



Australian Government  
Attorney-General's Department

# **SUPERANNUATION SPLITTING LAWS – FREQUENTLY ASKED QUESTIONS**

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# Superannuation splitting laws – frequently asked questions

## What are the superannuation splitting laws about?

### In brief

The superannuation splitting laws enable couples to split superannuation payments, payable under a superannuation interest one of them holds, in family law property settlements on relationship breakdown.

### Explanation

Couples who have separated are able to make an agreement - known as a **superannuation agreement** - about how any superannuation that either party will receive is to be split. Couples can also make a superannuation agreement before or during their marriage or de facto relationship about how any superannuation will be split on marriage or relationship breakdown.

A superannuation agreement is like a more general **financial agreement** in which couples can agree about how property other than superannuation is to be divided on relationship breakdown. Because superannuation is different to other property, there are special rules about what a superannuation agreement has to say.

Provided that a superannuation agreement complies with the legal requirements detailed in the superannuation splitting laws, the agreement is binding. If a superannuation agreement is binding, then:

- the trustee of a superannuation fund is required by law to implement it; and
- the court is not able to make an order about the superannuation interest that is dealt with in the superannuation agreement.

If couples are unable to agree, then:

- the court is able to make an order, as part of a property settlement order, about how any superannuation is to be split; and
- the court order is binding on the trustee of a superannuation fund, who has to comply with it, provided that the legal requirements have been complied with.

## Do the superannuation splitting laws apply to me?

### In brief

The superannuation splitting laws apply to:

- married (or formerly married) couples who had not finally settled their property arrangements, by a court order under section 79 of the Family Law Act or an agreement approved by a court under section 87 of that Act, before the laws commenced on 28 December 2002, and
- de facto couples, in most States and Territories, whose relationship broke down on or after 1 March 2009 (and South Australian de facto couples, where their relationship broke down on or after 1 July 2010).

The laws do not apply to de facto couples in Western Australia.

### Explanation

The superannuation splitting laws were enacted in 2002, at a time when the property settlement regime in the Family Law Act only applied to married couples whose marriages had broken down. A new property settlement regime for de facto couples, which includes the superannuation splitting laws, commenced under the Family Law Act in 2009.

Different application provisions apply, depending on whether you are or were:

- married, or
- in a de facto relationship.

If you are or were married, the superannuation splitting laws apply if you had not, before the laws commenced on 28 December 2002, finalised your property settlement

arrangements with your spouse or former spouse under the Family Law Act. The laws will also apply if those arrangements have, since the laws commenced on 28 December 2002, been overturned in court proceedings.

If you are married, it is not necessary to divorce for these laws to apply. The property settlement regime under the Family Law Act, which include the superannuation splitting laws, applies to couples are still married but who have separated and want to finalise arrangements about their property.

If you were in a de facto relationship with your former partner, the superannuation splitting laws will apply if:

- your relationship had a geographical connection with New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, the Northern Territory, Norfolk Island, Christmas Island, the Cocos (Keeling) Islands or, from 1 July 2010, South Australia, and
- your relationship broke down on or after 1 March 2009 (or, if your relationship was connected only to South Australia, it broke down on or after 1 July 2010).

For further details of the required geographical connection see the De Facto Property Regime page.

Also, de facto couples who separated before 1 March 2009 (or South Australian couples who separated before 1 July 2010) may choose that the new property settlement regime, including its superannuation splitting laws, applies to them. For further details of the circumstances in which that choice can be made see the De Facto Property Regime page.

## **Are there any superannuation interests that can't be split by agreement or court order?**

### **In brief**

Yes - the superannuation splitting laws say that some superannuation interests are 'unsplittable interests'.

## Explanation

Most superannuation can be split either by agreement or court order.

It is not, however, possible to split superannuation of little or no value when it would not be cost effective to do so. Superannuation interests with a withdrawal benefit of less than \$5,000, and those paying a non-commutable pension or an annuity of less than \$2,000 per annum, have been prescribed as unsplitable interests under the FL Super Regulations.

These general rules about when a superannuation interest is unsplitable do not apply to interests in the Commonwealth Judges' Pensions Act Scheme and in the scheme that covers judicial officers in South Australia.

## Do I have to pay any fees to the trustee for any things that are done under the superannuation splitting laws?

### In brief

Yes - the trustee can charge fees for things that are done for you under the superannuation splitting laws.

### Explanation

The superannuation splitting laws say that the trustee may charge reasonable fees for the administrative costs of doing a number of things including:

- a payment split
- a payment flag
- flag lifting, if the agreement doesn't also provide for a payment split
- an order terminating a payment flag, or
- an application for information.

The trustee can also charge for any other thing done in relation to a superannuation interest that is covered by a superannuation agreement, a flag lifting agreement or a



splitting order. This includes things done under any interest splitting options that are available in connection with the agreement or order.

What is reasonable will depend on the cost to the fund of providing the service, for example complying with the payment split, or, where you have asked for information, in providing that information to you.

With the exception of the fee for an application for information, the fees are generally to be paid by the member spouse and the non-member spouse equally. The exception to this is if there is a payment split under which the non-member spouse is entitled to be paid the whole of the amount of each splittable payment - in which case the fee is to be paid by the non-member spouse.

For an application for information, the fee is to be paid by the person who makes the application.

If the fee is being charged for information that you have applied for, then you won't be entitled to the information until you have paid the fee.

If the fee is for work done by the trustee to split superannuation payments or interests then this fee can be deducted by the trustee from the benefits ultimately payable to you.

## How can I get information about a superannuation interest?

### In brief

Under the superannuation splitting laws you can apply to the trustee of a superannuation fund for information about a superannuation interest - provided you have a genuine reason for needing the information.

