongdoer.

It might be argued that, in accepting the application and transferring Jane's superannuation contributions to Bob, the trustee was acting as Jane's agent. It might then be argued that insofar as the decision to split contributions was really made by Jane, the transfer ought to be reversed if it can be proven that her decision was made under duress. However, this argument is not consistent with the relationship of trustee and beneficiary because a trustee is not an agent.²⁶⁶ It is sufficient here to say that Jane has no clear and direct avenue of recourse.

This inability to seek recourse against the wrongdoer lies in conflict to the principles of fairness and justice underlying the legal system.²⁶⁷ Certainly, 'to protect people from being forced, tricked or misled in any way by others into

²⁶⁶ *Re Brockbank* [1948] 2 Ch 206, 208-9 (Vaisey J). See Ch IV.C.1 for a discussion on trustees' duty to not act under dictation.

²⁶⁷ Andrew Robertson, 'Constraints on Policy-Based Reasoning in Private Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 261, 265-6. See, eg, *Henville v Walker* (2001) 206 CLR 459, 470 (Gleeson CJ); *National Commercial Banking Corporation of Australia Ltd v Batty* (1986) 160 CLR 251, 268 (Gibbs CJ); *Roads and Traffic Authority v Royal* [2008] HCA 19 (14 May 2008) [92] (Kirby J); *Readymix Holdings International Pty Ltd v Wieland Process Equipment Pty Ltd (No 2)* [2008] FCA 1480 (3 October 2008) [122] (Flick J) where the courts considered what would be required by justice and equity.

parting with their property is one of the most legitimate objects of all laws'.²⁶⁸ Liability deters wrongful acts.²⁶⁹ If wrongdoers are not held liable under the scheme, a spouse will be able to coerce their spouse into splitting their superannuation contributions without fear of any consequences. This would be unfair for the beneficiary whose consent was impaired when making the application. This is particularly unjust and unfair to the beneficiary who would have a right to recourse against the wrongdoer if the financial benefit was conferred outside the superannuation context.

2 *Beneficiaries' Right to Recourse Against the Trustees*

If beneficiaries are unable to seek recourse against the wrongdoers, they are likely to seek to hold trustees liable for their loss. It was highlighted above that trustees, in accepting valid contributions splitting applications, are likely to be acting under the beneficiaries' instructions without truly exercising their discretion or making a genuine consideration. Beneficiaries can seek recourse against trustees where they can establish that the trustees breached their duties.²⁷⁰ However, the beneficiary bears the onus of proving that the trustee breached its duty.²⁷¹ Although trustees' actions in merely processing valid applications do appear to be contrary to their duty to exercise their discretion, not to act under dictation and to act in the beneficiary's best interest, these actions *are* in accordance with the notion that trustees are not the practical decision maker under the contributions splitting scheme.

A beneficiary will likely face difficulties in establishing that the trustee breached its duties to exercise their discretion by accepting a contributions splitting application. The court 'will not control trustees in the exercise of their purely discretionary powers unless they are acting *mala fide*, or have misconceived the

²⁶⁸ *Allcard v Skinner* (1887) LR 36 Ch D 145, 183 (Lindley LJ).

²⁶⁹ See *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, [53]; *New South Wales v Lepore* (2003) 212 CLR 511, 534 [36] (Gleeson CJ); Andrew Robertson, above n 267, 275.

²⁷⁰ *SIS Act* s 55.

²⁷¹ *Papadopoulos v Hristoforidis* [2001] NSWCA 368 (12 October 2001) [32] (Hodgson JA); *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260, 1269 (Dillon LJ); *Schreuders v Grandiflora Nominees Pty Ltd* [2014] VSC 310 (27 June 2014) [24] (Garde J).

nature of their discretion and acted on that misconception'.²⁷² Where trustees have absolute discretion in exercising their powers under the scheme,²⁷³ beneficiaries may need to establish that the trustees acted in bad faith to establish a breach.²⁷⁴ This hurdle is difficult to overcome given that trustees are not required to provide reasons for their decisions.²⁷⁵ There are also no indications that trustees are acting in bad faith under the contributions splitting scheme.

Even if beneficiaries can establish a breach of duty, the Court can relieve trustees of liability where trustees acted honestly, reasonably and ought fairly to be excused.²⁷⁶ This requires a broad evaluative judgment taking into account all the circumstances of the case.²⁷⁷ The relevant question is whether the trustee has 'acted honourably, fairly, in good faith and in a common sense manner as judged by the standards of others of a similar professional background'.²⁷⁸ The seriousness of the breach and whether the trustees' conduct met the statutory standard of care are also relevant.²⁷⁹ In determining whether a party should be relieved from liability, 'each case will very much depend on its own

²⁷² Heydon and Leeming, above n 219, 325, [16-06]. See also *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 115 [58] (Kirby J); *Cohen v Amberley Corporation Australia Pty Ltd* [2016] VSC 140 (7 April 2016) [26] (Derham AsJ); *Kain v Hutton* [2000] BCL 200 (3 December 2004) [226] (Panckhurst J).

²⁷³ See, eg, *AustralianSuper, AustralianSuper Trust Deed*, above n 204, cl 22.3; *UniSuper, Consolidated Trust Deed*, above n 204, cl 22; *Intrust Super*, above n 204, cl 10.31.

²⁷⁴ *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 99 [7] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 115 [58] (Kirby J); *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469, 480 (Heerey J), quoting *Gisborne v Gisborne* (1877) 2 App Cas 300, 305 (Northrop J).

²⁷⁵ *Curwen v Vanbreck Pty Ltd* (2009) 26 VR 335, 349 [25] (Redlich, Bongiorno JJA and Hansen AJA); *Mandie v Memart Nominees Pty Ltd* (2014) 42 VR 325, [93]-[94] (Macaulay J); *Cohen v Amberley Corporation Australia Pty Ltd* [2016] VSC 140 (8 April 2016) [27].

²⁷⁶ *Trustee Act 1958* (Vic) s 67; *Trustee Act 1936* (SA) s 56; *Trustee Act 1925* (ACT) s 85; *Trustee Act* (NT) s 49A; *Trustee Act 1898* (Tas) s 50; *Trustee Act 1925* (NSW) s 85; *Trustees Act 1962* (WA) s 75. Similar provisions are also found in the *Corporations Act 2001* (Cth) ss 1317JA, 1318. See *Australian Securities and Investments Commission v Vines* (2005) 224 ALR 499, 510-4 (Austin J) for a discussion on this.

²⁷⁷ *Morley v Australian Securities and Investments Commission (No 2)* (2011) 83 ACSR 620, 630 [50] (Spigelman CJ, Beazley and Giles JJA).

²⁷⁸ *Maelor Jones Investments (Noarlunga) Pty Ltd v Heywood-Smith* (1989) 54 SASR 285, 295 (Olssen J); *Australian Securities and Investments Commission v Edwards* [2006] NSWSC 376 (5 May 2006) [10] (Barrett J).

²⁷⁹ *Clarke v Great Southern Finance Pty Ltd (rec and mgr apptd) (in liq)* [2014] VSC 516 (11 December 2014) [1962] (Croft J); *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430, 441 [89] (Middleton J).

circumstances'.²⁸⁰ The courts have previously expressed reluctance to excuse professional trustees from liability.²⁸¹

In the contributions splitting context, it is clear that the superannuation trustees are acting honestly when accepting contributions splitting application. The contentious aspect is whether the superannuation trustees have acted reasonably and ought fairly to be excused. The rights of the beneficiaries will need to be balanced against the rights of the trustees in this respect.²⁸² As discussed above, the trustees appear to be acting in accordance with industry practice and as the scheme intended by accepting valid applications without undertaking further processes. Further, the government created the contributions splitting scheme to benefit the receiving spouse and the family unit rather than considering the splitting spouse's best interests as an individual.²⁸³

Additionally, the government did not impose any safeguards that trustees must take into account when considering an application or require trustees to ensure that beneficiaries obtain independent advice or are voluntarily seeking to split their contributions. It also appears to be industry practice and the government's intentions that the process of applying for contributions to be split to not occur in person.²⁸⁴ This may be due to the administrative costs to superannuation providers otherwise, which was a major concern when implementing the scheme.²⁸⁵ In conjunction, these factors indicate that trustees are following the scheme as the legislators intended. As such, it is difficult to see how trustees should be held liable for any losses arising in such circumstances. It would be

²⁸⁰ *Maelor Jones Investment v Heywood-Smith* (1989) 54 SASR 285, 292 (Olsson J). See also *Australian Securities and Investments Commission v Vines* (2005) 224 ALR 499, 510 [46] (Austin J).

²⁸¹ *Partridge v Equity Trustees Executors & Agency Co Ltd* (1947) 75 CLR 149, 165 (Starke, Dixon, Williams JJ); *Australian Securities and Investments Commission v Vines* (2005) 224 ALR 499, 513 [58] (Austin J).

²⁸² *Maelor Jones Investment v Heywood-Smith* (1989) 54 SASR 285, 295 (Olsson J).

²⁸³ Appendix B, Commenting Entity 13; Mercer Human Resource Consulting, above n 247, 1; CPA Australia, above n 247, 3; Women's Action Alliance, above n 46, 1.

²⁸⁴ See, eg, Australian Taxation Office, *Contributions Splitting*, above n 48; CARE Super Pty Ltd, above n 259. The contributions splitting application forms, including the Australian Taxation Office's form, all require beneficiaries to complete the form and send it to their superannuation provider electronically or via mail.

²⁸⁵ See Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 4; Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 1.

unjust and unfair to hold parties liable where they are not responsible.²⁸⁶ Despite the fact that superannuation trustees are professional trustees, it seems unlikely that they will be deemed to be breaching their duties under the scheme.

Thus, in the above scenario, Jane does not have a clear right to recourse against Bob because she was not the legal decision maker of the contributions splitting scheme. However, because she is the practical decision maker, she is also unlikely to have recourse against the trustee. The trustee was acting as the government intended in relation to the scheme and was not required to check that Jane's consent was not vitiated. There are also no indications that the trustee was acting dishonestly, in bad faith or was not following industry practice. Therefore, the trustee is likely to not have breached the trustees' duties discussed above. Even if a breach did occur, the courts are likely to relieve the trustee of liability. In conjunction, these factors indicate that Jane will not be able to seek recourse against the trustee for breach of duty. Relieving both the wrongdoers and trustees from liability means that beneficiaries are left without recourse under the contributions splitting scheme.

C Concluding Remarks

By imposing the application process of the contributions splitting scheme into the superannuation system's trust structure, the government created a situation where trustees are the decision makers legally but not in practice. This dissociation creates difficulties for beneficiaries seeking recourse where their decision to request for their contributions to be split was not free, informed or independent. As beneficiaries are not the decision makers at law, they are unable to seek recourse from wrongdoers where their decision to request a split was improperly obtained. This places trustees in a difficult position and leaves them open to allegations that they breached their duties in allowing contributions splitting. However, the public policy reasons underlying the scheme creates practical difficulties for beneficiaries seeking recourse from trustees. It is difficult to see how beneficiaries can prove that the trustees breached their duties and should be held liable when the trustees are acting as the government intended under the

²⁸⁶ Andrew Robertson, above n 267, 266-7, 274. See, eg, *Roads and Traffic Authority v Royal* [2008] HCA 19 (14 May 2008) [92] (Kirby J).

scheme. These issues arising from the disjoin between the legal and practical decision makers under the scheme essentially means that beneficiaries are currently left without any clear access to recourse.

This situation is exacerbated by the fact that trustees are not required, and do not appear to, undertake any processes when provided a valid contributions splitting application. This lack of safeguards enables beneficiaries to apply to split their superannuation contributions without receiving any financial advice, without knowing the practical implications of contributions splitting and also where their decision to apply was not free or independent. This issue is further exacerbated by the fact that spouses, by virtue of their relationship, have a heightened risk of vitiated consent in relation to financial decisions.

Thus, beneficiaries are also placed in a difficult position where they are at risk of losing large portions of their superannuation contributions as a result of the contributions splitting scheme. This is particularly detrimental to women, given that they are more likely to make financial decisions based on their emotional ties, which are not free, informed or independent. Women already retire with insufficient superannuation compared to men. This issue arising from the contributions splitting scheme may thus, worsen women's position in retirement instead of benefiting them as the government intended. While such issues have not yet arisen in the contributions splitting context, the relative youth of the scheme means that these issues may arise in the next 10 to 20 years. However, there are currently no systems in place to prevent these issues from occurring and no right to recourse available for those affected.

V POTENTIAL PREVENTATIVE AND REMEDIAL MEASURES TO IMPLEMENT IN
THE SUPERANNUATION CONTRIBUTIONS SPLITTING SCHEME

The previous chapters highlighted that the contributions splitting scheme does not provide any safeguards to ensure that beneficiaries' decision to apply for contributions splitting is not made in circumstances of impaired consent. It was also noted that the scheme does not provide beneficiaries with a clear right to recourse in such situations. It is important to prevent spouses from making decisions that are not free, informed or independent due to the potential detriment it may cause on a spouse's welfare at retirement. Further, due to the possibility that such situations have already occurred, it is important that spouses have a clear right to recourse against wrongdoers. This chapter will discuss potential preventative and remedial measures that could be implemented to help protect beneficiaries from applying to split their contributions due to impaired consent and aid beneficiaries where it does occur.

In seeking a workable means for protecting vulnerable spouses, multiple factors must be considered and balanced. In order for measures to be practical, they must be both administratively workable and not unreasonably expensive. The interests of the parties (being the splitting spouse, receiving spouse and trustee) must also be balanced to ensure that their interests are not unfairly affected. Certainly, this would be consistent with the principle of fairness and justice.²⁸⁷ Further, measures must respect individual autonomy and parties' right to make decisions for themselves.²⁸⁸ Indeed, the courts have noted that the law should not be too paternalistic and people should have the right to manage their own affairs.²⁸⁹ Further, underlying these factors is the need to maintain a strong superannuation system in order to support the economy and reduce reliance on the age pension.²⁹⁰ Thus, the preventative and remedial measures suggested are proposed as practical

²⁸⁷ Andrew Robertson, above n 267, 266-7.

²⁸⁸ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 424-5 (Kirby J). See also Matthew Thomas and Luke Buckmaster, 'Paternalism in Social Policy – When is it Justifiable?' (Research Paper No 8, Parliamentary Library, Parliament of Australia, 2010) 1-2, 20.

²⁸⁹ See *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 (3 May 1999) [10] (Young J); *Breen v Williams* (1996) 186 CLR 71, 114 (Gaudron and McHugh JJ); *Johnson v Staniforth* [2002] WASCA 97 (24 April 2002) [123], [142]-[143] (Robert-Smith J).

²⁹⁰ See Ch I.A for a discussion on the role of the Australian superannuation system.

measures that balance the interests of the relevant parties without undermining the autonomy of the splitting spouse.

