

Northern Territory Government and Public Authorities' Superannuation Scheme Family Law and Superannuation

Purpose of this publication

This publication is produced to provide general information to members of the Territory's public sector superannuation schemes regarding the treatment of superannuation under the Australian Government's *Family Law Legislation Amendment (Superannuation) Act 2001*.

The information applies to the following schemes:

- Northern Territory Government and Public Authorities Superannuation Scheme (NTGPASS);
- Northern Territory Supplementary Superannuation Scheme;
- Legislative Assembly Members' Superannuation Scheme;
- NT Police Supplementary Benefit Scheme;
- Administrators Pension Scheme; and
- Supreme Court Judges Pension Scheme.

About Family Law and superannuation

The introduction of the *Family Law Act 1975* was intended to make the settlement process for family law proceedings quicker and less distressing. However, certain areas such as splitting superannuation continued to be problematic because superannuation did not fall within the definition of property for the purposes of the *Family Law Act 1975*.

The *Family Law Act* was amended with effect from 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.

When do the amendments apply?

The 'super splitting' laws are not retrospective which means they only apply to court orders and superannuation agreements entered after 28 December 2002.

The laws do 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*.

Who do the amendments apply to?

The 'super splitting' laws only apply to legally married parties and do not cover property issues affecting de facto or same sex relationships.

The laws also apply to people who have entered into a superannuation agreement, either before or during a marriage, or after separation, which prescribes how superannuation interests are to be split in the event of marriage breakdown.

How do I obtain information about a superannuation interest?

Provided you are eligible, you can apply to the trustees of a superannuation fund for certain information about a superannuation interest.

You will be eligible if you are the member of the superannuation fund, the member's spouse (or ex-spouse), or intend to enter into a superannuation agreement with the member (this will usually mean that you intend to enter into a pre-nuptial agreement).

An **Application for Information about a Superannuation Interest** must be completed before any information can be provided. The trustees are bound by confidentiality and privacy requirements and a declaration must be made that the applicant requires the information for either or both of the following purposes:

- to assist the applicant to properly negotiate a superannuation agreement; and
- to assist the applicant in the operation of the new law.

A fee is payable at the time the application is lodged (see below). On receipt of the application, the trustees will value the superannuation interest and provide the information in writing.

What do I need to do with the information?

It is the responsibility of the separating parties to negotiate the distribution of their property interests.

The provision of information about a superannuation interest does not automatically lead to the division of superannuation. Separating parties may reach a fair adjustment of property interests without requiring superannuation to be split.

Where the parties are unable to agree on a division of property interests, the decision to divide a superannuation interest will need to be formalised in a superannuation agreement or Family Court order.

Superannuation agreements and Family Court orders

A superannuation agreement is a written agreement entered into between the separating parties with the assistance of independent legal advice that meets the requirements of the *Family Law Act*. The formal requirements are:

- the agreement is signed by both parties;
- the agreement contains a statement that, before the agreement was signed, each party was provided with independent legal advice from a legal practitioner;
- the agreement is accompanied by a statement by the legal practitioner that legal advice was provided;
- the agreement must not have been terminated or set aside by the court; and
- the original of the agreement is given to one of the parties and a copy to the other.

The separating parties will also have to show that the marriage has broken down. This can be demonstrated by:

- either a copy of the decree absolute dissolving the marriage; or
- a separation declaration made within the last 28 days stating that the spouses are separated at the declaration time. A person who makes a separation declaration knowing that it is false or misleading may be guilty of an offence if the declaration is served on the trustees of a superannuation fund for the purposes of splitting superannuation. The penalty is imprisonment up to 12 months.

However, if an agreement cannot be reached, the Family Court has the power to exercise its discretion to make an order to split or flag a superannuation interest.

How does the super split work?

Once the superannuation agreement or court order is lodged with the trustees of the superannuation fund, it will serve as their

authority to give effect to the requirements of the agreement or order.