## Explanation

Obviously, if you are thinking about making an agreement about a superannuation interest - or the court is considering making an order about it - you are going to need information about the superannuation interest.

Under the superannuation splitting laws, 'an eligible person' can apply to the trustee of a superannuation fund for information about the superannuation interest of a member.

You are an 'eligible person' in relation to a particular superannuation interest of a member of a superannuation fund if you are:

- the member
- the spouse of the member
- if the member or spouse of the member has died, the deceased person's legal personal representative, or
- a person who intends to enter into a superannuation agreement with the member.

Your application for information has to be accompanied by a declaration that basically says that you require the information in order to assist you:

- to properly negotiate a superannuation agreement, or
- in connection with family law proceedings in which the superannuation interest is likely to be considered.

You have to include in this declaration information about the member who has the superannuation interest - including their name and date of birth.

You should be aware that the superannuation splitting laws are designed to prevent people going on 'fishing expeditions' to find out information about the superannuation interest of someone with whom they have had no relationship or are not intending to enter into a relationship.

The superannuation splitting laws provide that it is an offence to knowingly make a false or misleading statement in a declaration - with a penalty of up to 12 months imprisonment.

Your application also needs to be accompanied by any fees that the fund charges for the provision of information - so you will need to ask what, if any, fees you need to submit with your application. Remember that it is the person who applies for the information who is liable for any fees charged for information that is provided.

Under the superannuation splitting laws, if the trustee receives an application that complies with the requirements, they have to provide the information that is specified in the superannuation splitting laws.

## What information about the superannuation interest can I get?

### In brief

Under the superannuation splitting laws, you can get information about the value of the superannuation interest - or information that will enable you, or the court, to calculate its value. You can also get other information that will be of assistance when you are considering what might be done with the superannuation interest.

### Explanation

The details of the information that the trustees are required to provide a person who applies for information about a superannuation interest are set out in Part 7 of the FL Super Regulations.

The information that you can get depends on the kind of interest that the member spouse has.

#### Accumulation interest

Generally, if the member has an accumulation interest, then the information that you get will include:

- whether or not the interest is 'unsplittable'—if an interest is 'unsplittable', then it can't be split by an agreement or court order

- whether or not the interest is already subject to a payment split or payment flag— if the interest is subject to a payment split, you will also get information about the amount that a person is entitled to be paid under the earlier payment split
- when the member joined the superannuation fund, and
- information about the value of the interest.

The information will enable this type of interest to be valued in accordance with the FL Super Regulations. What information you actually get depends on whether the interest is in the growth phase or the payment phase and, if it is in the payment phase, what type of pension is being paid. For a fully vested accumulation interest, the trustee will generally be able to give you a statement that says what the value of the interest is. For some it may be necessary to calculate the value on the basis of earlier statements provided. For a partially vested accumulation interest, the method of valuation is set out in Schedule 3 of the FL Super Regulations.

#### **Defined benefit interest**

Generally, if the member has a defined benefit interest, then the information that you will get will be similar to that listed above for accumulation interests. However, the member will get different information about this type of interest, so it can be actuarially valued in accordance with the FL Super Regulations.

The superannuation splitting laws allow scheme specific valuation methods or factors to be approved, if the methods or factors set out in the FL Super Regulations are not appropriate. If a scheme specific method or factors have been approved for the superannuation interest about which you are seeking information then the trustee will tell you this.

Some funds have indicated that they will calculate the value of the member's interest, in accordance with the valuation method set out in the FL Super Regulations. In this case, the information that you get will be the value of the superannuation interest calculated in accordance with the valuation method set out in the FL Super Regulations - and you won't have to calculate it yourself.

### **Percentage-only interest**

If the superannuation interest is a percentage-only interest and it is in the payment phase, then you will get information about the type of pension that is being paid and its value and duration.

If the interest is a percentage-only interest and is in the growth phase then you will not get information about the value of the interest. This is because the way in which this type of interest vests is unusual and you will need to seek advice, for example from an actuary, about its value.

### **Self managed superannuation funds**

If the superannuation interest is in a self managed superannuation fund and is in the payment phase, then you will also only get information about the type of pension that is being paid and its value and duration.

However, if the superannuation interest is in a self managed superannuation fund and is in the growth phase then you will not get information about the value of the interest. This is because the value of the superannuation interest will generally depend on things like the value of the physical assets that underpin the fund, for example real estate investments.

You can request a copy of the governing rules of the fund - and these should give you an indication of how the fund invests its assets.

## **Do I have to value a superannuation interest before making a payment splitting agreement?**

### **In brief**

Under the superannuation splitting laws, there is no legal requirement that you value a superannuation interest before making a payment splitting agreement about it - though clearly it would be sensible to do so.

## Explanation

The superannuation splitting laws do not require you to value the superannuation interest before making a payment splitting agreement.

It is different if the court is considering making a payment splitting order - in which case, the court is required to value the superannuation interest.

## What does my payment splitting agreement have to say?

### In brief

The payment splitting agreement has to say how the superannuation interest is to be split.

### Explanation

The superannuation splitting laws set out what a payment splitting agreement must specify in order for it to operate effectively.

Generally, a payment splitting agreement must specify:

- an amount - known as the 'base amount'
- a method for calculating the base amount, or
- a percentage that is to apply to all splittable payments made in respect of the superannuation interest.

For percentage-only interests, in both the growth phase and the payment phase, the only agreement that you can make is to specify a percentage - hence the title 'percentage-only' interest. This means that if the superannuation interest is a percentage-only interest, then the superannuation agreement cannot specify a base amount or a method for calculating such an amount.