A Preventative Measures

1 Only Allow Contributions to be Transferred to Low-income or Non-working Spouses

A potential safeguard would be to implement a statutory requirement that beneficiaries can only split contributions from a high-income spouse's superannuation account to a low-income or non-working spouse's account. This requirement would ensure that the scheme operates as it was originally intended to do.²⁹¹ It would also prevent the scheme from being used to the detriment of women in particular. As discussed previously, women are more likely to be the low-income or non-working spouse and are also more likely to be the victim of family violence.²⁹² Therefore, it is reasonable to predict that restricting contributions splitting to higher earning spouses would diminish the number of vulnerable women at risk of being coerced or deceived into transferring their superannuation contributions away.

This safeguard might be implemented by requiring beneficiaries to provide both spouses' income statements from the previous financial year's tax return. This, rather than information concerning the spouses' superannuation savings, will be necessary because the amount of superannuation contributions an individual receives in a financial year may not accurately reflect their income.²⁹³ Trustees could be statutorily allowed to rely on these statements in the same way that the scheme currently enables them to rely on information about the receiving spouse without investigating whether it is true.²⁹⁴ As such, this safeguard would impose minimal burden on trustees. This statutory safeguard would also assist the scheme to operate as it was originally intended to do. In preventing contribution

²⁹¹ See Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth) 3-4, 13; Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 3.

²⁹² See the discussion on why this is a gendered issue at Ch I.B and Ch III.A.

²⁹³ This is because individuals can make voluntary contributions to their superannuation account. Further, individuals may receive more than the minimum compulsory employer superannuation contributions rate of 9.5%.

²⁹⁴ See *SIS Regulations* reg 6.44(3).

from flowing away from low-income women, this safeguard would also assist the scheme to better address the problem that too many women are currently retiring with insufficient superannuation.²⁹⁵

However, this safeguard does not address the specific risk of vitiated consent between spouses and would not prevent spouses from applying to split their contributions when their decision is not free, informed or independent. Thus, situations involving duress, undue influence, misrepresentation and non est factum may still occur under the scheme.

However, this safeguard could be argued to be too paternalistic and interferes too greatly with individuals' autonomy. This is particularly so as it is a recommended financial strategy for spouses to split their contributions based on age, and not income level, in order to have earlier access to superannuation savings.²⁹⁶ However, the seriousness of the potential harm to victims where their application is made in circumstances of impaired consent must also be considered. Vulnerable spouses may be left less financially secure as a result of the contributions splitting scheme. This will cause such spouses to become more dependent on the age pension, the costs of which will be assumed by the community.

Ultimately, restricting individuals' ability to split their contributions may be politically unpopular given that it is currently allowed. However, given the risk that superannuation contributions will be transferred away from low-income or non-working spouses, paired with the seriousness of the potential impact on those affected and the community, it is submitted that this restriction should be imposed. Indeed, the courts created and upheld the doctrine of wife's special equity, despite criticisms of it being overly paternalistic, and noted that the need to protect vulnerable wives warranted the need to impose an obligation on

²⁹⁵ Senate Economics References Committee, above n 8, 13-4; Association of Superannuation Funds of Australia, 'Sixty Minute Super Incentive', above n 32; De Zwaan, Brimble and Stewart, above n 32, 12; Erica Thompson, above n 32, 33.

²⁹⁶ See Ch II.C.2.b for a more detailed discussion on this financial strategy.

creditors in relation to third party guarantees.²⁹⁷ Thus, while this safeguard may be politically impractical, it is submitted that the protection it would provide to vulnerable spouses would outweigh the disadvantages.

2 Trustees Must Meet Personally with Beneficiaries Before Accepting Applications

Trustees could be required to personally meet with beneficiaries and explain the nature and effect of contributions splitting. This would ensure that the beneficiary truly appreciates the effect and nature of the transaction. Accordingly, it would prevent applications to split being made in circumstances where misrepresentation has occurred or would ordinarily justify a plea of non est factum. This requirement is similar to that which was originally imposed in English third party guarantee cases. In *Barclays Bank plc v O'Brien*, the House of Lords held that, due to the heightened risk of vitiated consent in financial dealings between spouses, a creditor would be precluded from enforcing a guarantee given by one spouse with respect to the debts of her partner, unless the creditor had taken reasonable steps to ensure that the guarantor's consent had been properly procured.²⁹⁸ More specifically, Lord Browne-Wilkinson held that creditors were obliged to meet personally with the wife and explain the transaction and the risks involved and urge her to obtain independent legal advice.²⁹⁹ His Lordship considered that this would sufficiently balance the vulnerability of the wife against the interests of the creditors.³⁰⁰

It must be noted that part of the reasoning behind imposing such an obligation on creditors in relation to third party guarantees is that creditors would be unjustly enriched if they were able to enforce the guarantee.³⁰¹ However, in the contributions splitting context, trustees do not benefit from splitting contributions.

²⁹⁷ See *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 424-5 (Kirby J); Stephen M Cretney, 'The Little Woman and the Big Bad Bank' (1992) 108 *Law Quarterly Review* 534, 536-8.

²⁹⁸ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 196. See also *Yerkey v Jones* (1939) 63 CLR 649.

²⁹⁹ *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 196 (Lord Browne-Wilkinson).

³⁰⁰ *Ibid* 197 (Lord Browne-Wilkinson).

³⁰¹ *Garcia v National Bank of Australia Ltd* (1998) 194 CLR 395, 409 [31] (Gaudron, McHugh, Gummow, Hayne JJ).

While trustees may charge a fee to split contributions,³⁰² this fee covers the costs of services rendered rather than serving to enrich the trustee. On the other hand, superannuation trustees already owe duties to beneficiaries, unlike the third party guarantees context where creditors did not owe any duties to the wives before the courts imposed such an obligation. Furthermore, trustees, especially professional trustees, are generally held to a higher standard of care and thus, imposing such an obligation on them may be appropriate in principle.

However, it is unlikely that this requirement would work in practice. It should be noted that Lord Browne-Wilkinson's approach was subsequently criticised by the House of Lords in *Royal Bank of Scotland plc v Etridge (No 2)* and the requirement to meet and explain the transaction to guarantors was dropped in favour of a requirement to insist on receipt of a solicitor's certificate.³⁰³ Lord Nicholls argued that a personal meeting would likely expose the creditor to greater risks and that such meetings would be 'an intrusive, inconclusive and expensive exercise'.³⁰⁴ Ultimately, his Lordship assessed the requirement to meet to be a 'disproportionate response to the need to protect those cases, presumably a small minority, where a wife is being wronged'.³⁰⁵

In the contributions splitting context, it might be similarly argued that trustees ought not to be exposed to further liability by being obliged to meet beneficiaries because trustees derive no benefit from the beneficiaries' decision to split their contributions. Furthermore, such an obligation would arguably impose administrative burden and costs on superannuation trustees, such that it might be characterised as a disproportionate and expensive exercise. Importantly, it might be practically impossible to comply with such an obligation, given the number of beneficiaries in a superannuation trust. Trustees are unlikely to know individual beneficiaries and their circumstances. Even if the requirement was for trustees to correspond with the splitting spouse, rather than to meet them, significant administrative difficulty and cost would be entailed.

³⁰² See, eg, SuperSA, above n 50; SunSuper, above n 61.

³⁰³ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 805-6 (Lord Nicholls).

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid* 805 [53] (Lord Nicholls).

Furthermore, the costs associated with the implementation of this safeguard may be counterproductive. Given that beneficiaries who opt to split their contributions are already made to cover the costs of the scheme through payment of a fee, it is likely that these additional costs would be shifted to the beneficiaries and result in higher fees. Such an increase in the fees charged to split contributions may discourage beneficiaries from splitting their contributions. Furthermore, the potential liability and increased administrative burden might also discourage trustees from offering beneficiaries the option to split contributions.³⁰⁶ Discouraging parties from partaking in the scheme would be contrary to the government's intentions. More importantly, it would obstruct the achievement of the important public policy objectives that underpinned the scheme. If the contributions splitting scheme fails altogether, low-earning and non-earning spouses are likely to have less access to superannuation. Therefore, it is submitted that the practical disadvantages of this approach render it unviable. What is needed is a workable safeguard.

3 Beneficiaries Must Obtain Independent Advice Before Applying to Split Contributions

Another safeguard would be to require beneficiaries to obtain independent advice before applying to split their contributions. Similar to the approach taken by the House of Lords in *Royal Bank of Scotland v Etridge (No 2)*, application forms could require beneficiaries to submit a certificate to confirm that the beneficiary has obtained advice from an independent party about the nature and implications of the decision to split. This measure would prevent beneficiaries making uninformed decisions, without imposing too great a burden on trustees.

Admittedly, independent advice does not protect against undue influence but does protect against misrepresentation and non est factum.³⁰⁷ However, this approach is similar to the current requirement imposed in England on creditors for third party guarantees. Following this approach, it would not be necessary to 'wholly

³⁰⁶ Certainly, superannuation providers were against this idea in their submissions to the Australian Law Reform Commission due to the costs it would impose on them: Association of Superannuation Funds of Australia, Submission No 24 to Australian Law Reform Commission, above n 235, 2.

³⁰⁷ See *Credit Lyonnaise Bank Nederland NV v Burch* [1997] 1 All ER 144, 156 (Millett LJ).

eliminate the risk of undue influence or misrepresentation'.³⁰⁸ It would be sufficient to ensure that the splitting spouse understands the practical implications of contribution splitting and makes the application with their eyes open.³⁰⁹

Finally, it may be more appropriate to require beneficiaries to obtain independent financial advice rather than legal advice in the contributions splitting context. The courts have previously recognised that circumstances may require guarantors to obtain independent financial advice, particularly where guarantors have limited understanding 'about the obvious financial unwisdom of a transaction'.³¹⁰ The complexities of the superannuation system and the end benefit taxation rules of the contributions splitting scheme may warrant beneficiaries to obtain independent advice to truly understand the practical implications of contributions splitting.

It must be acknowledged that beneficiaries would still likely be facing increased costs for splitting contributions, as they will need to pay for independent advice. As such, the comments made earlier about the risk that beneficiaries might be discouraged from splitting their contributions – and the disadvantages of that outcome – apply here too. The practical implications of imposing these requirements are difficult to predict because there are numerous variables in play. For instance, it is possible that some beneficiaries already receive independent advice before splitting their contributions due to the complexities of the superannuation system.³¹¹ Such individuals would not incur any additional costs. Another factor that would need to be considered is whether beneficiaries are required to obtain independent advice for every single contributions splitting application submitted. Given that independent advice ensures that beneficiaries understand the basic elements of contributions splitting and these elements do not

³⁰⁸ *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773, 805 [54] (Lord Nicholls).

³⁰⁹ See *ibid.* See also Charles Y C Chew, above n 189, 48; Simone Wong, 'Revisiting Barclays Bank v O'Brien and Independent Legal Advice for Vulnerable Sureties' (2002) 7 *Journal of Business Law* 439, 456; Adrian Chandler, 'Undue Influence and the Function of Independent Advice' (1995) 111 *Law Quarterly Review* 51, 53.

³¹⁰ *Beneficial Finance Corp v Karavas* (1991) 21 NSWLR 256, 266 (Kirby P). See also *Amtel Pty Ltd v Ah Chee* [2015] WASC 341 (11 September 2015) [264]-[265] (Pritchard J); *ANZ Banking Group Ltd v Alirezai* [2004] QCA 6 (6 February 2004) [111] (Wilson J); Charles Y C Chew, above n 189, 46.

³¹¹ Certainly this is what some superannuation providers recommend although it is not required: Catholic Super, above n 95, 1; Media Super, above n 95, 1; First Super, above n 95.

change, it may be appropriate for beneficiaries to only obtain independent advice once in a set period of time. Doing so would decrease the costs involved in splitting contributions and may sufficiently balance the expenses involved against the level of protection required.

All things considered, balancing the interests of the beneficiaries and trustees and the expenses involved, independent advice looks to be the more appropriate preventative measure to minimise the risk of applications to split superannuation contributions being made by vulnerable spouses in circumstances of impaired consent. Adopted in conjunction with education programs about the scheme and the risks of making an uninformed decision to split superannuation contributions,³¹² this safeguard would go at least some way towards ameliorating the current situation.

B Remedial Measures

Preventing beneficiaries from seeking to split their superannuation contributions due to vitiated consent is essential in light of its detrimental effects and the importance of superannuation savings in retirement. However, remedial measures are also required due to the possibility that some beneficiaries have already made an uninformed decision to split their superannuation contributions. Further, notwithstanding that they may have been fully informed by an independent advisor, some spouses will be coerced or unduly influenced into transferring their benefits to their spouse. The prevalence of domestic violence, which can manifest as psychological and financial abuse, requires lawmakers to factor this in as a reality, not just a possibility.

³¹² Certainly, the need for splitting spouses to be educated about the scheme was highlighted by several parties during the scheme's consultation process: Appendix B, Commenting Entity 13, Commenting Entity 15; Association of Superannuation Funds of Australia, Submission No 6, above n 80, 8; Women's Action Alliance, above n 46, 4; Financial Planning Association of Australia, above n 96, 4.

1 *Statutory Amendment to Allow Trustees to Act Under Dictation for the Contributions Splitting Scheme*

One improvement might be to amend the statutory framework to remove the existing disjoin between the legal and practical decision making by acknowledging that superannuation trustees do act under direction in relation to contributions splitting and by stipulating that they are permitted to do so. This would prevent trustees from being exposed to potential liability for implementing the scheme in the manner that the government intended. Furthermore, this would resolve some of the difficulty that beneficiaries may face in seeking recourse under the scheme. This is because, in cases of duress, undue influence and misrepresentation, it would clarify the causal link between the receiving spouse's wrongdoing in corrupting the beneficiary's decision to direct that their superannuation contributions be split and the wrongdoer's enrichment as a result of the split. It might even facilitate the recovery of contributions in cases where there was no 'wrongdoer', such as in instances of non est factum.

This outcome might be achieved in several ways. Currently, trustees cannot act under dictation unless an exception applies.³¹³ Contributions splitting could be added to the existing permitted exceptions.³¹⁴ Alternatively, the scheme could be amended to remove trustees' discretion when they receive a valid contributions splitting application. Regulation 6.44 could permit trustees to impose additional requirements in their trust deeds that must be met, such as a minimum remaining balance to ensure that beneficiaries are able to meet their surcharge liabilities, before an application will be valid.³¹⁵

However, as trustees would have an obligation to follow the beneficiaries' directions, the trustees would have no discretion.³¹⁶ This would prevent trustees from being potentially liable for acting in breach of section 58(1), simply by virtue of implementing the contributions splitting scheme as the legislators intended. This amendment would be consistent with the suggestions for

³¹³ *SIS Act* s 58.

³¹⁴ See *ibid* s 58(2).

³¹⁵ *SIS Regulations* reg 6.44.

