

Family Law and Superannuation

Purpose of this publication

This publication is produced to provide general information regarding the treatment of superannuation under the *Family Law Act 1975* (Cth). The information is for any member of a NT public sector superannuation scheme who is in the process of:

- divorcing or separating from a marriage;
- separating from a de facto relationship; or
- intends to enter into a superannuation agreement with a person.

Who does the Family Law Act apply to?

The *Family Law Act* applies to legally married parties. From 1 March 2009, the *Family Law Act* was amended so that it also applies to de facto and same sex couples. This amendment operates prospectively, which means that it does not apply to a de facto or same sex relationship that broke down before 1 March 2009.

Super splitting under the Family Law Act

The *Family Law Act* was amended on 28 December 2002 to allow superannuation to be treated in the same way as property and other assets, allowing it to be divided (or 'split') between separating parties.

The 'super splitting' laws are prospective which means they only apply to court orders and superannuation agreements entered into after 28 December 2002.

The *Family Law Act* does not apply to anyone whose property arrangements were legally finalised before 28 December 2002, unless the court sets aside an earlier order and makes a new order under Part VIII B of the *Family Law Act*.

Valuation of a superannuation interest

The Superannuation Office will provide information about a superannuation interest to an eligible person, on behalf of the relevant scheme, to assist in negotiation of super splitting under the *Family Law Act*.

An eligible person is defined in the *Family Law Act* as:

- the Member;
- a spouse or de facto partner of the Member (i.e. the non-member spouse);
- a person who intends to enter into a superannuation agreement (including a pre-nuptial agreement) with a Member.

To obtain a valuation, a *Family Law Superannuation Valuation Application* must be lodged with the Superannuation Office. The Superannuation Office will value the superannuation interest and provide the information to the applicant in writing.

A fee is payable at the time the application is lodged.

The provision of information about a superannuation interest does not automatically lead to the division of superannuation.

Obtaining a court order or entering a superannuation agreement

The parties may either agree on a superannuation split and obtain a consent order from the court or, if they cannot reach an agreement, allow the court to decide the matter.

Alternatively, parties may enter a superannuation agreement. Superannuation agreements can be made either before or during marriage, or after dissolution of the marriage.

It is not necessary for superannuation to be split as part of the division of assets.

Superannuation agreements

A superannuation agreement is a written agreement entered into between the separating parties. Superannuation agreements will be binding if they comply with the requirements of the *Family Law Act*. The formal requirements are that they must:

- identify the superannuation interest;
- be 'in force' at the operative time;
- not relate to an interest that is an unsplitable interest;
- be in writing and be signed by both parties;
- contain a statement that before the agreement was signed, each party was provided with independent legal advice from a legal practitioner;
- include a statement by the legal practitioner that legal advice was provided;
- original must be given to one party and a signed copy to the other; and
- when served, be accompanied by a decree absolute or a separation declaration.

How does the super split work?

Once the binding superannuation agreement or court order is lodged with the Superannuation Office, the Superannuation Office is required by law to give effect to the agreement or order.

If the superannuation interest is to be split, the superannuation agreement or court order will direct the Superannuation Office to pay an amount or a percentage of the member's superannuation to the non-member spouse.

Once a split has occurred, a separate superannuation interest will be created for the non-member spouse (note that a non-member spouse may be a member of the same fund in his or her own right).

Subject to the rules of each superannuation scheme, the superannuation interest created on behalf of the non-member spouse can either remain in the fund or be transferred to another superannuation fund.

The effect of the split will be that the superannuation benefit payable to the member spouse at the cessation of scheme membership will be reduced by a proportion, which reflects the value of the superannuation interest created for the non-member spouse.

Preservation of a superannuation interest

The superannuation interest created for the non-member spouse will consist of restricted non-preserved and preserved amounts in the same proportions as the member's interest. Preserved amounts are subject to a condition of release under the Commonwealth Government's preservation arrangements.

Payment flags

In some circumstances, parties may wish to defer their agreement to split a superannuation interest. This may be because the party who holds the superannuation interest is nearing a condition of release, or because the valuation of the interest is subject to a vesting scale or calculated on a defined benefit basis. In this situation the parties may wish to make a payment flagging agreement.

Payment flagging agreements are only likely to be used where the value of the superannuation interests is currently unknown but will be known in the near future. If the value is known, there is little reason to flag the superannuation.

The practical effect of a payment flag agreement is to prohibit the Superannuation Office from making benefit payments, or even to make transfers to other funds. It puts a hold on the account and acknowledges that it may become the subject of a split at a later point in time.

A payment flag will apply to a superannuation interest if:

- the interest is identified in a superannuation agreement;
- the agreement provides that the interest is to be subject to a payment flag;
- the agreement is in force at the operative time;
- the interest is not an unflaggable interest; and
- when served, be accompanied by a decree absolute or a separation declaration.

It is an offence for the Superannuation Office to make any splittable payment in respect of the interest whilst a valid flag is in force. A payment flag agreement imposes a reporting obligation on the Superannuation Office if a splittable payment becomes payable whilst the flag is in force.

This may occur where the member spouse satisfies a condition of release (i.e. reaches their preservation age). Notification must be provided to both the member spouse and the non-member spouse within 14 days of the interest becoming payable.