For percentage-only interests, you can make an agreement that specifies a percentage that is to apply to the total of each splittable payment. However, there is also a special type of percentage agreement that can be made for a percentage-only superannuation

interest. This type of agreement provides that the non-member spouse is entitled to be paid an amount calculated in accordance with the FL Super Regulations by reference to the percentage specified in the agreement.

The reason for making this type of agreement is so that the superannuation that is split is only that which was accrued up to the time of separation. The effect of this special type of percentage agreement is that the specified percentage will be applied to the proportion of each payment that was accrued up to the date of the separation of the parties.

For superannuation interests that aren't percentage-only interests, an agreement based on a specified percentage is only likely to be used for a superannuation interest in the payment phase. The reason for this is because if you specify a percentage in the growth phase, when you don't know what the final value of the superannuation interest will be, you may end up with a result that you hadn't intended.

Say, for example, there is a superannuation interest in the growth phase that you value at \$200,000 at the time that you are making the agreement and you specify in your agreement that the non-member spouse is to be entitled to 25% of each splittable payment. It may be that you intended that the non-member spouse be entitled to a total of \$50,000 - because they were also going to acquire the house as part of the agreement. However in 20 years time, the value of the superannuation interest may now be \$1,000,000 - because of growth and contributions after separation. Under the original agreement, the non-member spouse would still be entitled to 25%, which is now worth \$250,000 rather than the \$50,000 when you originally did the calculations.

## What is my entitlement under a payment splitting agreement?

### In brief

What you are entitled to under a payment splitting agreement obviously depends on what the agreement says.

## Explanation

If the payment splitting agreement specifies a percentage, then you are generally entitled to that percentage of each payment that would otherwise go to the member spouse.

If, however, the payment splitting agreement specifies a base amount, or a method for calculating a base amount, you are generally entitled to that amount plus an increase that, generally, reflects the investment performance of the superannuation fund. The total of the base amount and the 'investment performance' increase is called the 'adjusted base amount.' The FL Super Regulations set out how the original base amount is to be adjusted to arrive at the final 'adjusted base amount.'

How the adjusted base amount is paid to you depends on the benefit structure behind the member spouse's interest. If the member spouse is entitled to receive a lump sum that is equal to or greater than the adjusted base amount, the non-member spouse is entitled to receive the adjusted base amount. If the member spouse is entitled to receive a lump sum that is less than the adjusted base amount, the non-member spouse is entitled to receive that lump sum and the proportion of all subsequent splittable payments that the unsatisfied portion of the adjusted base amount bears to the value of the remaining benefits for the member spouse.

It is important to understand that you **cannot** access your entitlement until you reach your own condition of release.

## Do I have to get legal advice in order to make a payment splitting agreement?

### In brief

Yes. If you don't get legal advice the payment splitting agreement won't be binding on the trustee of the superannuation fund.



## **Explanation**

In order for a payment splitting agreement to be binding it has to comply with the formal requirements of the superannuation splitting laws.

One of the most important requirements is that, as with the more general financial agreements, each party must get independent legal advice about the agreement that they are considering entering into.

The payment splitting agreement must state that each party has been provided with independent legal advice from a legal practitioner - and the legal practitioners must sign a certificate to that effect. The certificate must then be annexed to the agreement.

Trustees do not have to act in accordance with a payment splitting agreement that is not binding.

Also, if the payment splitting agreement is not binding then the court will be able to make an order covering the superannuation interest - which may not be what you intended.

## **What should I do with my payment splitting agreement?**

### **In brief**

If you have already separated, you should serve a copy of it on the trustee of the superannuation fund as soon as possible.

If you haven't separated yet, you should serve a copy of it on the trustee as soon as you do separate.

### **Explanation**

The superannuation splitting laws provide that a payment split under a superannuation agreement takes effect (that is, in the superannuation splitting laws, is 'operative') at the beginning of the fourth business day after the day on which a copy of the agreement has been served on the trustee.

Once the superannuation agreement takes effect the trustee can't make any payments out of the superannuation interest without taking into account the payment split specified in the agreement. Therefore, it is in your interests to ensure that the superannuation agreement takes effect as soon as possible after you have separated.

## Do I have to give the trustee any other documents as well as my payment splitting agreement?

### In brief

Yes - there are some other documents that need to accompany your payment splitting agreement.

### Explanation

The certificates from the legal practitioners that provided each party with independent legal advice have to be attached to the payment splitting agreement.

Under the superannuation splitting laws, you also have to provide either:

- a copy of your decree absolute if you have already divorced, or
- a separation declaration if you have separated but not yet divorced, or if your de facto relationship has broken down.

If the agreement specifies a method for calculating a base amount, you also need to provide a document setting out the amount calculated using the specified method.

## What does my separation declaration have to say?

### In brief

Your separation declaration has to give details about your separation from your spouse or former de facto partner.

## Explanation

A separation declaration is a written declaration, which must be signed by at least one of the spouses or former de facto partners. What it has to say depends on whether the total withdrawal value for all the superannuation interests of the member spouse is more than the low cap rate amount (\$150,000, for the 2009-2010 financial year).

The total withdrawal value is the sum of the withdrawal benefit of each superannuation interest that the member spouse has.

If the total withdrawal value for all the superannuation interests of the member spouse is less than or equal to the low cap rate amount, your separation declaration has to state that:

- you and your spouse are married or you and your former de facto partner lived in a de facto relationship, and
- you are separated at the time that you are making your separation declaration.

If, however, the total withdrawal value for all the superannuation interests of the member spouse is more than the low cap rate amount, your separation declaration has to state that:

- you and your spouse are married or you and your former de facto partner lived in a de facto relationship
- you have separated and lived separately and apart for a continuous period of at least 12 months, and
- in the opinion of the spouse or former de facto partner making the declaration (or both of you if you are making the declaration together) there is no reasonable likelihood of cohabitation being resumed.