³¹⁶ See *LGSS v Egan* [2002] NSWSC 1171 (4 December 2002) [87]-[89] (Austin J) where it was noted that trustees do not have discretion where they have an obligation to follow directions.

legislative reform made by Blue J in *Retail Employees Superannuation Pty Ltd v Pain*.³¹⁷ In that case, his Honour opined that section 58 should be recast so as not to apply to circumstances where trustees ought to be permitted to follow beneficiaries' instructions because the legislature could not have intended section 58(1) to prohibit such dictation.³¹⁸

2 *Statutory Claw-back Mechanism*

An alternative, or perhaps additional, remedial mechanism would be to implement a statutory provision enabling beneficiaries to 'claw-back' superannuation contributions split when their decision to apply was not free, informed or independent. This mechanism would enable beneficiaries to bypass the issues concerning their ability to seek recourse arising from the fact that beneficiaries do not legally consent to transferring contributions to the receiving spouse. Such mechanism would be akin to rescission, which is the usual remedy provided to innocent parties where their consent to a transaction was vitiated.³¹⁹

The Australian Law Reform Commission considered the idea of a statutory claw-back mechanism to address the possibility of spouses being coerced into splitting their superannuation contributions.³²⁰ The Association of Superannuation Funds of Australia and the Australian Institute of Superannuation Trustees did not oppose this idea.³²¹

A statutory claw-back mechanism could provide that where beneficiaries can establish that they applied to split their contributions due to vitiated consent, trustees must transfer the split contributions back to the splitting spouse. Such a

³¹⁷ [2016] SASC 121 (8 August 2016) (Blue J).

³¹⁸ *Ibid* [512] (Blue J).

³¹⁹ See, eg, *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* [2013] WASC 36 (20 February 2013) [201] (Murphy JA); *National Westminster Bank plc v Morgan* [1985] AC 686, 705 (Lord Scarman); *Cockburn v Gio Finance Ltd (No 2)* (2001) 51 NSWLW 624, 634 (Mason J); *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J); *Sharpley v Louth* (1876) 2 Ch D 663, 685 (James LJ).

³²⁰ Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, above n 2, 466.

³²¹ Association of Superannuation Funds of Australia, Submission No 24 to Australian Law Reform Commission, above n 235, 2; Australian Institute of Superannuation Trustees, Submission No 146 to Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, October 2011, 4.

mechanism should be limited to circumstances involving vitiated consent so that parties cannot seek to claw-back contributions transferred due to a change of mind. This mechanism might also be available in cases of vitiated consent where there is no ‘wrongdoer’, such as in instances of non est factum. To allow otherwise would prevent receiving spouses from having security and control over the contributions received in circumstances where no improper acts have occurred. Certainly, the government intended that split contributions would be irrevocable once transferred.³²²

This mechanism should be administered by the Court, which should determine the amount to be ‘clawed-back’, in order to shield superannuation trustees from liability to the splitting spouse for retransferring too little or to the receiving spouse for retransferring too much. A statutory mechanism can also address issues concerning the lapse of time between the improper acts and returning the contributions to the splitting spouse. Generally, there is a six years limitation period before parties are barred from bringing claims against wrongdoers or trustees.³²³ This can be problematic in the superannuation context because the innocent party may not be aware within six years of the improper act. A claw-back mechanism can explicitly address the likelihood of delays in bringing claims and provide a more suitable limitation period.

C Concluding Remarks

There are currently no safeguards in place to ensure that applications to split superannuation contributions are made as the result of a free and informed decision. Furthermore, the fact that the scheme is implemented using an application process within the superannuation system’s trust mechanism means that beneficiaries currently have no clear avenue of recourse to recover contributions improperly made from the receiving spouse. Trustees may be exposed to liability as a result. The importance of superannuation in ensuring that individuals have sufficient retirement income makes it necessary for the issues in the superannuation contributions splitting scheme to be resolved.

³²² Treasury, *Splitting of Superannuation Contributions Between Couples*, above n 34, 4.

³²³ See, eg, *Limitation Act 2005* (WA) s 13; *Limitation Act 1969* (NSW) s 48; *Limitation of Actions Act 1974* (Qld) s 27.

Preventative safeguards should be implemented to ensure that beneficiaries understand the practical implications of contributions splitting and are not forced or manipulated to split their contributions. While the safeguards discussed will impose administrative burdens on trustees and additional costs on beneficiaries, requiring beneficiaries to seek independent advice provides a reasonable balance between both parties' interests.

Furthermore, remedial measures should be introduced to allow affected beneficiaries to seek recourse where the quality of their consent to the transfer of their contributions was unacceptably impaired. It is probably unfair to hold trustees liable for implementing the scheme as the legislature intended them to. Liability should fall on the wrongdoer, or where there is no wrongdoer, on the unjustly enriched receiving spouse – unless the receiving spouse has a good defence.

Therefore, it is submitted that the superannuation contributions splitting scheme should be amended to require that an applicant first obtains independent advice about the implications and advisability of splitting their contributions with their spouse. The legislation should also permit trustees to obey a direction of the beneficiary to split their contributions. The legislation should also be amended to prevent contributions splitting in circumstances where the receiving spouse has a higher income than the splitting spouse. Finally, the legislation should be amended to provide beneficiaries with a statutory mechanism by which they can recover contributions that were split due to vitiated consent.

VI CONCLUSION

This thesis examined the dangerous deficiencies of the superannuation contributions splitting scheme. As matters stand, spouses can be coerced, pressured and misled to confer most, if not all of their superannuation contributions to their spouse. Further, it has been recognised in the case law that financial dealings between spouses carry a higher risk of impaired consent and the very well-known dangers of psychological and financial abuse as manifestations of intimate partner abuse. Thus, a scheme that was intended to improve the position of women with respect to superannuation savings can in fact be used as a weapon to strip women of their financial independence.

Yet, there are currently no safeguards in place to protect vulnerable individuals in the contributions splitting scheme. Furthermore, the manner in which the scheme was implemented creates a dissociation between the decision to split superannuation contributions, which is, as a matter of practice, made by the splitting spouse, and the decision to accept the application and transfer the contributions to the receiving spouse, which is, as a matter of law, made by the superannuation trustee. As a result, splitting spouses do not have a clear right to recourse under the scheme where their consent to make an application was impaired.

Moreover, the delayed impact of the contributions splitting scheme means that spouses will not realise the damage caused until decades later. At that point, it will be too late for victims to recover financially. Given the importance of superannuation in providing individuals with income in retirement, these issues under the contributions splitting scheme must be addressed. This is particularly as traditional trust laws are unlikely to provide victims with a right to recourse under the contributions splitting scheme. This thesis has proposed potential solutions to reduce the risk of harm to spouses and provide them with a right to recover contributions that were improperly split.

Until these legal issues are addressed, there is a risk that low-income and non-working spouses, and women in particular, will be left in a worse financial

position under the contributions splitting scheme. If these issues are not resolved, the community will ultimately bear the burden of providing welfare to the victims left with insufficient superannuation savings through the age pension. Women are already retiring with insufficient superannuation savings and there is also an increasing number of older women becoming homeless as a result of insufficient superannuation savings. Thus, there is a risk that this situation will worsen if left unchanged.

However, the legal issues underlying the superannuation contributions splitting scheme form only a small part of a much larger problem. Ultimately, the issues concerning the contributions splitting scheme stem from the incongruence between the superannuation system and certain aspects of traditional trust law. Trust law plays a complex role in the superannuation system,³²⁴ which is made all the more complex by the lack of clarity as to the extent to which trust law applies to and is modified by the superannuation system. Further research will be necessary to fully understand the role trust law plays in the contributions splitting scheme and, more generally, the superannuation system in order to resolve these underlying issues.

³²⁴ See Scott Donald, *The Role of Trust Law in the Superannuation System*, above n 5 for a discussion on the multi-layered role trust law plays in the superannuation system.

VII BIBLIOGRAPHY

A *Articles/Reports*

Adams, Adrienne E et al, 'Development of the Scale of Economic Abuse' (2008) 14 *Violence Against Women* 563

Antai, Diddy et al, 'The Effect of Economic, Physical, and Psychological Abuse on Mental Health: A Population-Based Study of Women in the Philippines' (2014) 2014 *International Journal of Family Medicine* 1

Australia's National Research Organisation for Women's Safety, *Violence Against Women: Key Statistics*
<<http://anrows.org.au/sites/default/files/Violence-Against-Australian-Women-Key-Statistics.pdf>>

Australian Consumer Law, *Compliance and Enforcement: How Regulators Enforce the Australian Consumer Law* (2010)
<http://consumerlaw.gov.au/files/2015/06/compliance_enforcement_guide.pdf>

Australian Government, *Australian Consumer Survey* (2011)
<http://consumerlaw.gov.au/files/2015/09/Australian_Consumer_Survey_Report.pdf>

Barnish, Mary, *Domestic Violence: A Literature Review* (September 2004) *Her Majesty's Inspectorate of Probation*
<<http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/inspectors/hmi-probation/docs/thematic-dv-literaturereview-rps.pdf>>

Bower, Rhys, '*Finch v Telstra Super*: The High Court declines to move on from *Karger v Paul*' (2011) 5 *Journal of Equity* 151

Chandler, Adrian, 'Undue Influence and the Function of Independent Advice' (1995) 111 *Law Quarterly Review* 51

Chew, Charles C Y, 'Another Look at the Giving of Independent Advice to Sureties: Some Uncertainties and Evolving Concerns' (2006) 18 *Bond Law Review* 45

Chew, Charles, 'Rethinking the Special Equity Rule for Wives: Post Garcia, Quo Vadis, Where to From Here?' (2007) 19 *Bond Law Review* 61

Collins, Paul, 'The Best Interests Duty and the Standard of Care for Superannuation Trustees' (2014) 88 *Australian Law Journal* 632

Corrie, Tanya and Magdalena McGuire, *Searching for Solutions: A Spotlight on Economic Abuse Research Report* (Good Shepherd Youth & Family Service and Kildonan UnitingCare, 2013)

Cretney, Stephen M, 'The Little Woman and the Big Bad Bank' (1992) 108 *Law Quarterly Review* 534

Dal Pont, G, 'The Varying Shades of "Unconscionable" Conduct – Same Term, Different Meaning' (2000) 19 *Australian Bar Review* 135

Daly, Tony, 'Work, Care, Retirement and Health: Ageing 'Agendas'' (October 2014) University of South Australia Hawke Research Institute
<<https://unisa.edu.au/Global/EASS/HRI/CWL/publications/AA%20lit%20review%20Final.pdf>>

De Zwaan, Laura, Mark Brimble and Jenny Stewart, 'Engagement with Superannuation: Is There Really a Gender Gap?' (2015) 4 *Finsia Journal of Applied Finance* 12

Doherty, Deborah and Dorothy Berglund, *Psychological Abuse: A Discussion Paper* (26 July 2012) Public Health Agency of Canada
<<http://www.phac-aspc.gc.ca/sfv-avf/sources/fv/fv-psych-abus/index-eng.php>>

Donald, Scott, "'Best" Interests?' (2008) 2 *Journal of Equity* 245

Donald, Scott, 'What's in a Name? Examining the Consequences of Inter-legality in Australia's Superannuation System' (2011) 33 *Sydney Law Review* 295

Donald, Scott, *The Role of Trust Law in the Superannuation System*, Australian Prudential Regulation Authority
<<http://www.apra.gov.au/AboutAPRA/WorkingAtAPRA/Documents/Scott-Donal>>

d_What-contribution-does-trust-law-make-to-the-regulatory-scheme-shaping-superannuation-in-Australia.pdf>

Edelman, James and Elise Bant, 'Setting Aside Contracts of Suretyship: The Theory and Practice of Both Limbs of *Yerkey v Jones*' (2004) 15 *Journal of Banking and Finance Law and Practice* 5

Follingstad, Diane R and Dana D DeHart, 'Defining Psychological Abuse of Husbands Toward Wives: Contexts, Behaviors, and Typologies' (2000) 15 *Journal of Interpersonal Violence* 891

Goodman, Lisa et al, 'The Intimate Partner Violence Strategies Index: Development and Application' (2003) 9 *Violence Against Women* 163

Heng, Panha, Scott Niblock and Jennifer Harrison, 'Retirement Policy: A Review of the Role, Characteristics, and Contribution of the Australian Superannuation System' (2015) 29 *Asian-Pacific Economic Literature* 1

Howell, Nicola, "'Sexually Transmitted Debt": Feminist Analysis of Laws Regulating Guarantors and Co-Borrowers' (1995) 4 *Australian Feminist Law Journal* 93

Millbank, Jenny and Jenny Lovric, 'Darling, Please Sign This Form: Relationship Debt and Guarantees' (2003) 28 *Alternative Law Journal* 282

O'Donovan, James, 'The Retreat from *Yerkey v Jones*: From Status Back to Contract' (1996) 26 *Western Australian Law Review* 309

O'Leary, K D, 'Psychological Abuse: A Variable Deserving Critical Attention in Domestic Violence' (1999) 14(1) *Violence and Victims* 3

Parker, Christine and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Businesses Think about the Costs of Compliance with the Trade Practices Act' (2008) 32(2) *Melbourne University Law Review* 554

Paterson, Jeannie, 'The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934

Phillips, John, 'Setting Aside Guarantees: Another Approach' (2002) 2 *Oxford University Commonwealth Law Journal* 47

Pico-Alfonso, Maria A et al, 'The Impact of Physical, Psychological, and Sexual Intimate Male Partner Violence on Women's Mental Health: Depressive Symptoms, Posttraumatic Stress Disorder, State Anxiety, and Suicide' (2006) 15 *Journal of Women's Health* 599

Smallwood, Emma, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence* (September 2015) Women's Legal Service Victoria
<<http://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report.pdf>>

Stavrianou, Angela, 'Expanding the Equitable Doctrine of Wife's Special Equity' (2007) 18 *Journal of Banking and Finance Law and Practice* 105

Taft, Angela, Kelsey Hegarty and Michael Flood, 'Are Men and Women Equally Violent to Intimate Partners?' (2001) 25 *Australian and New Zealand Journal of Public Health* 498

Thomas, Geraint W, 'The Duty of Trustees to Act in the 'Best Interests' of their Beneficiaries' (2008) 2 *Journal of Equity* 177

Wong, Simone, 'Revisiting Barclays Bank v O'Brien and Independent Legal Advice for Vulnerable Sureties' (2002) 7 *Journal of Business Law* 439

B Books

Behrens, Juliet, 'Women and Family Law' in Patricia Eastal (ed), *Women and the Law in Australia*, (LexisNexis Butterworths, 2010)

Bozzi, Claudio, 'Contracts of Guarantee' in Dilan Thampapillai et al, *Australian Commercial Law* (Cambridge University Press, 2015) 239

Carter, J W, *Carter on Contract* (LexisNexis Butterworths, 6th ed, 2012)

Enonchong, Nelson, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2nd ed, 2012)

Goodrich, Peter, 'Gender and Contracts' in Anne Bottomley (ed) *Feminist Perspectives on The Foundational Subjects of Law* (Cavendish Publishing Limited, 1996) 17