What happens after the flag is imposed?

The payment flag continues to operate until one of two things happen, either:

(1) the Court makes an order terminating the operation of the flag; or

(2) the parties make a new agreement, called a flag lifting agreement.

What fees apply?

- Fee payable on lodgement of the Family Law Superannuation Valuation Application:
 - scheme member \$75.00 (fee not subject to GST); and
 - spouse of scheme member \$82.50 (inclusive of GST \$7.50).
- Fee payable to split or flag a superannuation interest:
 - each party is liable for one half of \$275 (fee not subject to GST) which will be deducted from the superannuation interest subject to a payment split or flag.

Checklist

- Step 1 - Applying for information**

Complete and return the *Family Law Superannuation Valuation Application* form along with the appropriate fee to the Superannuation Office.
- Step 2 – Provision of information**

The Superannuation Office will provide information about a superannuation interest to the applicant to assist in determining the distribution of property and assets.

The application for information is private and confidential and will not be disclosed to anyone without your express consent.
- Step 3 – Distribution of property**

The separating parties determine the distribution of their property and assets, which may or may not require superannuation to be split.

If the parties are unable to agree on a division of property and assets, the division of a superannuation interest will need to be formalised in a superannuation agreement or a court order.

Note the formal requirements for a superannuation agreement outlined previously.
- Step 4 – Notice to the Superannuation Office**

A copy of the superannuation agreement (including a decree absolute or separation declaration) or a court order is served on the Superannuation Office.

The agreement or order will be in force from the fourth business day after the day on which it is served on the Superannuation Office.
- Step 5 – To split or not to split**

If the superannuation agreement or court order requires a superannuation interest to be split, the Superannuation Office will serve a payment split notice to both the member and the non-member spouse within 28 days advising that the member's interest is subject to a split.

The notice will also request the non-member spouse to advise payment details within 28 days. If the non-member spouse fails to advise the Superannuation Office within 28 days, the superannuation interest will automatically be transferred to an NTGPASS account in their name.

However, if a superannuation interest is the subject of a flagging agreement or order, the Superannuation Office will be required to delay the split until such time as the exact value of the superannuation benefit is known (e.g. at cessation of membership).

Step 6 – What happens to the member’s interest after a split occurs?

The effect for the member will be that they will have a new balance in the superannuation fund, due to the creation of a superannuation interest for the non-member spouse.

The superannuation benefit payable to the member at the cessation of scheme membership will be reduced by a proportion, which reflects the value of the superannuation interest created for the non-member spouse.

Disclaimer

In preparing and compiling the information, no account has been taken of any particular member’s objectives, financial situation or individual needs.

This information does not constitute financial advice and should not be taken as such. The decision as to how to manage your superannuation has taxation and social security implications. As each member is ultimately responsible for making his or her own decisions, the Commissioner of Superannuation urges you to obtain professional advice (whether legal, financial or otherwise) before proceeding.

The Commissioner of Superannuation and the Northern Territory of Australia accept no responsibility for any losses arising from any use or reliance upon the information or conclusions reached using the information.

Further Information

Please contact the NT Superannuation Office:

Telephone: 8901 4200
Free Call: 1800 631630
Web: www.nt.gov.au/ntt/super/

If you are considering or undergoing a property settlement, we strongly suggest you seek legal advice. The following sources of information are also available:

Family Law Online: www.familylaw.gov.au
Family Court: www.familycourt.gov.au

Glossary

Consent order A signed agreement that you present to the Family Court to have made into court orders.

Decree absolute A decree that the parties have formally dissolved their marriage.

Family Court order An order issued by the Family Court that will require, amongst other things, a superannuation interest to be split between the parties.

Flagging agreement An agreement between the parties that prevents a superannuation fund from making a payment out of the member’s entitlement.

Flagging order A Family Court order preventing a superannuation fund from paying out a member’s entitlement and requiring a superannuation fund to notify the court when the members benefit becomes payable.

Member spouse The spouse who holds the superannuation interest in the fund (i.e. the member).

Non-member spouse The spouse of the member who holds the superannuation interest. Note that a non-member spouse may be a member of the same superannuation fund as the member spouse.

Operative time The fourth business day after the day on which a superannuation agreement, Family Court order or flag lifting agreement is served on the superannuation fund. In relation to a court order, it means the date specified in the order.

Payment Split Notice The superannuation fund must send a notice to both spouses within 28 days of receiving a splitting order or agreement.

Payment split The act of splitting a member’s superannuation interest to satisfy the requirements of a superannuation agreement or Family Court order.

Separation declaration A declaration made in accordance with the *Family Law Act* evidencing that the parties have separated. Generally a declaration will state that the parties have lived separately and apart for 12 months and that there is no reasonable likelihood of cohabitation.

Superannuation agreement An agreement between the parties on how a member’s superannuation interest should be split.

Superannuation interest The value determined for a member’s benefit in a superannuation fund by reference to prescribed actuarial formulas and factors as approved in the *Family Law (Superannuation) Regulations 2001*.

Unflaggable interest A superannuation interest of a member spouse that is in the payment phase.

Unsplittable interest An interest with a withdrawal benefit of less than \$5 000.