The reason for the more onerous declaration if the total withdrawal value of all the superannuation interests of the member spouse is more than the low cap rate amount is because there are tax advantages in splitting superannuation interests. If the superannuation interest is split, following a payment splitting agreement or order, both parties have their own separate low cap rate amount.

Therefore, it is necessary to ensure that only those people who have legitimately separated can split their superannuation interests under the superannuation splitting laws.

Under the superannuation splitting laws, you can apply to the trustee of a superannuation fund to find out the withdrawal benefit of each superannuation interest that the member spouse has. You then add them up to work out the total withdrawal value, and whether or not you have to make the more detailed separation declaration.

Under the superannuation splitting laws a person is guilty of an offence if they make a statement in a declaration knowing that the statement is false or misleading and they then serve the declaration on the trustee of a superannuation fund. The penalty for this offence is imprisonment for a period of up to 12 months.

## When does my payment splitting agreement take effect?

### In brief

Your payment splitting agreement takes effect (in the superannuation splitting laws, this is called becoming 'operative') at the beginning of the fourth business day after the day on which a copy of it is served on the trustee.

### Explanation

The intention is that the superannuation agreement should become operative as soon as possible. The reason for the delay of 4 business days is so that the superannuation agreement has time to get to the relevant administrators of the superannuation fund (who have to implement the agreement).

You also need to remember that the superannuation agreement does not become operative unless it is accompanied by the required documents.

Once the superannuation agreement is operative, it means that the trustee can't make any payments out of the superannuation interest without taking into account the payment split specified in the agreement.

## What if we want to defer making a decision about how to split a superannuation interest?

### In brief

You can make a flagging agreement, which effectively prevents a trustee from making any payment out of the superannuation interest until the flag is lifted.

### Explanation

It may be that, at the time when you are negotiating your property arrangements, you think that it would be better to wait for a while before making an agreement about how to split your superannuation.

It is not envisaged that this would happen often. However, there are circumstances in which it might be appropriate.

If a superannuation interest is a defined benefit interest it is not possible to actually value the interest until a condition of release is met and the member can know, with certainty, what the superannuation interest is actually worth.

If a member spouse is nearing a condition of release, the member spouse and the non-member spouse might decide that rather than agree on how to split the superannuation now they will wait until the condition of release is met, and the actual value of the interest is known, before making a decision about the interest.

In such a circumstance, it might be advisable to make a flagging agreement that will prevent the trustee from making any payment out of the superannuation interest until the flag is lifted.

Remember that you can only make a flagging agreement when the superannuation interest is in the growth phase. If the superannuation interest is in the payment phase, the superannuation splitting laws say that it is 'unflaggable.'

## When does a flagging agreement take effect?

### In brief

Generally, your flagging agreement takes effect (in the superannuation splitting laws it is called becoming 'operative') at the beginning of the fourth business day after the day on which a copy of it is served on the trustee. However, there is an important exception.

### Explanation

As with payment splitting agreements, the intention is that the flagging agreement should become operative as soon as possible.

The reason for the delay of 4 business days is so that the superannuation agreement has time to get to the relevant administrators of the superannuation fund - who will have to implement the agreement.

There is an exception to this general rule and that is for self managed superannuation funds. For an interest that is in a self managed superannuation fund, a payment flag agreement takes effect at the time when a copy the agreement is served on the trustee.

The reason for this is that these funds are self managed and so there should not be any delay in getting the agreement to the relevant administrator of the fund.

Remember that the payment flagging agreement will not become operative unless it is accompanied by the required documents.

Once the payment flagging agreement is operative, it means that the trustee can't make any payments out of the superannuation interest until the flag has been lifted.

## How can a payment flag that is operating on a superannuation interest be lifted?

### In brief

You can make a flag lifting agreement or, if you can't agree to lift the flag the court can order that the flag be lifted.

### Explanation

At any time when a payment flag agreement is operating on a superannuation interest, you can make a flag lifting agreement with your spouse or former de facto partner.

What the flag lifting agreement has to say depends on whether or not you have decided that you now want to split the superannuation interest.

If you just want to lift the flag but not split the superannuation interest, then the flag lifting agreement only has to say that the flag is to cease operating without any payment split. This is called a termination agreement.

If, however, you want to split the superannuation interest, the flag lifting agreement has to also specify the method of splitting that you have decided on. The options for this are the same as for a payment splitting agreement.

It may be, however, that by the time you want to lift the payment flag you and your former spouse are not able to come to an agreement about it.

If this happens, you can apply to the court to lift the flag. If the court decides that there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement, then it can make an order setting aside the flagging agreement.

You should also consider whether or not to apply to the court for an order to split the superannuation interest on which the flag has been operating. Once the flag has been lifted, then the superannuation fund is able to make payments to the member spouse if a condition of release has been reached.

## Is a payment splitting agreement or a flagging agreement binding on the trustee of the fund in which the superannuation interest is held?

### In brief

Yes - if you have complied with the requirements of the superannuation splitting laws.

### Explanation

The superannuation splitting laws set out a number of requirements with which a payment splitting agreement or a flagging agreement have to comply.

If the agreement complies with these legal requirements then it is binding on the trustee of the fund in which the superannuation interest is held. This means that the trustee is not able to deal with the superannuation interest except in accordance with the agreement.

However, if the agreement does not comply with the legal requirements, then it is **not** binding on the trustee of the fund in which the superannuation interest is held. This means that the trustee is not obliged to act in accordance with the agreement.

Remember, that an agreement is not binding unless each party has obtained independent legal advice. You should check with your independent legal adviser that all the legal requirements have been complied with before you provide the trustee with the agreement and other necessary documents.