Heydon, J D and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016)

Pascoe, Janine, *Women Directors who Guarantee Company Debts: Resolving the Conundrum of Protection Versus Liability* (Lawbook, 2004)

Radan, Peter and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2013)

Robertson, Andrew, 'Constraints on Policy-Based Reasoning in Private Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing, 2009) 261

Robinson, Amanda, 'Domestic Violence' in Fiona Brookman et al (eds), *Handbook on Crime* (Willan Publishing, 2010) 245

Xiao, Jing Jian, *Consumer Economic Wellbeing* (Springer, 2015)

C Cases

Agripay Pty Limited v Byrne [2011] QCA 85 (3 May 2011)

Alcoa of Australia Retirement Plan Pty Ltd v Frost (2012) 36 VR 618

Allcard v Skinner (1887) 36 Ch D 145

Amtel Pty Ltd v Ah Chee [2015] WASC 341 (11 September 2015)

ANZ Banking Group Ltd v Alirezai [2004] QCA 6 (6 February 2004)

Application of Scali [2010] NSWSC 1254 (6 October 2010)

Arkwright v Newbold (1881) 17 Ch D 301

Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd [1999] 1 VR 144

Astley v Austrust Ltd (1999) 197 CLR 1

Attorney-General (Cth) v Breckler (1999) 197 CLR 83

Attorney-General v Kowalski [2015] SASC 123 (19 August 2015)

Austin v Austin (1906) 3 CLR 516

Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (rec and mgr apptd) (in liq) (Controllers apptd) (No 3) [2013] FCA 1342 (12 December 2013)

Australian Securities and Investments Commission v Edwards [2006] NSWSC 376 (5 May 2006)

Australian Securities and Investments Commission v Healey (No 2) (2011) 196 FCR 430

Australian Securities and Investments Commission v Vines (2005) 224 ALR 499

Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424

Avery v Saree Holdings Ltd [2012] NSWSC 938 (10 August 2012)

Bank of Credit and Commerce International SA v Aboody [1990] 1 QB 923

Bank of New South Wales v Rogers (1941) 65 CLR 42

Barclays Bank plc v O'Brien [1993] QB 109

Barclays Bank plc v O'Brien [1994] 1 AC 180

Barton v Armstrong [1976] AC 104

Beneficial Finance Corp v Karavas (1991) 21 NSWLR 256

Bester v Perpetual Trustee Company Ltd [1970] 3 NSW 30

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd [2015] NSWCA 104 (22 April 2015)

Breen v Williams (1996) 186 CLR 71

Bridgewater v Leahy (1998) 194 CLR 457

Brown v The NSW Trustee [2011] NSWSC 1203 (23 September 2011)

Butler v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2012] FCA 790 (29 June 2012)

Carruthers v Carruthers [1896] AC 659

Citisecurities Limited v Commissioner of Stamp Duties [1995] QCA 317 (28 July 1995)

Civil Service Co-operative Society of Victoria Ltd v Blyth (1914) 17 CLR 601

Clarke v Great Southern Finance Pty Ltd (rec and mgr apptd) (in liq) [2014] VSC 516 (11 December 2014)

Cockburn v Gio Finance Ltd (No 2) (2001) 51 NSWLW 624

Cohen v Amberley Corporation Australia Pty Ltd [2016] VSC 140 (7 April 2016)

Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447

Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Beck (2016) 334 ALR 992

Cowan v Scargill [1985] Ch 270

Credit Lyonnaise Bank Nederland NV v Burch [1997] 1 All ER 144ch

Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40

Curwen v Vanbreck Pty Ltd (2009) 26 VR 335

Darjan Estate Co plc v Hurley [2012] 1 WLR 1782

Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) [1992] 2 AC 152

Edington v Board of Trustees of the State Public Sector Superannuation Scheme
[2015] QSC 245 (21 August 2015)

Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd
[2013] WASCA 36 (20 February 2013)

Emhill Pty Ltd v Bonsoc Pty Ltd (No 2) [2007] VSCA 108 (31 May 2007)

Farmers' Co-operative Executors & Trustees Ltd v Perks (1989) 52 SASR 399

Fay v Moramba Services Pty Ltd [2009] NSWSC 1428 (16 December 2009)

Finch v Telstra Super Pty Ltd (2010) 242 CLR 254

Folan v United Super Pty Ltd [2014] NSWSC 343 (27 March 2014)

Ford v Perpetual Trustees Victoria Ltd (2009) 75 NSWLR 42

Foster v Mackinnon (1869) LR 4 CP 704

Friend v Brooker (2009) 239 CLR 129

Garcia v National Bank of Australia Ltd (1998) 194 CLR 395

Gibbons v Wright (1954) 91 CLR 423

Gisborne v Gisborne (1877) 2 App Cas 300

Gould v Vaggelas (1985) 157 CLR 215

Harb v Harb [2010] NSWSC 1251 (5 October 2010)

Hart v Burbidge [2013] EQHC 1628 (Ch) (12 June 2013)

Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405

Haywood v Roadknight [1927] VLR 512

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465

Henville v Walker (2001) 206 CLR 459

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

HSBC Bank plc v Brown [2015] EWHC 359 (Ch) (17 February 2015)

Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)
(1993) 182 CLR 26

Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd
(2006) 198 FLR 302

Johnson v Buttress (1936) 56 CLR 113

Johnson v Staniforth [2002] WASCA 97 (24 April 2002)

Kain v Hutton [2000] BCL 200 (3 December 2004)

Karger v Paul [1984] VR 161

Kenyon v Spry (2008) 238 CLR 366

Khan v Khan (2004) 62 NSWLR 229

Kokos International Pty Ltd v Libra Motors Pty Ltd (No 3) [2007] WASC 301 (10
December 2007)

Kowalski v MMAL Staff Superannuation Fund Pty Ltd (No 3) [2009] FCA 53 (5
February 2009)

LGSS v Egan [2002] NSWSC 1171 (4 December 2002)

Louth v Diprose (1992) 175 CLR 621

Macklin v Dowsett [2004] EWCA Civ 904 (14 June 2004)

Maelor Jones Investments (Noarlunga) Pty Ltd v Heywood-Smith (1989) 54
SASR 285

Magnacrete Ltd v Douglas-Hill (1988) 48 SASR 565

Maguire v Makaronis (1997) 188 CLR 449

Mandie v Memart Nominees Pty Ltd (2014) 42 VR 325

Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd
(2011) 282 ALR 167

Mason v New South Wales (1959) 102 CLR 108

Mavaddat v HSBC Bank Australia Ltd (No 2) [2016] WASCA 94 (9 June 2016)

McIvor v Westpac Banking Corporation [2012] QSC 404 (14 December 2012)

McLaughlin v Daily Telegraph Newspaper Co Ltd (1904) 1 CLR 243

McMillan v McMillan (1891) 17 VLR 33

Mercer Superannuation (Australia) Limited v Billinghamurst [2016] FCA 1274 (28
October 2016)

Miljevic v Holden Employee Superannuation Fund Pty Ltd [2016] FCA 718 (17
June 2016)

Morley v Australian Securities and Investments Commission (No 2) (2011) 83
ACSR 620

Muskham Finance Ltd v Howard [1963] 1 QB 904

National Commercial Banking Corporation of Australia Ltd v Batty (1986) 160
CLR 251

National Westminster Bank plc v Morgan [1985] AC 686

Nestle v National Westminster Bank plc [1993] 1 WLR 1260

New South Wales v Lepore (2003) 212 CLR 511

Niersmans v Pesticcio [2004] EWCA Civ 372 (1 April 2004)

Padden v Bevan Ashford Solicitors [2012] 1 WLR 1759

Pao On v Lau Yiu Long [1980] AC 614

- Papadopoulos v Hristoforidis* [2001] NSWCA 368 (12 October 2001)
- Partridge v Equity Trustees Executors & Agency Co Ltd* (1947) 75 CLR 149
- Peanut Marketing Board v Cuda* (1984) 79 FLR 368
- Permanent Mortgagees Pty Ltd v Vandenberg* (2010) 41 WAR 353
- Petelin v Cullen* (1975) 132 CLR 355
- Quinton v Proctor* [1998] 4 VR 469 (25 May 1998)
- Ramsay Health Care Australia Pty Limited v Adrian Compton* [2015] NSWSC 163 (6 March 2015)
- Randall v Randall* [2004] EWHC 2258 (Ch) (30 July 2004)
- Re Anderson-Berry* [1928] Ch 290
- Re Brockbank* [1948] Ch 206
- Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 (3 May 1999)
- Readymix Holdings International Pte Ltd v Wieland Process Equipment Pty Ltd (No 2)* [2008] FCA 1480 (3 October 2008)
- Roads and Traffic Authority v Royal* [2008] HCA 19 (14 May 2008)
- Rose v Piscopo* [2010] FMCA 948 (14 December 2010)
- Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773
- Saintclair v Saintclair* [2015] FamCAFC 245 (21 December 2015)
- Saunders v Anglia Building Society* [1971] AC 1004
- Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 (13 November 2003)
- Schreuders v Grandiflora Nominees Pty Ltd* [2014] VSC 310 (27 June 2014)
- Schultz v Bank of Queensland Ltd* [2015] QCA 208 (27 October 2015)

- Sharp v Maritime Super Pty Ltd* [2012] NSWSC 1350 (7 November 2012)
- Sharpley v Louth* (1876) 2 Ch D 663
- Sharpley v Louth* (1876) 2 Ch D 663
- Skeate v Beale* (1841) 113 ER 688
- Speight v Grant* (1883) 9 App Cas 1
- State Bank of New South Wales Ltd v Lanyoun* [2001] NSWSC 113 (9 March 2001)
- State Bank of New South Wales v Hibbert* [2000] NSWSC 628 (6 July 2000)
- Target Holdings Ltd v Redferns* [1996] 1 AC 421
- Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165
- Trustees of the Kean Memorial Trust Fund v Attorney-General (SA)* (2003) 86 SASR 449
- Tulloch (deceased) v Braybon (No 2)* [2010] NSWSC 650 (17 June 2010)
- Union Bank of Australia v Whitelaw* [1906] VLR 711
- Union Fidelity Trustee Co of Australia Ltd v Gibson* [1971] VR 573
- Universe Tankships Inc of Monrovia v International Transport Workers' Federation* [1983] 1 AC 366
- VBN v Australian Prudential Regulation Authority* (2006) 92 ALD 259
- Walker v Willis* [1969] VR 778 (1 January 1969)
- Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514
- Watkins v Combes* (1922) 30 CLR 180
- West v Public Trustee* [1942] SASR 109
- Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267

Wickstead v Browne (1992) 30 NSWLR 1

Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd (1998) 79 FCR 469

Winefield v Clarke [2008] NSWSC 882 (29 August 2008)

Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460

Yerkey v Jones (1939) 63 CLR 649

Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484

D Legislation

Acts Interpretation Act 1901 (Cth)

Corporations Act 2001 (Cth)

Family Law Act 1975 (Cth)

Family Law Rules 2004 (Cth)

Legislation Act 2003 (Cth)

Limitation Act 1969 (NSW)

Limitation Act 2005 (WA)

Limitation of Actions Act 1974 (Qld)

Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth)

Superannuation Guarantee (Administration) Act 1992 (Cth)

Superannuation Industry (Supervision) Act 1993 (Cth)

Superannuation Industry (Supervision) Regulations 1994 (Cth)

Trustee Act (NT)

Trustee Act 1898 (Tas)

Trustee Act 1925 (ACT)

Trustee Act 1925 (NSW)

Trustee Act 1936 (SA)

Trustee Act 1958 (Vic)

Trustees Act 1962 (WA)

E Internet Materials

Association of Superannuation Funds of Australia, *About ASFA*

<<http://www.superannuation.asn.au/about-asfa/who-is-asfa>>

Australian Bureau of Statistics, *Personal Safety, Australia, 2012* (11 December

2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>>

Australian Bureau of Statistics, *Average Weekly Earnings, Australia, May 2016*

(18 August 2016)

<<http://www.abs.gov.au/ausstats/abs@.nsf/0/7F76D15354BB25D5CA2575BC001D5866?Opendocument>>

Australian Investors Association, *Power of Compounding*

<<http://www.investors.asn.au/education/investment-basics/power-of-compounding/>>

Australian Prudential Regulatory Authority, *Superannuation*

<<http://www.apra.gov.au/super/pages/default.aspx>>

Australian Prudential Regulatory Authority, *Trust Deeds/Governing Rules*

<<http://www.apra.gov.au/Super/Pages/super-licensing-faq-trust-deeds-governing-rules.aspx>>

Australian Securities and Investments Commission, *Types of Super Funds* (1

April 2016) MoneySmart

<<https://www.moneysmart.gov.au/superannuation-and-retirement/how-super-works/choosing-a-super-fund/types-of-super-funds#difference>>

Australian Securities and Investments Commission, *Employer Contributions Calculator* (1 September 2016) MoneySmart

<<https://www.moneysmart.gov.au/tools-and-resources/calculators-and-apps/employer-contributions-calculator>>

Australian Securities and Investments Commission, *Getting Your Super* (17 October 2016) MoneySmart

<<https://www.moneysmart.gov.au/superannuation-and-retirement/how-super-works/getting-your-super>>

Australian Taxation Office, *Superannuation Contributions*

Surcharge - Information for Super Funds and Professionals (25 May 2015)

<<https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/APRA-resources/Fact-sheets/Superannuation-contributions-surcharge/>>

Australian Taxation Office, *Contribution Caps* (16 June 2015)

<<https://www.ato.gov.au/Super/Self-managed-super-funds/Contributions-and-roll-overs/Contribution-caps/>>

Australian Taxation Office, *How Your SMSF is Regulated* (16 June 2015)

<<https://www.ato.gov.au/Super/Self-managed-super-funds/Administering-and-reporting/How-we-help-and-regulate-SMSFs/How-your-SMSF-is-regulated/>>

Australian Taxation Office, *Contributions Splitting for Members* (8 September 2015)

<<https://www.ato.gov.au/Super/APRA-regulated-funds/Managing-member-benefits/Contributions-splitting-for-members/>>

Australian Taxation Office, *Claiming Deductions for Personal Super Contributions* (1 September 2016)

<<https://www.ato.gov.au/Individuals/Super/In-detail/Growing/Claiming-deductions-for-personal-super-contributions/>>

Australian Taxation Office, *How Tax Applies to Your Super* (1 September 2016)
<<https://www.ato.gov.au/individuals/super/in-detail/withdrawing-and-paying-tax/withdrawing-your-super-and-paying-tax/?page=3>>

Australian Taxation Office, *Concessional Contributions Cap* (7 September 2016)
<<https://www.ato.gov.au/Rates/Key-superannuation-rates-and-thresholds/?anchor=Concessionalcontributionscap#Concessionalcontributionscap>>

Cox, Kelly, *Preservation Age: It's Not All About Access*, Money Management (19 March 2015)
<<http://www.moneymanagement.com.au/features/tools-guides/preservation-age-it%E2%80%99s-not-all-about-access>>