A superannuation agreement or court order will be in force at the operative time, generally the fourth business day after the day on which a copy of the superannuation agreement (and evidence of separation), or court order is served on the trustees of the superannuation fund.

If the superannuation interest is to be split, the superannuation agreement or court order will direct the trustees to pay an amount or a percentage of the member's superannuation to the non-member spouse. The trustees of the Northern Territory's defined benefit schemes are required to split a superannuation interest by reference to a prescribed actuarial formula and valuation factors.

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 fund, 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.

Payment flags

In some circumstances, the parties may want to wait before making a superannuation agreement or seeking a court order to split superannuation. In the meantime, to prevent the trustees paying the benefit, the parties may agree or the Court may order, that a member's superannuation is flagged.

If a member's account has a payment flag in place, most payments and withdrawals cannot be made until the flag is lifted. Exceptions include payments on compassionate grounds or for financial hardship.

If a payment flag has been applied by agreement, a subsequent agreement must be received before the flag is lifted. This agreement can be solely for lifting the flag (a "flag lifting agreement"), or it can be incorporated with a payment split agreement (a "flag termination agreement"). Alternatively the court can order that the flag be lifted. If a flag was applied with a court order, then only a court order can lift the flag.

Preservation of a superannuation interest

Where a superannuation agreement or order is actioned, 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 Australian Government's preservation arrangements.

Tax and Eligible Termination Payments (ETPs)

Any superannuation interest created for the non-member spouse will have the same ETP components as the member's superannuation interest.

The components of the ETP will be in the same proportion as the split of the superannuation interest (e.g. if the split is in the proportion of 60/40, the tax components will be split into the same proportions).

Each party will be measured against their own ETP thresholds for Australian Taxation Office purposes.

Superannuation contributions surcharge

Any known superannuation surcharge debt is required to be paid before a superannuation interest is split. The payment of any known surcharge debt will therefore be triggered whenever a payment is made to the non-member spouse.

Any surcharge assessments that are issued after a split, in respect of a period before the split, are liable to be paid by the fund holding the surchargeable contributions on behalf of the member.

Fees payable to trustees

- Fee payable on lodgement of an **Application for Information about a Superannuation Interest**
 - 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 **Application for Information about a Superannuation Interest** along with the appropriate fee, it to the NT Superannuation Office.

☑ Step 2 - Provision of information

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

As with any personal information, the application for information is private and confidential and will not be divulged to any other party.

☑ Step 3 - Distribution of property

The separating parties then 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.

Please note the formal requirements for a superannuation agreement (outlined above).

☑ Step 4 - Notice to the trustees

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

The agreement or order will be in force from the fourth business day after the day on which it is served on the trustees.

☑ Step 5 - To split or not to split

A superannuation agreement or court order may require the trustees to split a superannuation interest. If this is the case, the trustees will serve notice to both the member and the non-member spouse within 28 days that the member's interest is subject to a split.

The non-member spouse has 28 days from the date of the trustee's notice to advise the trustee regarding the payment or transfer of the superannuation interest.

If the non-member spouse fails to advise the trustees of a decision at the end of the 28 days, the trustees will automatically transfer the superannuation interest to an account in their name in NTGPASS.

However, if a superannuation interest is the subject of a flagging agreement or order, the trustees 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.

Glossary – what does that mean?

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

Defined benefit A superannuation interest, which when payable is determined by a formula or makes reference to an accrued multiple.

Family Court order An order by the Family Court requiring a superannuation interest to be split or flagged.

Flagging agreement A superannuation agreement, which does not require a superannuation interest to be immediately split.

Flagging order A Family Court order, which does not require a superannuation interest to be immediately split.

Member spouse The spouse who holds the superannuation interest in the fund (ie. 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 In relation to a payment split, the fourth business day after the day on which a superannuation agreement or Family Court order is served on the trustees.

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 by the parties as evidence that the parties have separated if the marriage has not been formally dissolved.

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*.

Further questions?

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