## What happens if we can't agree on what to do with the superannuation?

### In brief

If you can't agree then the court can make an order splitting a superannuation interest, as part of a property settlement.

### Explanation

The property settlement regimes for married couples are set out under section 79 of the Family Law Act and, for de facto couples whose relationship has broken down, under section 90SM of that Act. The regimes enable orders to be made altering interests of the parties in their jointly or individually owned property, including orders in relation to superannuation interests of the parties in accordance with the superannuation splitting laws. For general details about the Family Law Act's property settlement regimes see the Victoria Legal Aid website.

## Does the court have to order that a superannuation interest be split?

### In brief

No - The superannuation splitting laws do not say that the court must make a payment splitting order.

### Explanation

Under the Family Law Act, a court must be satisfied that it is just and equitable, in all the circumstances, to make any property settlement order it is proposing to make.

It may be that the court will decide that in your particular circumstances it would not be just and equitable to make a payment splitting order covering a superannuation interest that either you or your spouse have.

## Does the court have to value a superannuation interest?

### In brief

Before it makes an order splitting a superannuation interest, the court **must** determine the value of the interest.

### Explanation

The superannuation splitting laws say that before making a splitting order the court must determine the value of the interest.

If there is a scheme specific method or factors approved for the superannuation interest, then the court must determine the value of the interest in accordance with the method or factors approved.

If the FL Super Regulations provide a method for determining the value of the interest, and there are no scheme specific methods or factors approved, then the court must determine the value in accordance with the method provided.

If there are no scheme specific methods or factors and the FL Super Regulations do not provide a method of determining the value of the interest then the court will determine the value of the interest by such method as it considers appropriate.

In practice, what this means is that the court expects that the parties to have valued the interest and to provide information about this, including:

- evidence about the nature of the superannuation interest
- documents evidencing the basis upon which the value of the superannuation interest has been calculated
- any documents calculating the value of the superannuation interest

- the information necessary, as provided by the trustee, for the interest to be valued in accordance with the FL Superannuation Regulations, and
- if the fund is a self managed superannuation fund, the Trust Deed of the fund.

The court is required to value the superannuation interest, in accordance with the superannuation splitting laws, before it makes a splitting order covering that interest.

Even if you are not seeking a splitting order, it is likely that the court will require you to value any superannuation interest that either party has.

In general property proceedings the court's first step is to value the property. So even if you are not seeking an order to divide a superannuation interest, you should probably still value the superannuation interest as the value of it is likely to be relevant to the division of any other property that you and your former spouse may have.

## What happens if we can't agree on what the value of the superannuation interest is?

### In brief

For most superannuation interests this shouldn't happen, because the method of valuing the interest is detailed in the FL Super Regulations.

### Explanation

The reason for including valuation methods in the superannuation splitting laws is to prevent, as far as possible, any arguments about the value of the superannuation interest.

The superannuation splitting laws require the trustee of a fund to provide all the information needed to value the superannuation interest. If it is necessary to actuarially calculate the value of the superannuation, then the valuation methods show you how to do this. There should not be any argument about the value of the superannuation interest provided you use the correct valuation method.

However, if for some reason you and your partner are not able to agree on the value of the superannuation interest, you need to remember that the court is required to value it in accordance with the appropriate valuation method set out in the FL Super Regulations or the scheme specific valuation method, if one has been approved that applies to the superannuation interest that you want to value. And it will do so on the basis of the information that the trustee has provided to you about the superannuation interest.

You need to remember that there are some superannuation interests for which no valuation methods are provided. These are:

- an interest in a self managed superannuation fund, and
- a percentage-only interest.

You will need to provide evidence to the court about the value of an interest of this type - and it may be, in this case, that there will be differing opinions about the value of the interest.

If this happens, the court will deal with the situation in exactly the same way as it deals with differences of opinion about the value of other items of property - that is, it will make an assessment, based on the evidence that each party provides to the court, of the value of the superannuation interest.

## What kind of splitting order can the court make?

### In brief

The court can make orders to split the superannuation interest similar to the types of agreements that you can make.

### Explanation

The kind of splitting order that the court can make depends on the type of superannuation interest and whether it is in the growth phase or the payment phase.

For most superannuation interests, the court will be able to make an order that effectively entitles the non-member spouse to either:

- an amount calculated in accordance with the FL Super Regulations, based on the amount specified in the order (a 'base amount' split), or
- a specified percentage of each of the splittable payments that is paid out of the superannuation interest - a percentage split.

For percentage-only interests, in both the growth phase and the payment phase, the order can only specify a percentage (hence the title 'percentage-only' interest). This means that if the superannuation interest is a percentage-only interest, then the order cannot specify a base amount or a method for calculating such an amount.

For percentage-only interests, the order can specify a percentage that is to apply to the total of each splittable payment. However, there is also a special type of percentage order that can be made for a percentage-only superannuation interest. This type of order provides that the non-member spouse is entitled to be paid an amount calculated in accordance with the FL Super Regulations by reference to the percentage specified in the order.

The reason for making this type of order is so that the superannuation that is split is only that which was accrued up to the time of separation. The effect of this special type of percentage order is that the specified percentage will be applied to the proportion of each payment that was accrued up to the date of the separation of the parties.

For superannuation interests that are not percentage-only interests, it is expected that the base amount split will be used in the growth phase. What the order might say is something like:

'The value of the superannuation interest is calculated in accordance with the superannuation splitting laws to be \$400,000. A base amount of \$150,000 is allocated to the non-member spouse.'