Dixon Advisory, *Spouse Splitting Contributions May Have Benefits* (1 January 2014)
<<https://www.dixon.com.au/news/news-article/01-01-14/spouse-splitting-contributions-may-have-benefits>>

Domestic Violence and Sexual Assault Services, *What is Domestic Violence*
<<http://dvsas.org/get-informed/types-of-abuse/>>

GESB Superannuation, *Superannuation Contributions Surcharge*
<http://www.gesb.com.au/gesb_media/surcharge_fact_sheet.pdf>

Joyce, Rosanne, *Why It Pays to Split Up: The Benefit of a Contributions Splitting Strategy* (30 September 2015) The Private Practice
<http://theprivatepractice.com.au/_blog/Articles/post/why-it-pays-to-split-up-the-benefits-of-a-contributions-splitting-strategy/>

Legal Aid Western Australia, *Dividing Property - Married Couples* (1 October 2015)
<<http://www.legalaid.wa.gov.au/informationaboutthelaw/familyrelationshipschildren/financialmatters/Pages/DividingPropertyMarriedCouples.aspx>>

Murphy, Clare, *Domestic Violence is Much More than Physical Violence* (27 January 2009) Speak Out Loud

<<https://speakoutloud.net/helping-victims-survivors/physical-violence/coercive-control-3>>

NKH Knight, *Super Contributions Splitting*

<<https://www.nkhknight.com.au/blog/super-contributions-splitting/>>

One in Three, *Male Victims of Family Violence: Barriers to Disclosing*

<<http://www.oneinthree.com.au/malevictims>>

Our Watch, *Understanding Violence: Facts and Figures*

<<http://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>>

Power, Trish, *Retiring Before the Age of 60: The Tax Deal* (23 August 2016)

SuperGuide

<<http://www.superguide.com.au/accessing-superannuation/retiring-before-the-age-of-60-the-tax-deal>>

Power, Trish, *Super Concessional (Before-tax) Contributions: 2016/2017 Survival Guide* (19 July 2016) SuperGuide

<<http://www.superguide.com.au/boost-your-superannuation/super-concessional-contributions-survival-guide>>

SunSuper, *Contribution Splitting: Is it Right for You and Your Partner?* (July 2016)

<<https://www.sunsuper.com.au/documents/factsheets/sunsuper-contribution-splitting-factsheet.pdf>>

Treasury, *Our Department*

<<http://www.treasury.gov.au/About-Treasury/OurDepartment>>

Vision Super, *How Super Works – Additional Guide* (7 April 2016)

<<https://www.visionsuper.com.au/images/pds/2-How-super-works-Vision-Super-Saver.pdf>>

F Other

AMP, Submission to Treasury, *Exposure Draft of the Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012*, January 2012

Association of Superannuation Funds of Australia, Submission No 6 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, October 2003

Association of Superannuation Funds of Australia, Submission No 24 to Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, 7 April 2011

Association of Superannuation Funds of Australia, ‘Sixty Minute Super Incentive’ (Media Release, 7 March 2013)

<<http://www.superannuation.asn.au/media/media-releases/2013/media-release-7-march-2013>>

Asteron, *Contributions Splitting Application Form* (30 June 2008)

<http://www.asteronlife.com.au/sites/default/files/find-a-form/OPT839_Contributions_Splitting.pdf>

Australian Institute of Superannuation Trustees, Submission No 146 to Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, October 2011

Australian Law Reform Commission, *Equality Before the Law: Women’s Equality*, Report No 69 (1994) pt 2

Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010)

Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011)

Australian Law Reform Commission, *Grey Area – Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012)

Australian Taxation Office, *Contributions Splitting*

<<https://www.ato.gov.au/uploadedFiles/Content/SPR/downloads/SPR19312n15237.pdf>>

AustralianSuper, *AustralianSuper Trust Deed*

<<https://www.australiansuper.com/~media/Files/BoardGovernance/201111/AustralianSuper%20Trust%20Deed.ashx>>

AustralianSuper, *Split Your Super Contributions with Your Spouse*

<<https://www.australiansuper.com/~media/Files/Forms/Split%20your%20super%20contributions%20with%20your%20spouse.ashx>>

Brough, Mal, ‘Splitting of Superannuation Contributions Between Couples’ (Media Release, No. 27, 10 May 2005)

<<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2005/027.htm&pageID=003&min=mtb&Year=2005&DocType=0>>

CARE Super Pty Ltd, *Contribution Splitting Form*

<<https://www.caresuper.com.au/download.php?node=1970>>

Catholic Super, *Splitting Super Contributions*

<<http://csf.com.au/documents/forms/ContributionsSplittingApplication.pdf>>

Cavendish Superannuation, ‘Splitting Under the Knife’ [2006] (April) *Cavendish Superannuation: Technical Updates*

Cbus, Submission No 9 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 2003

Charaneka, Scott and Stanley Drummond, *Superannuation Trustees’ Proactive Duty to Investigate TPD Claims* (December 2011) *Norton Rose Fulbright*

<<http://www.nortonrosefulbright.com/knowledge/publications/61021/superannuation-trustees-proactive-duty-to-investigate-tpd-claims>>

Charter Group, Parliament of Australia, *A Super Charter: Fewer Changes, Better Outcomes* (2013)

Cleveland, Debra, 'Salary Sacrifice Early and Let Compound Interest do the Hard Work to Build your Super', *Australian Financial Review* (online), 1 May 2015
<<http://www.afr.com/personal-finance/budgeting/salary-sacrifice-early-and-let-compound-interest-do-the-hard-work-to-build-your-super-20150423-1mrzxn>>

Clough Superannuation Fund, *Contribution Splitting*
<http://www.cloughsuper.com.au/contribution_splitting.pdf>

Clough Superannuation Fund, *Deed of Variation* (30 June 2005)
<<http://www.cloughsuper.com.au/TrustDeed.pdf>>

Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 2005

CPA Australia, Submission No 8 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 17 October 2003

Economics Legislation Committee, Senate, *Provisions of the Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003 and Associated Regulations* (2003)

Email from The Treasury Retirement Income Policy Division to Collin Ong, 18 October 2016

Explanatory Memorandum, Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012 (Cth)

Explanatory Memorandum, Tax Laws Amendment (Simplified Superannuation) Bill 2006 (Cth)

Explanatory Memorandum, Tax Laws Amendment (Superannuation Contributions Splitting) Bill 2005 (Cth)

Financial Planning Association of Australia, Submission No 16 to Senate Standing Economics Legislation Committee, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 2003

First Super, *Contribution Splitting*

<http://www.firstsuper.com.au/wp-content/uploads/2015/03/75_fir003-contribution-splittingv2-ed5413d4-6db6-42db-95f1-814b7ef3fa0f-0_4ea266.pdf>

Ford, Harold et al, Thomson Reuters, *Ford and Lees: The Law of Trusts* (at 12 August 2015) 9 Trustees' Duties, 'Duty to Act Personally'

Ford, Harold et al, Thomson Reuters, *Ford and Lees: The Law of Trusts* (at 12 August 2015) 9 Trustees' Duties, 'The Duty: General and Specific'

HOSTPLUS, *Trust Deed for the HOSTPLUS Superannuation Fund* (5 April 2013)

<<https://hostplus.com.au/-/media/Files/Hostplus/Documents/About-Us/hostplus-trust-deed.pdf>>

House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Improving the Superannuation Savings of People under 40* (2006) 71

Howard, John, Prime Minister of Australia, 'Superannuation and Savings Policy Launch' (Speech delivered at the Superannuation and Savings Policy Launch, Brisbane, 5 November 2001)

Institute of Chartered Accountants in Australia, Submission No 4 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 17 October 2003

Intrust Super, *Intrust Super Fund Deed of Variation* (22 September 2016)

<<http://www.intrustsuper.com.au/wp-content/uploads/Trust-Deed-2016.pdf>>

Lawbook, *The Laws of Australia* (at 1 February 2014) 35 Unfair Dealing, '8 Undue Influence'

Lawbook, *The Laws of Australia* (at 1 February 2014) 35 Unfair Dealing, '2 Misrepresentation'

Levy, Michelle, *Unravelling: The Best Interests Duties – Process or Outcome?* (5 February 2015) Allens

<<http://www.allens.com.au/pubs/fsr/150205-unravelling-02.htm>>

LexisNexis, *Halsbury's Law of Australia* (at 6 October 2004) 110 Contract, '4 Vitiating Factors'

Macquarie, *Superannuation Technical Information Booklet* (1 October 2016)

<<http://www.macquarie.com.au/dafiles/Internet/mgl/au/docs/yourwrap/supertech.pdf>>

Maritime Super, *Deed of Amendment* (27 August 2015)

<<http://www.maritimesuper.com.au/Assets/Documents/other/trust-deed-and-amendments.pdf>>

Media Super, *Splitting Super Contributions*

<https://www.mediasuper.com.au/sites/mediasuper.com.au/files/splitting_super_contributions_jul_16.pdf>

Mercer Human Resource Consulting, Submission No 2 to Standing Senate Economics Legislation Committee, Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, 16 October 2003

Morgan, Anthony and Hannah Chadwick, 'Key Issues in Domestic Violence' (Research in Practice No 07, Australian Institute of Criminology, Australian Government, 2009)

Nielson, Leslie, Parliament of Australia, *Tax Laws Amendment (Superannuation Contribution Splitting) Bill 2005*, No 68 of 2005-06, 28 November 2005

Parliament of Australia, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003* (14 November 2003)

<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed%20inquiries/2002-04/super_splitting/submissions/sublist>

Phillips, Janet and Malcolm Park, 'Measuring Domestic Violence and Sexual Assault Against Women: A Review of the Literature and Statistics', (E-Brief, Parliamentary Library, Parliament of Australia, 2006)

Senate Economics References Committee, *A Husband is Not a Retirement Plan: Achieving Economic Security for Women in Retirement* (2016)

Senate Selection of Bills Committee, Parliament of Australia, *Report No 11 of 2003* (2003)

SuperSA, *Application to Split Eligible Contributions*

<http://www.supersa.sa.gov.au/files/import960-442_tsfm22.pdf>

Telstra Super, *The Trust Deed* (16 July 2013)

<http://www.telstrasuper.com.au/About_us/About_Telstra_Super/The_Trust_Deed>

Thomas, Matthew and Luke Buckmaster, 'Paternalism in Social Policy – When is it Justifiable?' (Research Paper No 8, Parliamentary Library, Parliament of Australia, 2010)

Thompson, Erica, 'Most Baby Boomers Today Have Insufficient Superannuation Savings - Those Golden Years', *The Courier – Mail* (Brisbane), 30 October 2006

Treasury, Australian Government, *Splitting of Superannuation Contributions Between Couples*, Consultation Paper (2002)

Treasury, Australian Government, *Objective of Superannuation*, Discussion Paper (9 March 2016)

Treasury, Australian Government, *Superannuation Reform: Reforming the Taxation of Concessional Contributions* (9 November 2016)

<http://www.budget.gov.au/2016-17/content/glossies/tax_super/downloads/FS-Super/03-SFS-Reform_of_concessional_contributions-161109.pdf>

UniSuper, *Consolidated Trust Deed* (1 November 2016)

<<https://www.unisuper.com.au/~media/FEBF4351CBA54329963C429D50EFD1CE.pdf>>

UniSuper, *See the Difference Interest Can Make*

<<https://www.unisuper.com.au/learning-centre/understanding-super/see-the-difference-interest-can-make>>

UniSuper, *Super Contribution Splitting with Your Spouse*

<https://www.unisuper.com.au/~media/files/forms%20and%20downloads/forms%20and%20brochures/contributing%20to%20super/unis000f34_contribution_splitting_fact_sheet_and_form.pdf>

Women's Action Alliance, Submission No 10 to Senate Standing Economics Legislation Committee, *Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003*, October 2003

VIII APPENDICES

A Australian Taxation Office's Contributions Splitting Application Form

Australian Government
Australian Taxation Office

Superannuation contributions splitting application

WHEN COMPLETING THIS FORM

- Print clearly in BLOCK LETTERS using a black pen only.
- Place in ALL applicable boxes.

Section A: Your details

1 Tax file number (TFN)

You don't have to provide your TFN to your superannuation fund. However, if your superannuation fund does not have your TFN, they cannot accept personal contributions (and other member contributions) and extra tax may be deducted from your employer contributions (and other assessable contributions).

<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
----------------------	----------------------	----------------------	----------------------	----------------------	----------------------	----------------------	----------------------

2 Full name

Title: Mr Mrs Miss Ms Other

Family name

First given name

Other given names

3 Address

<input type="text"/>
<input type="text"/>

Suburb/town

State/territory

Postcode

4 Date of birth ^{Day} / ^{Month} / ^{Year}

5 Sex Male Female

6 Daytime phone number (include area code)

7 Email address

Section B: Your superannuation fund's details

8 Fund's name


<input type="text"/>
<input type="text"/>

9 Australian business number (ABN)

10 Member account number

Section C: Your spouse's details

11 Tax file number (TFN)

 You don't have to provide your TFN to your superannuation fund. However, if your superannuation fund does not have your TFN, they cannot accept personal contributions (and other member contributions) and extra tax may be deducted from your employer contributions (and other assessable contributions).

12 Full name

Title: Mr Mrs Miss Ms Other

Family name

First given name

Other given names

13 Address

Suburb/town

State/territory

Postcode

14 Date of birth / /

15 Sex Male Female

16 Daytime phone number (include area code)

17 Email address

Section D: Your spouse's superannuation fund details

18 Fund's name

19 ABN

20 Member account number

B De-identified Summary of Submissions Made to the 2002 Consultation Provided by the Treasury

Commenting Entity	KEY POINTS/PROPOSALS AND MAIN LINE OF QUESTIONING
1	<ul style="list-style-type: none"> • To provide for maximum flexibility, all of the splitting options should be available with spouses choosing the most appropriate one for them – to avoid disputes if they have different views. • Exclude Superannuation fund where there has been a Court approved settlement. <ul style="list-style-type: none"> - The settlement approved by the Family Court allocates the payment of a portion of superannuation by way of periodic payment to one party. In this case, splitting of payment from fund can be allowable? - Splitting superannuation contributions could last many years and consequently create significant trauma where the cases have been settled and people have moved on in their lives.
2	<ul style="list-style-type: none"> • Where a Self Managed Superannuation Fund (SMSF) or Small APRA Fund (SAF) accepts a spouse member, the status of the fund (as determined by the number of members) may change. <ul style="list-style-type: none"> - There will be provisions to allow the fund to retain its status under certain conditions)? or - A fund will be expected to adjusted to this change in status? • Would be opposed to a policy which brought about a change in the status of a significant number of funds. • One of the main factors that enable funds to offer low cost insurance to members is the homogenous nature of the pool of fund members, eg particular occupation, similar work conditions, healthy enough to work etc. Opening fund membership to outside that homogeneous pool would change the risk profile of the pool consequently that

	<p>could result in an increase in the cost of insurance to all members.</p> <ul style="list-style-type: none"> • Where salary sacrifice amounts over and above those remitted to the Defined Benefit fund, the employee could pay pre-tax salary into an accumulation fund, then split it with spouse. This would avoid FBT of the employer contributing for an associate. • It is important that sufficient lead time is allowed for systems and controls to be in place to account for the splits and take on extra members.
3	<ul style="list-style-type: none"> • It convinced that Government lost sight to the major reason for having superannuation, that is to provide the highest level of superannuation entitlements for the member of the fund. This policy is pursuing because there was an election commitment. • The estimate cost to taxation revenue, \$11 million as stated in the consultation paper in Section 2 “key features”, must reflect costs of about \$70 million coming mostly from members accounts. • Comment in Section 3 - <i>“Given the Government election commitment that the administration burden will not fall on employers, this paper does not canvass options that involve the employer”</i> - is wrong. <ul style="list-style-type: none"> - In the case of Corporate Funds, who are run for the benefit of members with the sponsoring company covering some or all of the administration costs, administration burden will fall on employers. • To maximise the Superannuation benefits for members and their spoused, the only way is to allow the splitting of superannuation entitlements at retirement because it will not generate additional costs to members. • Given the flexible nature of the workforce and the recent changes to Family Law legislation relative to superannuation, to make a splitting decision irrevocable seems to be nonsense.

	<ul style="list-style-type: none"> - It is wrong word to use if “irrevocable” in the paper means that once contributions have been transferred into the spouse account they cannot be transferred back to the member account. • All split superannuation accounts at the benefit payment stage (after preservation age). This could also apply easily to defined benefit plans therefore avoiding the problems of having different rates for different types of policies.
4	<ul style="list-style-type: none"> • Option 1 is preferred. <ul style="list-style-type: none"> - It easy to handle changing circumstances and reduce administration. - It would be an ongoing arrangement for each pay period. - The spouse’s share although treated as employer (deducted) contribution should not be allowed to affect the spouse’s eligibility to claim a tax deduction for super contributions as a self-employed person.
5	<ul style="list-style-type: none"> • The resulting administration complexities and additional costs generated by the options have not been adequately discussed by the Paper. <ul style="list-style-type: none"> - Split contributions would create an enormous administration burden and consequently create additional costs to members. - Superannuation funds are required to provide offer the splitting options to all members, thus could create a cost explosion because funds need to update systems and processes. • Suggestion – The ability for providers to ‘opt in or out’: <ul style="list-style-type: none"> - facilitate an open environment which would allow providers to assess the demand from their fund members

	<p>and thus make an informed decision.</p> <ul style="list-style-type: none">- Provide fund members with the ability to select a provider based on their required ‘bells and whistles’, similar to the choice of fund regime. <ul style="list-style-type: none">• In relation to ‘Prospective Split’ and ‘Annual Split’ there would be an ability for fund members to decide which account the split contributions are sent.<ul style="list-style-type: none">- Enormous administration/compliance burden would be created for superannuation fund as effectively rollovers will be required each time a split is requested.- From experience, an increase in fees of 0.5% of the fund balance would be created.- Suggestion: only allow fund members to split contributions into an account within the splitting spouse’s fund, ie. The receiving spouse would be required to become a member of the splitting spouse’s fund.• Allow members to retrospectively advise their superannuation provider of the splitting between 1 July and 31 January under Annual split option would make problems with superannuation providers in completing year end accounts/report given a fund’s requirements for accounts/reports as at 30 June each year.• Annual Split suggests that fund members would have 7 months from year end to election, but most superannuation funds are required to lodge their returns within 4 months of year end.• Suggestions: Fund members who were looking for flexibility each year in relation to their splitting requirements could use the Retrospective Split option at the end of every year. Alternatively fund members who chose to fall under Splitting Flag option would have a flag attached to their fund account at all times and be able to have their desired splitting requirements in place going forward.<ul style="list-style-type: none">- <i>Splitting Flag:</i> allow fund members to advise their fund of their desired split requirements and for the fund to
--	--

	<p>flag the member’s account with these requirements. The flag would only be able to be revoked or amended by the splitting spouse’s request. In terms of timing, the Splitting Flag should be provided at least quarterly to allow funds and members to monitor the splitting of contributions.</p> <ul style="list-style-type: none"> - <i>Retrospective Split</i>: the ‘window of opportunity’ for fund members to retrospectively split be only available for 1 month after year end. Retrospective Split option would be able to be offered on an annual basis. However, fund members would be able to review the split when they receive their annual report and member statements later that year. • The Paper’s option 3 seems workable but need further information to make comments. • Remove the statement that a member who has satisfied a condition of release would not be eligible to receive splittable contributions, and replaced with the current spouse contribution eligibility, ie. Less than 65. • 50% restriction is sufficient deterrent for potential schemes that look to influence the ‘spirit’ of the splitting option proposal. • The Paper advises that a fund member who is in a pension account in their fund would not be eligible. The issue arises here with a fund that offers fund members the ability to run an accumulation account and a pension account within the same fund. This is particularly prevalent in SMSFs and small APRA funds. • The Paper discusses that eligibility to participate will be restricted to fund members who are ‘regular’ contributors. ‘Regular’ should be defined as at least annually.
6	<ul style="list-style-type: none"> • Option only allow people to split contributions which made after 2003. It would not work effective and attractive on people who will retire within several years.

	<ul style="list-style-type: none"> • Option is not equitable to self-funded retirees – still heavy tax burden.
7	<ul style="list-style-type: none"> • Strong support the concept of allowing couples to split their superannuation. • Allowing benefits to be split rather than contributions can achieve desired objectives. It also will only involve one transaction per member. Little action is required until a benefit become payable in cash. The split will occur at the time as the member’s benefit is being processed and amounts available to be split can be readily calculated using a proportionate method. • The cost involved with contribution splitting will unnecessarily erode the retirement savings unless an appropriate alternative, eg based on splitting a proportion of benefit, is developed. • With Family Law improvement and Choice of Fund implements, immediately control of superannuation will not be a significant flaw. • Use through splitting options by non-earning spouses to access cost effective death and disability cover in justifying contribution splitting is tenuous. • At the splitting stage, the individual will not have the ability to access the superannuation benefit and may not have other monies to pay for a proper advice. • Prospective Split Option generates too many transactions and creates high cost in trust deeds amendments, communication material to member, amending system, modify existing audit controls and costs associate with compliance issues. • Option 2 ‘Annual Split’ would appear to be a much more logical option, however, it still would result in significant cost.

- With ‘Annual Split’, complexities will arise if a member transfers to a new fund in a particular year. The new fund will not be aware of the contributions made during the year to the member’s previous year.
- ‘Joint Account’ Option does not include pre 1 July 2003 balances would result in many couples needing to have at least 3 accounts (one for each for pre July 2003 contributions and a joint account).
- It is doubtful that 50% limitation will result in the earlier establishment of superannuation accounts for spouses.
- If a maximum of 50% is to apply, it should be based on a percentage of the actual contributions received, including irregular contributions.
- The maximum amounts should not be adjusted to allow for taxed, fees and interest etc that have been charged or credited to the original member’s account.
- No need for a different maximum applying to undeducted contributions. The same percentage should apply to all contributions.
- The Proposal
 - Discriminates against older people, particularly older females;
 - Is inconsistent with the new provisions of the Family Law Act where there are no age barriers to splitting;
 - Will be difficult to administer as the original fund will generally not know the age details of the receiving spouse. This will lead to further costs as the receiving fund may need to return the amount to the original fund with further procession costs involved.
- It should be possible to transfer part of any future tax assessments to the fund of the receiving spouse.

	<ul style="list-style-type: none"> • Where a defined benefit member also has an account to which contributions are being made solely for the purpose of providing accumulation benefits, then splitting of the accumulation part should be allowed. • Have a concern with the proposal that self employed members will not be able to lodge or vary an election to claim a tax deduction after a contribution has been split. • The approach proposed in the Paper, that eligible service period of the original member would not transfer across to the receiving spouse, is consistent with the approach adopted under Family Law. • It is inappropriate to force funds to split contributions for members who only have an accumulation interest in the fund. It would be preferable if trustees, acting in the best interest of their members, could determine whether or not to make the arrangement available. • Recommend that Trustee be given the option of only allowing contributions splitting where the money remains in the same fund, ie the spouse also becomes a member of the fund. • Alternative approaches have been provided in Appendix 2.
8	<ul style="list-style-type: none"> • To ensure a more simplistic mechanism and to minimise costs, splitting should occur at the benefit end. It would provide a fairer splitting mechanism for all Australians including those with defined benefits and those who are approaching retirement and would be easier for funds to administer. • The link between employment and superannuation should be comprehensively reviewed as it is not in keeping with the changes in working arrangements and demographic patterns. <ul style="list-style-type: none"> - The employment link should be removed for Australians under 65 with a simplified employment test imposed for those Australians aged 65 or more.

	<ul style="list-style-type: none">- This would also reflect the many recent changes made to superannuation such as spouse contributions and child contributions that do not require the employment test to be passed.• The terminology used in the discussion is very loose and confusing.<ul style="list-style-type: none">- The use of the term ‘spouse contributions’ as outlined in the paper could potentially give rise to confusion with the current spouse contributions.- Should provide for a unique identifier, such as ‘split contributions’.• It should be made clear what contributions are captured under the term ‘deductible contributions’. All employer contributions should be included in this term.• No similar initiatives and taxation concessions have been considered in respect of same sex partners.• The self employed are not in the position to take full advantage of the splitting arrangements.• The options outlined provide more favourable arrangements for those people with multiple funds rather than one fund because of the rule allowing only deducted contributions to be split where a member has both deducted and undeducted contributions paid into the same fund.• Fees levied by the funds should represent the actual cost associated with providing the service and not the costs of implementing the splitting regime.• It is noted that the transfer of any contributions to a spouse account will be treated as an Eligible Termination Payment (ETP) roll-over. Clarification is needed as to what this will involve in terms of process and associated documentation.• Current surcharge reporting for non-self assessing funds will need to be modified if the split contributions are to be
--	---

	<p>included in the adjusted taxable income calculations of the splitting spouse.</p> <ul style="list-style-type: none">• With proposal, once the contribution has been split, a self employed person would not be able to make a new election to claim a deduction or amend an existing election in respect of a split amount. The rule should be reconsidered to ensure self-employed persons are not presented with arrangement that are overly restrictive.• System changes and reporting arrangements are required to ensure that the surcharge liability is not attached to those contributions that have been transferred to the receiving spouse. As a further point, the fund will be required to report their contributions for the year to the ATO.• There are issues in terms of the timing of member benefit statements with the splitting of contribution. The option that is ultimately used should limit confusion to members and complaints to funds where members do not understand how the splitting regime impacts the reports of their benefits and the timing of the contribution splitting.• It is unclear how death and disability insurance will be provided to the splitting spouse.• Further guidance is required in relation to the requirement that the receiving spouse should not be able to take the split contributions in cash immediately and to ensure consistency with the current preservation rules.• Alternative Option:<ul style="list-style-type: none">- Consideration should be given to adopting a hybrid approach based on options 1 and 2. That is, the member must lodge a prospective nomination of their intention to split before 30 June. The fund should determine the frequency of the split. The effective date of the split will be 30 June.- Self employed person should be given the option of providing a notice of intention to claim a ta deduction with their notice of intention split prior to 30 June. The requirement that self employer provide a 82AAT
--	---

	<p>notice prior to the splitting of the contributions should be removed as the member is unable to control when the fund will split the contributions.</p> <ul style="list-style-type: none"> • Does not favour Option 3 – Joint account because it would give rise to administrative complexities.
9	<ul style="list-style-type: none"> • The 50% maximum is adding another arbitrary element to the superannuation environment and adding to the complexity of superannuation. • Change the legislation, so that ATO can follow the split funds if there are not enough funds in the splitting spouse's account, or get rid of surcharge to allow people make additional contributions to split with their spouse and build spouse's superannuation.
10	<ul style="list-style-type: none"> • The proposed arrangement only apply to new contributions made after 1 July 2003, thus it will take years to before any spouses can gain any benefit sufficient enough to assist their future retirement. • In single income families, the single income earners will continue to pay the higher tax on their superannuation contributions and also be limited by the ETP and RBL whilst supporting their family. • Since the proposed arrangements only apply to 'accumulation funds', members of a 'defined benefit scheme' will be prevented from sharing their superannuation benefits with their spouse. • The proposed arrangements do not meet the objectives identified in Senator Coonan's forward.
11	<ul style="list-style-type: none"> • Have no objection so long as the costs can be recovered in service fees. • Detailed comments will be provided later.

12	<ul style="list-style-type: none">• The exclusion of accumulation benefits of defined benefit members from the splitting measure is inconsistent with the Government's policy and sends a confused message to members who have both defined benefits and accumulation benefits.• Flexibility of the splitting measure particularly will be needed by non-working spouses, who for some reason have limited superannuation. It is not clear why the contribution splitting measure should not be available to spouses over age 65.<ul style="list-style-type: none">- enabling couples in this category to access the measure promotes the Government's policy of encouraging self-reliance in retirement without offending other principles of retirement-income policy.• Prospective split:<ul style="list-style-type: none">- It seems relates to periodic or regular contributions. It could exclude 'one-off' or irregular contributions from a decision to split or members elect to split the 'one-off' but without election applying to regular/periodic contributions.- If the quarterly splitting option is adopted, the ownership of the split contributions prior to the split actually being made the superannuation provider would need to be clear, eg in the event that a benefit becomes payable, or bankruptcy intervenes etc. Presumably, the ownership to contributions to be split would be in the same proportion as the member's election.- Presumably, members will be able to revoke a contributions splitting election prospectively in respect of contributions made after the revocation is given to the superannuation provider (subject to any cap on the number of revocations which may be made within a given period imposed by a superannuation provider for administrative reasons).• Annual split:
----	--

	<ul style="list-style-type: none"> - the ownership of the contributions to be split prior to the split being effected would need to be made clear. - A distinction would need to be made for this purpose between prospective and retrospective decisions to split contributions (given that split contributions subject to a prospective election is capable of being effective as soon as the split contributions are received by the fund even though the actual contributions split by the fund may not occur at that time). - Consideration should be given to whether there are circumstances which should disentitle a member from making a retrospective election to split contributions, eg a self-employed member who has a RBL issue becomes bankrupt after making super contributions to the fund.
13	<ul style="list-style-type: none"> • Remains concerned that the consultation paper was released before the Government had made a decision on the legal advice they received with regard to Option 3. Cannot make extensive comment on the viability of the option. Therefore will maintain in this submission that Option 2, at this stage, seems to be the preferred option. • Option 2 is the most effective option, requiring less administrative change than Option 1. • There has been no commitment to an education program. The starting date of 1 July 2003 is supported, however, an extensive education program associated with this policy initiative will be required. • It will be difficult to ensure that the costs of administration change are borne only by those who elect to utilise superannuation splitting. Increased costs will be borne by all fund members. • Although the Paper states that it is not mandatory for fund to accept contributions on behalf of the receiving spouse, because of market competition super funds will have no choice, but to accept payments to continue to attract clients and maintain the competitive edge. • Greater clarity on the term ‘receiving spouse’s superannuation/separate account’ is required – is that means the

	<p>receiving spouse can have a completely different super fund to their splitting spouse?</p> <ul style="list-style-type: none"> • Member benefit protection should warrant greater thought. <ul style="list-style-type: none"> - the policy initiative would include a clause to the effect that super funds trustees have the ability to set minimum amounts, that must be in the super funds before splitting can occur. - Proposal should have indication on type of disclosure super funds are required to provide to both the splitting spouse and receiving spouse, ie. To provide members of the community with prospectuses and key feature statements. • Policy options that flow on from splitting of super contributions: <ul style="list-style-type: none"> - the next natural policy direction is to allow single-unemployed people to gain access to contributing to superannuation. - The Policy intent of the splitting of super accounts is to treat the individual as part of the family unit for taxation purpose. Would like to work with Tsy to explore the possibilities of broadening this outcome to the wider Income Tax regime.
14	<ul style="list-style-type: none"> • The most practical option would be to allow a person to split their benefit at retirement. • Splitting during the contribution phase may result in an imbalance in the final benefits with one partner still having benefits in excess of ET and RBL thresholds whilst the other partner is well below the thresholds. • Splitting during the growth phase will not result in any tax advantages. The only time the couples will receive tax advantages are at retirement.