For superannuation interests that are not percentage-only interests, it is expected that generally the percentage split will be used in the payment phase. What the order might say is something like:

'The value of the superannuation interest is calculated in accordance with the superannuation splitting laws to be \$600,000, with payments each year of \$40,000. The non-member spouse is entitled to 50% of each splittable payment.' The reason that it is envisaged that a percentage split will generally not be used in the growth phase is because you may end up with unintended consequences.

Say, for example, there is a superannuation interest in the growth phase that you value at \$200,000 at the time that you are making the agreement and you specify in your agreement that the non-member spouse is to be entitled to 25% of each splittable payment. It may be that you intended that the non-member spouse be entitled to \$50,000 - because they were also going to acquire the house as part of the agreement. However in 20 years time, the value of the superannuation interest may now be \$1,000,000 - because of growth and contributions after separation. Under the original agreement, the non-member spouse would still be entitled to 25% - now worth \$250,000 rather than the \$50,000 when you originally did the calculations. If this is not what you intended, you would have been better off making a base amount agreement rather than a percentage agreement.

## What if the court wants to defer making a splitting order?

### In brief

The court can make a flagging order - remembering that the overall property settlement must be just and equitable.

### Explanation

There may be circumstances in which the court thinks it would be best to defer making a splitting order.

As with flagging agreements, the circumstances are likely to be that the superannuation interest is a defined benefit interest that is about to 'crystallise' because the member is

nearing a condition of release. In this situation, the court may consider that it would be better to actually (rather than actuarially) value the superannuation interest.

The superannuation splitting laws say that in deciding whether to make a flagging order the court may take into account the likelihood that a splittable payment will soon become payable and any other matter that it considers relevant.

The superannuation splitting laws do not require the court to value a superannuation interest before it makes a flagging order. However, it is likely that the court will want information about the value of the superannuation interest— especially if there is also other property that the court is considering as part of the property settlement application.

## When will a splitting order or a flagging order take effect?

### In brief

A court order will take effect (referred to as the ‘operative time’ in the superannuation splitting laws) at the time specified in the order.

### Explanation

The court will make a decision as to what it thinks is the appropriate time for the order to become operative. As with agreements, the intention would be not to allow too much time between the making of the order and when it takes effect. This is necessary to minimise the risk of something happening that would make it difficult, if not impossible, for the order to be complied with.

Obviously, the trustee needs to know that an order has been made - and what that order says.

The superannuation splitting laws say that the parties are responsible for serving a copy of the order on the trustee of the relevant fund.

## How can a flagging order be lifted?

### In brief

You can apply to the court to lift the flagging order and also seek a splitting order, if you want to.

### Explanation

The trustee can't make that payment to the member spouse - because of the flagging order.

At any time that a flagging order is operating, you can apply to the court for an order that the flagging order be lifted.

If a flagging order is in place when a splittable payment becomes payable to the member spouse, the superannuation splitting laws say that the trustee of the fund in which the superannuation interest is held must notify the court about this.

When the court receives this notification, it will call the case on for mention and give notice of this to both the member spouse and the non-member spouse. You need to make sure that the court always has a record of your current postal address otherwise you may not get any notice that is sent to you.

## Is a splitting order or flagging order binding on the trustee of the fund in which the superannuation interest is held?

### In brief

If the legal requirements are followed, then the order is binding on the trustee.



## Explanation

The superannuation splitting laws say that the court cannot make an order unless the trustee of the fund has been ‘accorded procedural fairness’ in relation to the making of the order.

In law, procedural fairness can mean a number of different things. But for the purposes of making orders under the superannuation splitting laws that bind the trustee, it means that the ‘hearing rule’ must be applied and the order must be served on the trustee.

The ‘hearing rule’ says that the trustee must be given:

- notice that the order is being considered, and
- an opportunity to be ‘heard’ (hence the name ‘hearing rule’).

In practice, the trustee needs to be given notice that the court has an application before it that might result in a splitting or flagging order. The court has indicated that, where a flagging or splitting order is sought by one or both of the parties, it expects the parties to notify the trustee of the relevant superannuation fund about the orders that are being sought.

The notice needs to give the trustee ‘sufficient’ time to consider the proposed order and to make a decision whether or not they wish to become involved in the court proceedings because of the proposed order. You will need to provide evidence to the court that the trustee has been given sufficient notice.

When you give notice to the trustee about the proposed order that is being sought, it might be advisable to ask the trustee to respond by a certain date and let you know whether or not they wish to participate in the proceedings.

While you need to give the trustee an opportunity to be ‘heard’, it is expected that in most cases the trustee will not want to participate in the proceedings. However, there may be circumstances in which the trustee may wish to participate in the proceedings and argue against the making of the proposed order. For example, in a self managed superannuation fund where the assets of the fund are real property, the trustee may

wish to tell the court that the effect of making a splitting order would be that the real property would have to be sold and this would disadvantage the rest of the members.

Whether or not the trustee participates in the court proceedings, procedural fairness requires that any order made by the court in the proceedings must be served on the trustee.

## What is my entitlement under a payment splitting order?

### In brief

What you will be entitled to under a payment splitting order will depend on what the order says.

### Explanation

If the payment splitting order specifies a percentage, then you are generally entitled to that percentage of each splittable payment that would otherwise go to the member spouse.

If, however, the payment splitting order specifies a base amount, or a method for calculating a base amount, you are generally entitled to that amount plus an increase that, generally, reflects the investment performance of the superannuation fund. The total of the base amount, and the 'investment performance' increase, is called the 'adjusted base amount.' The FL Super Regulations set out how the original base amount is to be adjusted to arrive at the final 'adjusted base amount.'