	<ul style="list-style-type: none"> • If the cost of implementing and administering splitting was only passed on to those who take advantage of this proposal then the cost would be prohibitive. Funds will only be able to implement this proposal by passing the cost on to all members, for the advantage of a few. • opposed to extending contribution splitting to defined benefit funds since that would result in a reduced benefit accrual and lower death and temporary or total disablement benefits for the member. • does not believe that contribution splitting should be mandatory for all funds. • The proposed implementation date does not allow funds enough time to implement system and procedural changes. 2004 commencement date would be more realistic. • The Government should assess alternative options within the current eligible spouse contribution regime. • Require that the spouse account must be in the same fund as the member account will streamline administrative requirements and reduce costs.
15	<ul style="list-style-type: none"> • Instead of couples who have share one earning spouse's superannuation over extended periods of time having access to two RBL, They should qualify for one and a half or another discounted rate – just as married couples do not receive two full age pensions. • Capping of the amount able to be split could be considered, or means testing could be applied so that only those earning less than a certain amount (eg three time Average Weekly Earnings) could split. How much this would contain the cost to taxation revenue would also be worth examining. • The Government's intention, that the administrative burden not fall upon employers, is supported. • Option 1 may be simpler for splitting to go with the contributions flow in a computerised environment. It would

	<p>eliminate some of the timing and ongoing communications issues raised under Option 2.</p> <ul style="list-style-type: none">• For spouse who has a superannuation account from their previously work and has no intention of returning to work, the option of transferring her super assets into her husband's fund in a separate account, to facilitate splitting and reduce the administrative cost may be attractive.• Option1:<ul style="list-style-type: none">- It believes any service fee levied to effect the split should be minimal since the actual split between the two accounts would be a simple process for the administrators and that the administration costs would not increase significantly as a result of running two separate accounts for the working and non-working spouse.• Option 2: rather than make a yearly request, one notification should be sufficient and splitting should proceed until the member notifies otherwise.• Option 3: Do not favour join accounts believing that this could cause complication with death and disability insurance. It also will have extra administrative costs in relating to maintaining a third account.• The model adopted is not as important to them proceeding to implement this ground breaking pre election promise for women and in what is found to be the most practical manner possible, imposing the least administration costs and being most acceptable to the various stakeholders.• Other comments:<ul style="list-style-type: none">- the new arrangement should signal a move away from women having to sacrifice their rightful retirement income in order to secure a roof over the heads of themselves and their children after divorce.- Need for an education program before the new arrangements being introduced.
--	---

	<ul style="list-style-type: none"> - An obligation should be placed on providers to make clear statement on costs. • A sub account of the wage earner’s fund might also be favoured for death/disability cover. The inclusion of non-industrial participants may have the effect of lowering the average risk profile.
16	<ul style="list-style-type: none"> • Favours the annual split method. • Advantages of the annual split: <ul style="list-style-type: none"> - It is the most administratively simple to implement and cost effective method. It also requires minor wording changes to the Member’s Benefit Statements. - The split for the first year after commencement would take place after 1 July 2004 leaving more time for implementation. - The Annual Report to members to be issued after the 30 June 2003 year end would provide the opportunity to notify members of superannuation splitting to commence from 1 July 2003 with the first split being require after 1 July 2004l • Issues relating to the annual split: <ul style="list-style-type: none"> - It would be preferable for there to be minimum annual level of contributions before a split can occur. - Where a receiving spouse prefer s the contributions split to go to another fund there needs to be consistent policy concerning acceptance of that contribution as some funds may be willing to accept the contribution and some funds not. - The Member Benefit Protection standards in Part 5 of the SIS Regulations would need to be amended to

	<p>allow splitting fees to be charged where a member is a protected member of alternatively require a minimum account balance for splitting (ie above \$1,000 after the split).</p> <ul style="list-style-type: none">- Legislation would need to reflect the possible situation where the member exits the fund after a splitting order has been provided but before the splitting actually has been taken. In this case splitting order should be void.- Although it is clear that any surcharge liability remains with the splitting spouse after a split of contributions, there will need to be a “notional” contribution picked up for the reporting of surchargeable contributions after year end via the Member Contribution Statement.- For Risk only superannuation policies where there is no investment balance (ie the full contribution provides for insurance benefits) there is a problem with the debiting of any later surcharge liability. <ul style="list-style-type: none">• Disadvantages of the prospective split option:<ul style="list-style-type: none">- This option would require wholesale changes to the Section 82AAT notice process as the Section 82AAT(1A) notice is required to be submitted to the superannuation fund before the split of a contribution occurs. The Norwich Union 82AAT process is a year end process rather than during the year.- A high volume of transactions would be expected to occur.- Contact would need to be made with the other fund to ensure the contribution would be accepted by that fund and the process of transferring funds out, thus significant extra administrative costs will be created.- This would require system changes to cater for an automatic split from the splitting member’s account.- Changes required to Trust Deeds (this would apply to all options) to allow splitting of contributions.
--	---

	<ul style="list-style-type: none">- Increased monitoring of age 65 limit to splitting contributions and increased monitoring for the other conditions of release (eg retirement) extending now to the status of spouses over their preservation age (this would apply to all options).• Disadvantages of the joint account option:<ul style="list-style-type: none">- Complex changes to superannuation legislation to account for joint accounts whereas current superannuation legislation is drafted based on individual beneficiaries.- Unlikely to result in a 50/50 interest between two spouses as the splitting spouse would incur transaction costs (such as contribution tax on deductible contributions),- Possibly higher fees if both splitting spouse and receiving spouse have superannuation accounts outside the new joint account.- Substantial changes to disclosure documents and attached application forms to account for joint accounts.- Complexity and uncertainty as to whether binding nominations are allowed in relation to a joint account.- Changes required to Trust Deeds (this would apply to all options) to allow splitting of contributions.- Very onerous systems development effectively requiring another systems overlay,- Inability to accept rollovers compromises the encouragement of consolidating superannuation and will result in many policies becoming mere holding accounts (ie inactive accounts).- Significant hindrance on employers as the joint account could not be held within the standard employer sponsored plan if both spouses were receiving Superannuation Guarantee contributions from 2 different employers (ie can't have 2 different and unrelated employers for a standard employer sponsored
--	--

	<p>arrangement).</p> <ul style="list-style-type: none"> • Alternative options to those offered by the Government: <ul style="list-style-type: none"> - Only provide for splitting of employer contributions and deductible personal contributions. The disadvantage of this method is that retirement savings for the spouse would grow to a larger amount with the inclusion of undeducted contributions. <p>Introduce a combined couples Reasonable Benefit Limit (RBL) to be twice the size of the current individual limits and a combined couple ETP low rate threshold. Where a valid spouse relationship exists benefits splitting at retirement or attaining age 65 would result in the couple being assessed against a higher RBL and a higher ETP low rate threshold.</p>
17	<ul style="list-style-type: none"> • The restriction of the proposed contributions splitting to accumulation fund members however is discriminatory and denies a large proportion of Australians the benefits it is designed to provide. • The proposed income splitting arrangements therefore discriminate markedly against those Australians who must compulsorily contribute to their retirement incomes compared to those who have no such requirement. • those public sector employees not in schemes such as the CSS and PSS are not compelled to make superannuation contributions but nevertheless, stand to enjoy the benefits this proposal offers. • Historically, many women have been disadvantaged through their inability to make superannuation savings while they are rearing families, however, that recent amendments to relevant legislation will empower the Family Law Court to direct a proportion of a superannuation entitlement to a former spouse. • Discussion paper mentions under its objectives, page 3, second dot point, that contributions splitting will provide low income or non-working spouses with their own superannuation assets, under their own control and their own

	<p>income in retirement. That is a commendable feature of this proposal.</p> <ul style="list-style-type: none"> • it discriminates against defined benefit fund members whose superannuation pension is paid to one member of a couple, denying the opportunity to split their superannuation pension for tax planning purposes. • The proposed limitations on the proportion of contributions splitting appear to be a little inflexible, notwithstanding the need to ensure that sufficient funds exist to meet a member’s surcharge liability. <ul style="list-style-type: none"> - Is it possible to permit a higher ratio, based for example on the likely maximum or median superannuation surcharge liability? - Alternatively, if a higher percentage of splitting was permitted, it could be on the condition that where insufficient funds existed in the transferring member’s account to meet surcharge liability, then that liability could be deducted from the spouse’s account. • There are arguments why the restriction should be based on preservation age, but splitting should surely be permissible where the spouse works a pre-determined minimum number of hours per week after reaching preservation age. That would be consistent with the Government’s recognition of the desire of some older Australians to work beyond “normal” retirement age when it increased the limit from 70 to 75 years for personal contributions to superannuation in the last Budget.
18	<ul style="list-style-type: none"> • <i>Possible Alternative – Splitting the Final Benefit.</i> • As the difference between any revenue generated from fees imposed upon the splitting parties and the costs incurred will be borne by the membership as a whole, this will effectively result in splitting spouses being cross subsidised by those members who are single, in a same sex relationship or who simply choose not to split their superannuation.

	<ul style="list-style-type: none">• It is difficult to reconcile the comment that “<i>the general link between paid employment and the ability to contribute to superannuation will be maintained</i>” with the “<i>introduc[tion of] a number of measures that have broadened the accessibility of superannuation to individuals who are outside of the workforce</i>”.<ul style="list-style-type: none">- The introduction of accessibility to superannuation for non working spouses, children and persons in receipt of a baby bonus means that the “<i>link between paid employment and the ability to contribute to superannuation</i>” has been well and truly broken?• The retention of the occupational nexus, especially with respect to those members aged over 65, only serves to create considerable confusion and costs and, accordingly, the link with employment should be removed. Instead, persons should be able to contribute until the age of 70 (or possibly 75) at which point the contributions must cease and the benefit must be paid.• The reference to “personal” contributions has caused considerable confusion amongst the superannuation industry and considered there is no need to facilitate the splitting of personal contributions.<ul style="list-style-type: none">- As personal contributions are made after tax and can be split before it reach the super funds. They would be treated as undeducted contributions on receipt as an Eligible Termination Payment they would be tax-free and would not count towards either the low-rate threshold or the Reasonable Benefit Limit.• Option 1 should not be implemented due to the significant cost and administrative works would involve. The timing of the split and any potential loss of investment earnings and or insurance cover will also be a significant issue.• Option 2 is the preferable option because it is considerably easier than splitting contributions on an on-going basis.<ul style="list-style-type: none">- One point to note is that not all funds report on a 30 June year and it may be easier for such fund to implement a “period in arrears of the fund’s year end” basis as opposed to strictly adhering to the concept of
--	--

	<p>a 30 June year.</p> <ul style="list-style-type: none">- Alternative option could be: after splitting member advises intention to split a specified proportion to a specified account, funds advise members their “standing” arrangement on their annual member statement. Then member has specified period after receipt of statement to revoke or amend the split (say 60 days). If no revocation or amendment is received then the superannuation provider effects split within a further 60 days.- That consideration is given to a variation to Option 2 whereby an annual in arrears ‘standing arrangement’ is effected. <ul style="list-style-type: none">• Questions in relating to option 3:<ul style="list-style-type: none">- how directions as to investment choice can be given;- what would occur in the event of the death of the splitting member or the receiving spouse;- what would occur in the event of the separation of the spouses; and- who is to receive member statements; annual reports and other information disclosure.• Option 3 should not be implemented.• Participation Restrictions: Given that the trustee may not be aware of the age of the receiving spouse and is generally unaware of their employment status, the only feasible method by which this requirement can be imposed would be to impose an obligation upon the splitting member. The splitting member could be required to provide the receiving spouse’s age and to notify the fund once the receiving spouse is no longer eligible to receive split contributions.• Clarification is required as to how these contributions are to be treated when paid as an Eligible Termination
--	---

	Payment to the receiving spouse.
19	<ul style="list-style-type: none">• Support the proposals to allow members of accumulation funds to split both personal and employer contributions made after 1 July 2003 with their spouse.• It is unclear how the splitting proposal interact with the new superannuation and family law requirement (i.e. super on divorce) and with spouse contributions.
20	<ul style="list-style-type: none">• In terms of overall maximising retirement savings, equitable distribution of assets, cost effectiveness and simplicity could be achieved by permitting the splitting of superannuation benefits at the point of retirement of either spouse.• The proposal does not extend to a defined benefit interest.• The stated restriction on splitting deductible contributions is governed by taxation issues relating to both contributions tax and the superannuation contributions surcharge.• Early response from members suggests that it could be taken by fund members who are currently married and approaching retirement. However, there could be a low initial take-up rate by younger couples, which would reduce the value of the currently proposed options.• Brief analysis of the potential changes to administration processes has been undertaken. The extensive changes required suggest that both set up and ongoing costs will not be insignificant. Increase administration cost will have an impact on member account balances.• A single income family would be required to hold a minimum of two accounts, thus doubling current administration charges the family currently incurs.