How the adjusted base amount is paid to you depends on the benefit structure behind the member spouse's interest. If the member spouse is entitled to receive a lump sum that is equal to or greater than the adjusted base amount, the non-member spouse will be entitled to receive the adjusted base amount. If the member spouse is entitled to receive a lump sum that is less than the adjusted base amount, the non-member spouse is entitled to receive that lump sum and the proportion of all subsequent splittable payments that the unsatisfied portion of the adjusted base amount bears to the value of the remaining benefits for the member spouse.

## What will the trustee do when they get my superannuation agreement or the court order?

### In brief

When the trustee gets your superannuation agreement or the court order they will record details of it on their information systems. There are also some things that they will need to tell you, and some things that you will need to tell them.

### Explanation

The superannuation splitting laws say that once there is an operative superannuation agreement or court order in place, trustees cannot make any payments to the member spouse without taking the payment split, as specified in the agreement or order, into account. The trustees will need to record details of the agreement or order on their information systems in order that they can comply with this legal requirement.

The superannuation splitting laws also say that, following the service of an agreement or order on the trustee, the trustee must give to the non-member spouse a written notice stating:

- the contact details for the fund
- if there is one, the base amount allocated to the non-member spouse under the agreement or order and the method by which it will be adjusted
- the circumstances in which the entitlement of the non-member spouse will become payable, and
- details of any fee payable by the non-member spouse in respect of the payment split, and arrangements for the payment of any fees.

The fact that you have a superannuation agreement or court order in place doesn't necessarily mean that anything will happen to the superannuation interest immediately.

In some circumstances it will be possible for a new superannuation interest to be created for the non-member spouse - but in others it won't be possible.

If a new superannuation interest cannot be created, and the agreement/order allocates a base amount, the trustees need to monitor the non-member spouse's entitlement until the member spouse becomes entitled to a payment from the superannuation interest.

Between the time when the superannuation agreement or order becomes operative and the time when a payment to the member spouse is due, the non-member spouse's base amount will 'grow', in accordance with the rules set out in the superannuation splitting laws. What the non-member spouse is generally entitled to when the payment to the member spouse is due is called the 'adjusted base amount.'

When a payment is due to be paid to the member spouse, the trustee has to implement the payment split that is specified in the superannuation agreement or order - and pay a certain amount to the non-member spouse and the remaining amount to the member spouse. What the non-member spouse is entitled to depends on what the agreement or order says:

- If the agreement or order specified is a base amount, then the non-member spouse is entitled to the adjusted base amount, or
- if the agreement or order specified a percentage, then the non-member spouse is entitled to that percentage of each of the payments made to the member spouse.

If a new interest hasn't been created for the non-member spouse, at the end of each financial year the trustee must give the following information to the non-member spouse:

- the value of the adjusted base amount at the end of the financial year
- the amount of the adjustment in the financial year, and
- the interest rate that applied to the superannuation interest for the financial year.

The trustee is not able to give this information to the non-member spouse if they do not have that person's contact details.

The superannuation splitting laws provide that the non-member spouse must notify the trustee, as soon as possible after the copy of the superannuation agreement or order is served on the trustee, the following details about themselves:

- full name

- postal address
- date of birth, and
- whether or not they are a member of the fund and, if so, their membership number.

## What happens if either the member spouse or the non-member spouse dies and there is a payment split agreement or order in place?

### In brief

The payment split will continue to operate unless the superannuation interest is paying an income stream that ceases on the death of the member.

### Explanation

Under the superannuation splitting laws, a payment split agreement or order essentially says when a splittable payment becomes payable then a certain amount of it is to be paid to the non-member spouse.

If the member spouse dies, the superannuation splitting laws say that a payment made by the trustee to the legal personal representative of the deceased member is a splittable payment. The legal personal representative is generally the executor of the deceased person's will. This means that any payment split agreement or order continues to operate and any entitlement that the non-member spouse has will be met for as long as splittable payments continue to be made.

If the superannuation interest is in the payment phase and the income stream does not continue after the death of the member spouse (for example because there is no reversionary beneficiary), then there will be no further splittable payments and the non-member spouse will not receive anything further. This is the case regardless of whether the non-member spouse's full entitlement under the payment split agreement or order has been met at the time that the splittable payments cease. For this reason it might be advisable for the non-member spouse to seek to have their entitlement separated from the member spouse's interest.

If there is a payment split agreement or order in place and the non-member spouse dies, then the superannuation splitting laws say that the payment split continues to operate in favour of the 'legal personal representative' of the deceased spouse. The legal personal representative is usually the executor of the deceased person's will.

What this means in effect is that payments will continue to be made after the death of the non-member spouse and they will be made to the estate of the non-member.

## What if I want to actually split my spouse's superannuation interest and get a new superannuation interest for myself?

### In brief

In some circumstances it is possible for your spouse's superannuation interest to be split and for your entitlement, under the superannuation agreement, to be put into your own superannuation interest.

However, it is **not** possible in all circumstances.

### Explanation

Whether or not it is possible for a new superannuation interest to be created for the non-member spouse depends on what type of superannuation interest the member spouse has.

Generally, this situation arises where the member spouse's superannuation interest is in a regulated superannuation fund or an approved deposit fund and:

- the member spouse's interest is an accumulation interest that is in the growth phase, or
- an allocated pension is being paid in respect of the member spouse's interest.

In these situations, the non-member spouse has a number of options open to them under the SIS Regulations.

The non-member spouse can ask the trustee of the fund in which the member spouse's interest is held to create a new interest in that fund for them.

Alternatively, the non-member spouse can ask the trustee to roll over or transfer the benefits to another fund, or to a retirement savings account, specified in the request, to be held for the benefit of the non-member spouse.

If the member spouse's interest is in a self managed fund, the member spouse can also ask the trustee to transfer or roll over the non-member spouse's entitlement.

The governing rules of some funds do not allow a new interest to be created for the non-member spouse in the fund. In this case, if the trustee gets a request from the non-member spouse to create a new interest in that fund for them, the trustee is not able to do this. If the trustee gets a request that they can't comply with, they have to roll over or transfer the non-member spouse's entitlement to another fund, or to a retirement savings account nominated by the non-member spouse.

If the non-member spouse does not nominate a fund then the trustee will roll over or transfer the non-member spouse's entitlement to an eligible rollover fund - and the trustee must advise the non-member spouse that this has been done and give them contact details for the fund.

Similar options are available to the non-member spouse where the member spouse's superannuation interest is an RSA.

Also, some funds have amended their governing rules so that a new interest may be able to be created, or a roll over or transfer to occur, under those rules.

If the SIS Regulations do not cover your situation and you are interested in the possibility of creating a new interest from your entitlement, you should ask the trustee of the member spouse's superannuation interest whether there are any possibilities under the governing rules of the fund.

## What do I have to do if I want to have a new interest created or my entitlement transferred or rolled over to another fund under the SIS Regulations?

### In brief

You have to give the trustee a written request outlining what you would like the trustee to do.

### Explanation

Under the SIS Regulations, if a superannuation interest in a regulated superannuation fund or an ADF becomes subject to a payment split, the trustee of the fund has to notify both the member spouse and the non-member spouse that the interest is subject to a payment split. The trustee has, generally, up to 28 days to give these notices - called 'payment split' notices.

After the trustee has given a payment split notice to the non-member spouse, they have 28 days in which to make a written request to the trustee outlining what they want the trustee to do. Some trustees may allow a longer period in which the person can make the request.

The written request notice must:

- be signed by the person making the request, and
- state the date when it is given to the trustee.

Remember that if you want the entitlement transferred or rolled over to a specific fund or retirement savings account you also need to give the trustee information about where you want it to go. If you don't specify where you want the entitlement to go, the trustee may transfer or roll over the entitlement to an eligible rollover fund.

The superannuation splitting laws say that the trustee may allow a request, once it has been given, to be withdrawn. But the law does not say that the trustee must allow a



request to be withdrawn - so you should think carefully before putting in a request and make sure that you have all the necessary and relevant information in the request.

If the trustee receives a request that satisfies the formal requirements, the trustee must give effect to it unless:

- the trustee has received an earlier request, which has not been withdrawn, relating to the same interest
- if the request asks for a new interest to be created in the same fund and the governing rules of the fund don't allow this to happen, or
- if the request asks for the entitlement to be transferred or rolled out to a specified fund or retirement savings account provider and that fund or provider does not accept the rollover or transfer of the benefits for the non-member spouse.

If either of the last two things happen, the trustee must roll over or transfer the entitlement to either another fund or retirement savings account nominated by the non-member spouse or, if the non-member spouse doesn't nominate one, an eligible rollover fund.

If the trustee rolls over or transfers the entitlement to an eligible rollover fund then the trustee must give the non-member spouse a written notice stating that it has happened and giving the name and contact details for the fund into which the entitlement has gone.

The member spouse is also permitted to give a request to the trustee in the same way as the non-member spouse can. However, if the member spouse puts in the request then it has to include a written nomination by the non-member spouse specifying the fund to which the non-member spouse wishes the entitlement to be transferred.

## What happens if I don't put in a request under the SIS Regulations?

### In brief

If you don't put in a request to the trustee telling them what you want to happen to your entitlement under the payment splitting agreement, the trustee can make a decision itself about what to do with your entitlement.

### Explanation

The trustee has the same options as the non-member spouse about what to do with the non-member spouse's entitlement.

If the trustee doesn't receive a request within the time allowed, the trustee may:

- create a new interest for the non-member spouse in the superannuation fund or ADF in which the original interest is held, or
- roll over or transfer the entitlement to another fund or retirement savings account nominated by the non-member spouse, to be held for the benefit of the non-member spouse.

However, in some cases, as explained earlier, the governing rules of the nominated fund or retirement savings account may preclude the fund accepting the roll over or transfer.

Obviously, if the trustee decides to initiate a roll over or transfer it will need to ask the non-member spouse to nominate the place where they want the entitlement to go to. Therefore, before rolling over or transferring the entitlement, the trustee must give the non-member spouse a written notice stating that:

- they have 28 days in which to nominate a fund or retirement savings account into which the entitlement may be rolled over or transferred
- if the non-member spouse doesn't nominate a fund, then the trustee may roll over or transfer the entitlement to an eligible rollover fund, and

- they have provided the contact details of the eligible rollover fund that they intend to use.

## What happens if I get a new interest created in my name or my entitlement is transferred or rolled over to another fund under the SIS Regulations?

### In brief

Generally, you will become a member of the fund in your own right. But there may be special rules that apply to you.

### Explanation

If the non-member spouse gets a new interest created in their name in the fund where the original interest is held, or the entitlement is transferred or rolled over to another fund, then the non-member spouse generally becomes a member of the fund in which their interest is held.

This means that the non-member spouse will not have any further ties with the member spouse's superannuation interest. The non-member spouse's entitlement is not dependent on decisions made by the member spouse, for example investment decisions that may not prove effective. Similarly the non-member spouse's entitlement is not dependent on what happens to the member spouse, for example if the member spouse dies and the pension payments cease.

However, in some cases it may be that there are special rules for an interest that is created for a non-member spouse in the same fund as the member's original interest. For example, the governing rules of the fund may provide that the non-member spouse is not able to make any additional contributions to the new interest that is created for them.

You should find out from the trustee of the fund whether there are any special rules that apply if a new interest is created for you in the fund. This may affect the decision that

you make about whether or not to have the new interest created in that fund or the entitlement transferred or rolled over.