- It is important to weigh up the issue of control of the savings during accumulation against the goal of maximising retirement income for the couple.
 - Option 1 & 2 support the government’s objective to give the non-working spouse a separate account during the accumulation phase thus providing an opportunity for that spouse to make nay decision in relation to any investment options offered by the fund. Option 3 departs from this objective.
- Insurance would probably not be offered to a non-employee spouse in a fund that was not public offer.
- For employers who currently meet all or part of the administration costs of their sponsored funds, the options would result in an increase in employment costs.
- The Consultation Paper is silent on the issue of whether split deductible contributions, once rolled over, are to be treated as mandated contributions and subject to member protection.
- The ‘anti-detriment’ provisions of the Income Tax Assessment Act may require review due to the use of a current account balance to calculate the anti-detriment credit. The “rollover” of substantial contributions may skew the calculation result.
- Requirement, that receiving spouse has not meet a condition of release, is beyond practical administration where the spouse account is in another Fund.
- Option 1 is expensive to administer and requires and additional account being set up for the member if non already exist.
 - Superannuation funds whose administration systems are highly automated and readily adaptable to new processes found it to be somewhat preferable to option 2 and 3.

- Annual split will require essentially the same changes as the prospective split option.
 - funds with legacy administration systems preferred this option to options 1 and 3 since it is better suited to ‘batch’ processing.
- Joint accounts Option
 - A joint account would avoid the need for the automatic triggered ‘rollover’ requirements of the other proposals, many of the other changes identified for those proposals may still be necessary.
 - For a dual income couple where each wished to split part of their superannuation contributions, it could require the family operating four accounts – two individual and two joint.
 - This option has not been supported by their membership.
- An alternative proposal – a ‘split at end’ approach.
- Consideration should be given to developing an additional proposal:
 - at a nominated start date record the quantum of a member’s personal undeducted, deducted, and total contributions.
 - When either partner first satisfied an aged-retirement associated condition of release permit the partners to elect to transfer all or part of wither partner’s deducted or personal undeducted contributions accumulated after the start date and any earnings accumulated since the start date to their spouse.
 - Only the partner meeting the condition of release would be able to immediately access their (now adjusted) superannuation benefits.

21	<ul style="list-style-type: none">• Alternatives to achieve objectives:<ul style="list-style-type: none">- Splitting of end benefits – this would occur at the time a benefit is payable to the member at retirement or earlier change of employment and would operate in a similar manner to the benefit split which can occur on divorce.- Removal of the employment nexus – this would enable contributions to be accepted from all Australians of working age.• The implementation of this measure will simplest for self managed superannuation funds and small APRA funds. However there is a risk of leakage in relation surcharge payments if reporting requirements are unclear and the contribution flows are not appropriately reported.• Some small funds may require to be split to enable spouses to receive contributions from their contributing partner. This will arise in funds made up of 3 or 4 business partners. This is considered to be a minor impact to funds• There are some instances where an employer contribution is not deductible, eg where the payment is made as a result of the application of the superannuation guarantee charge, an employer contributes more than the deductible amount or a contribution is credited to SHAR.<ul style="list-style-type: none">- It needs to be made clear in any legislation what contributions can be split.• Prospective Split<ul style="list-style-type: none">- the capture and reporting of additional information will be both required by super funds and ATO thus create significant costs.- Funds should not be required to split contributions more frequently than quarterly to avoid excessive costs.
----	---

	<ul style="list-style-type: none">- The recommendation in relation to S82AAT notices will prevent self employed persons using this option.• Annual Split<ul style="list-style-type: none">- where implementing a split a significant time after the year end, the funds have to reissue members statements or to issue interim statements after a split has occurred to reduce the incidence of complaints to funds.- The provision of multiple statements will result in an increase in administration costs associated with the splitting process.- the member would be taking any investment risk associated with the contribution for a significant period of time up to 18 months under the proposal outlined. this could have a detrimental impact on the contributors retirement savings in the current environment. Ideally the contributions would be split on a more frequent basis to enable this risk to be shared.- The delay in splitting contributions proposed will also make the reconciliation of taxation movements a more complex matter.• Joint account:<ul style="list-style-type: none">- It is likely to be significant development costs to implement.- This option leads to addition complexity in relation to the taxation of superannuation benefits and when benefits become payable.- This is the least preferred option.
--	--

	<ul style="list-style-type: none"> • Preferred Option <ul style="list-style-type: none"> - A combination of prospective split and the annual split. Those in a position to nominate a split prior to making contributions able to make a split on a prospective basis. - The split would ideally be effected on a quarterly basis to enable the investment risks to be shared. - Those which are not aware of the deductibility of the contribution until a section 82 AAT notice is prepared at year end should be given the option to elect when giving this notice for the contributions to be split in arrears. The split could then be effected at the end of the next quarterly splitting cycle for the fund.
22	<ul style="list-style-type: none"> • The paper is discrimination against older people and members of defined benefit funds. • Each superannuation fund should be given flexibility on how it implements splitting arrangement. • Members of defined benefits funds at least should be allowed to split their own personal contributions. • 50% restriction is too restrictive. It would be sufficient to require that the part of member's account balance required to satisfy any surcharge liability cannot be split. • Disagree with Option 1 because it involves unnecessary complex transfers and significant administrative costs. • The proposal that contributions be split at least quarterly will involve difficulties for trustees and is inconsistent with the proposal for investment choice. <ul style="list-style-type: none"> - difficulties can avoid by paying the split contributions directly into the spouse's account rather than must first be paid into the member's account.

- Option 2 will give rise to timing problems relating to reports to members and administrative work in redeeming and issuing units.
- Member should not be allowed to split a contribution where the account balance will be reduced below the required protection level for small accounts.
- Option 3 could affect member's investment choice and it would involve a voting right issue in relation to the appointment of member representatives to the trust board.
- Option 3 would be preferable if the trustees were given flexibility as to the form of the splitting of contributions that they will permit.
- There is not sufficient justification to impose an age limit on splitting.
- There should not be a restriction on splitting of contributions where the spouse has satisfied a condition of release.
- The deadline of 31 January in relation to the Annual split method is not appropriate since members not required to be sent any reports would miss the opportunity to split contributions.
- Both internal or external splits would have issues arise respect to the impact of surcharge.
- In the Paper, the statement on page 5 under heading 2 'Key Features' is inconsistent with the statement on page 12 under heading 4.1 'Limitations on Proportion of Splitting'.
- 'regular contributions' need to be clarified.
- No indication is given that a mandated employer contribution received by the member will, after the split to the

	<p>spouse, still be regarded as a mandated employer contribution.</p> <ul style="list-style-type: none">• It is not clear whether the amount to be split at the end of year under the Annual Split method is just the amount that is the desired proportion of the number of dollars as actually contributed in respect of the member, or that amount after the investment return is credited to or debited to that amount.• No indication is given as to the timing of splits under the Prospective Split method.• A period of 90 days is suggest for the Annual Split method. Cost and fee issues will be significantly influenced by this.
23	<ul style="list-style-type: none">• More costs to funds thus more fees to members.• Regarding to non-earning spouses get access to cost effective death and disability cover, private cover has already been available.• The proposal will not really lower superannuation tax.
24	<ul style="list-style-type: none">• Support the proposal for splitting.• Concern about the potential misuse of taxation concessions as the access to two low-rate ETP threshold and RBL.• Flexibility should be given to super funds to accept/retain splitting spouse contributions.• Superannuation funds should be allowed to levy a fee either on the spouse, the splitting spouse etc in order recoup associated administrative costs.

25	<ul style="list-style-type: none">• Couples may have up to 3 superannuation accounts thus extra cost will be created.• Issues might arise where non-working spouse's exiting super fund lies dormant then start up another fund.• The issue in relation to Option 3 is that the earner member of the couple could reach benefit age before a non-earner.• In long run, the splitting would create more costs and more paper work.• Members in defined benefit fund are discriminated.• Access to death and disability insurance cover need more clarification.• Super splitting should be mandatory, using income thresholds.• What happens when one partner has more than one super fund?• Can middle to high income earner split off their super into a children's fund?
26	<ul style="list-style-type: none">• Exclude contributions made before 1 July 2003 discriminates old people.• Deadline of industry submission gives insufficient time to do justice to such an important subject.
27	<ul style="list-style-type: none">• Supports the general principle that members should have the facility to split their contributions with their spouses.• Split contributions would create an enormous administration burden and consequently create additional costs to members..

- 50% limit should be removed.
- Option 1 involves a stream of multiple transactions thus high costs.
 - The proposal aims young couples but most of them would not be planning that far ahead.
 - It discriminates members in Defined Benefit Fund and should be available for couples in same sex relationships.
 - Funds should be given choice to allow a member to split.
 - The Paper has no mention on whether the split will apply to all member's accounts and no mention is made of the timing a super fund would need to adhere to for passing the split contributions to the spouse's account.
 - Member Protection issue should be addressed.
 - Systems would need to be enhanced to reflect the contribution being transferred to the spouse's account as separate transactions on the member's account.
 - Will ETP rollover paperwork need to be produced?
 - Will members be able to split employer contributions that are subject to a vesting scale
- Option 2 would be less awkward and costly for funds but timing issues would arise.
 - More flexibility should be vested to members.
 - Should fines be imposed for lost interest due to funds administrative errors?

- Option 3 would reduce the number of accounts required in respect of each couple but members requiring to transfer less than 50% of their contributions to a spouse would still end up with at least two family accounts, with resulting additional costs.
- Under Option 3, difficulties would arise to track the entitlement and interests and also it would be the significant potential legal complexity in arranging to establish joint accounts.
 - Start date as 1/7/2003 is not appropriate.
 - Joint account is not effective and efficient way for people.
 - Will member have the option to decide not to continue the splitting?
 - It would cause management complexity.
 - It will have reporting implications.
 - Difficulties would arise when different investment strategies adopted by members.
 - Should members benefit protection rules apply to couples separately?
 - Would need to consider members' details to be kept separately?
- Election of splitting should be revocable.
- Preferred option would be the Prospective Split.
- Age limit should be removed.

	<ul style="list-style-type: none">• The Government should ensure that rules about ESPs for non-working spouses are made clear.
28	<ul style="list-style-type: none">• It raises complexities and potential costs of the same order of the splitting of superannuation on family breakdown.• A considerable lead time should be given for any consideration of the matter.• It discriminates members in Defined Benefits Funds.
29	<ul style="list-style-type: none">• The proposal has discrimination against couples under current system where the primary bread winner is significantly younger than their partner.• Superannuation splitting should be considered in respect of existing unreserved amounts in addition future contributions.<ul style="list-style-type: none">- should one of the couple leave their current employment, they will be able to “cash in” their unreserved benefits and apply them to a spouse account, effectively splitting them.• Rather than restrict to 50/50 splits, Joint accounts should be allowed to split in nominated proportion either prospective or retrospectively.• The proposed 50% splitting limit on deducted contributions appear unnecessary.
30	<ul style="list-style-type: none">• The present system discriminates single income married (or de facto) couples at every level

C Treasury's Rejection of the Freedom of Information Request



Australian Government
The Treasury

17 October 2016

FOI ref: 1972

Ms Collin Ong

By email:

Dear Ms Ong

FREEDOM OF INFORMATION (FOI) REQUEST: INTENTION TO REFUSE UNDER SECTION 24

I refer to your FOI request to this department dated 6 October 2016. You have requested the following documents:

'1. Documents relating to the government's 'Splitting of Superannuation Contributions Between Couples' 2002 Consultation Paper

(<http://archive.treasury.gov.au/contentitem.asp?NavId=&ContentID=367>) such as submissions made to the government and a list of the number of submissions received;

2. Documents relating to the government's 2004 Consultation on Superannuation Contributions Splitting Regulations (<http://archive.treasury.gov.au/contentitem.asp?ContentID=835&NavID=>) including submissions made to the government and a list of the number of submissions received; and

3. Documents relating to the government's 2005 Consultation on Superannuation Contributions Splitting Regulations (<http://archive.treasury.gov.au/contentitem.asp?ContentID=1018>) including submissions made to the government and a list of the number of submissions received.'

I am an authorised decision maker under section 23 of the *Freedom of Information Act 1982* (the Act).

We have estimated that there would be around 2000 pages of material held by the department which would come within the scope of your request as it is presently worded. As you can appreciate, that is a considerable amount of material which would have to be firstly retrieved and then examined in order to process your request. This would be an extremely time and resource consuming task. I am satisfied that it would place an extremely heavy burden on a limited number of departmental staff.

Sections 24 and 24AA of the Act together provide that an agency may refuse a request if it is satisfied that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations.

Section 24(1) of the Act provides that, before an agency can refuse a request on this ground, it must first undertake a 'request consultation process' with the applicant under section 24AB of the Act. The purpose

Langton Crescent, PARKES ACT 2600 Australia
P 02 6263 2800
www.treasury.gov.au

of this process is to, firstly, advise the applicant that the agency is intending to refuse the request on that ground and, secondly, to give the applicant an opportunity to revise the request to make it more manageable.

Therefore, pursuant to section 24AB of the Act, I am formally advising you that I am intending to refuse your request under section 24(1) of the Act on the ground that the work involved in processing it would substantially and unreasonably divert the resources of the department from its other operations.

One way of narrowing the scope of your request would be restricting it to the actual submissions to which you have referred – and excluding the documents which merely ‘relate’ to the issue, which are presently included in your request. While this would reduce the number of documents in scope of the request such that the request may become ‘doable’, this should not be taken as an indication that the submissions may be ultimately released. Based on our initial investigations, submissions appear to have been provided to Treasury in confidence, either explicitly or implicitly. I note that section 45 of the Act states that documents are exempt from release if their disclosure would found an action for breach of confidence. While a final decision would only be taken when and if the request is revised, confidentiality is one of the factors that would be taken into account.

If you wish to discuss this matter, please contact the FOI team on 02 62632800 or send comments by email to FOI@treasury.gov.au during the consultation period. The consultation period will run for 14 days from the day after you receive this letter.

The Act provides that you may now:

- revise your request;
- advise us that you do not wish to revise your request; or
- withdraw your request.

It further provides that if you have not done any of the above by the end of the consultation period of 14 days, your request will be deemed withdrawn.


I should lastly advise that, pursuant to section 24AB(8) of the Act, the period starting on the day you receive this notice and ending on the day you do any of the above, will be disregarded for the purpose of calculating the 30 day period within which all reasonable steps must be taken to finalise your request.

Yours sincerely



Jenny Wilkinson
Division Head
Retirement Income Policy Division

D Follow-up Email from the Treasury Dated 18 October 2016

Superannuation 

18 October 2016 1:35 pm

S

To:

RE: Request for Information - Submissions Made to the Superannuation Contributions Splitting Scheme Consultation Paper [SEC=UNCLASSIFIED]

Dear Collin

We have managed to find some information that may be of assistance to you.

- In relation to your request for submissions to the Splitting of Superannuation Contributions Between Couples - Consultation Paper July 2002, we have attached a de-identified document containing a summary of comments/submission by various persons and organisations. Unfortunately, we are unable to provide the actual submissions or a list of people/organisations that made submissions for confidentiality reasons.
- You may also find this link to a Senate Inquiry into Taxation Laws Amendment (Superannuation Contributions Splitting) Bill 2003 useful (it includes Treasury's submission and a number of other submissions) - http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2002-04/super_splitting/submissions/sublist

This is all the information we can provide at this time. All the best with your honours thesis.

Retirement Income Policy Division
The Treasury