

Super and family law



A quick guide to the family law rules that apply to superannuation

Family law treats super as property that can be divided or split in the event of a marriage or a de facto relationship breakdown. Here's a quick overview.



In summary, the splitting laws allow superannuation interests to be divided either by agreement (known as a superannuation agreement) between the parties of a marriage or de facto relationship breakdown, or by Court Order implementing a property settlement in relation to a divorce or separation.

The Trustee of the member's superannuation fund must give effect to the agreement or the Court Order.

What do the laws state?

The splitting laws cover the whole process relating to the splitting of superannuation interests, which requires trustees of super funds to:

- provide initial information to an eligible person who enquires about the value of a superannuation interest
- flag a superannuation interest (on the request of the parties or by Court Order) so that no payment can be made until the flag is lifted
- split a superannuation interest between the parties to a marriage or de facto relationship, either by agreement or by Court Order.

Who can request information for family law purposes?

The following parties are able to make a request for information from the super fund:

- the member of the super fund (called the *member spouse*)
- the spouse of a member (*non-member spouse*)
- a person who intends to enter into a superannuation agreement with the fund member for family law purposes.

A spouse includes a person who was married or in a de facto relationship with a fund member before the dissolution of the marriage or de facto relationship.

Does your superannuation fund have to provide information?

The trustee must respond to a request for information from an eligible applicant if the request meets the following essential requirements.

What are the essential requirements?

A request for information can only be processed where a written application is submitted with a declaration in the prescribed form (known as a *Form 6 Declaration*). If the requirements are not met, or the fund member cannot be identified from the information provided, the applicant will be informed that the information requested cannot be provided.

What information must the fund provide to the applicant?

We provide any necessary information within a reasonable timeframe. The information is based on the fund member's interest at the date of receipt of the application or an earlier date if nominated by the applicant.

If the applicant is an eligible person other than the fund member, then only the information prescribed under the family law provisions can be provided. Under privacy requirements, we cannot provide any further information requested regarding a fund member's superannuation interest, which is not covered by the family law provisions, without the authorisation of the fund member.

As a standard practice, we will provide the necessary information in accordance with family law provisions to eligible applicants who meet the essential requirements.

If a member requires information the member must submit a Form 6 Declaration to allow us to supply the relevant information. Benefit quotes are still available to a member at any time free of charge.

What information cannot be provided by the fund?

If the request comes from a non-member spouse, we cannot provide the member spouse's address (including a postal address). Nor can we advise the member spouse that the non-member spouse has applied for the information.

Benefit payment flagging

A benefit payment flag is likely to be put in place in the circumstances where a benefit payment is expected to occur reasonably soon and a decision has not yet been made on whether or how the benefit might be split. However, parties to a marriage or a de facto relationship could agree to a flag at any time, as long as they are separated or divorced.

A superannuation benefit that cannot be flagged is called an *unflaggable interest*. An unflaggable interest is a benefit that is in the *payment phase*, that is, where a benefit has already commenced to be paid.

How can a benefit payment flag be set?

A benefit payment flag can be set by a:

- a Court Order; or
- a superannuation agreement made between the parties of a marriage or a de facto relationship who are separated or divorced.

How is a benefit payment flag set by agreement?

A benefit payment flag agreement notice must be served on the Trustee and must clearly identify the superannuation interest to be flagged. This notice has to be accompanied by a:

- copy of the decree absolute dissolving the marriage or a de facto relationship; or
- *separation declaration* dated not more than 28 days before the date the declaration is served on the Trustee.

A benefit payment flag stops the Trustee from paying a superannuation benefit while the flag is in place.



Some benefit payments are not subject to a payment flag, e.g. if the benefit is already being paid. Other payments that cannot be split may be made even though a flag is in place, for example, when a benefit is released to the member spouse on grounds of financial hardship.

What is a separation declaration and what needs to be included in the declaration for the benefit payment flag to be set?

A separation declaration is a written statutory declaration signed by at least one of the spouses. The information that must be provided depends on whether or not the value of the member spouse withdrawal benefit at the time the declaration is made, is less than or greater than the low rate cap for super lump sum payments. For more information please see the *Super taxes, caps, payments, thresholds and rebates* fact sheet available from our website.

a) Withdrawal benefit less than low rate cap

The separation declaration must state that the spouses are married or in a de facto relationship, but are separated, at the date of the declaration.

b) Withdrawal benefit greater than low rate cap

The separation declaration must state that:

- the spouses are married or in a de facto relationship; and
- the spouses separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the date of the declaration; and
- in the opinion of the spouse (or spouses) making the declaration, there is no reasonable likelihood of cohabitation being resumed.

Note that the separation declaration is required to be signed by only one spouse to be effective.

When does a benefit payment flag take effect?

Where a benefit payment flag is set in accordance with a superannuation agreement, the flag is effective no later than the beginning of the 4th business day after the date on which a copy of the agreement (together with a copy of the decree absolute or separation declaration) is served on the Trustee. Remember that a separation declaration must be dated no more than 28 days before the date the declaration is served on the Trustee.

In the case of a Court Order, the flag starts from the time it is served (or a time specified in the order). A payment flag continues to apply even if a spouse dies.

What is the Trustee required to do if a benefit becomes payable while a flag is in place?

If a benefit becomes payable, we must notify both the member spouse and the non-member spouse within 14 days after the date the benefit became payable.

If the flag was imposed under a Court Order, we must also notify the Court, within the period specified in the order, that a benefit has become payable. This alerts the parties so that we can impose a splitting notice for the sharing of the benefit between the married or de facto partners.

When does a benefit become payable?

Specifically, a benefit becomes payable from a fund when:

- the member is eligible to receive a benefit because the fund and/or Federal Government superannuation rules applying to payment of a particular benefit have been satisfied for example, the member has ceased employment on reaching the fund retirement age; and
- We have received an application for benefit payment from the member.

When does a benefit payment flag cease to operate?

A benefit payment flag is lifted when:

- a court orders the lifting of the flag; or
- a flag lifting agreement (together with a copy of the decree absolute or separation declaration) is served on the Trustee.

Generally, a benefit flag is lifted to enable the benefit to be split between the parties.

An agreement or Court Order to lift a flag will usually include instructions on how a superannuation interest is to be split (see *Splitting of superannuation interests*).

What must a valid flag lifting agreement contain?

A valid flag lifting agreement must:

- be signed by both spouses;
- contain a statement that each spouse has received independent legal advice as to the legal effect of the agreement;
- be accompanied by a certificate signed by the legal advisers, stating that the advice has been provided and is attached to the agreement;
- be provided (a copy only) to each spouse.

Can the Trustee charge a fee for the benefit flagging process?

The Trustee is able to charge a reasonable fee for setting or lifting a benefit payment flag. The fee is payable by the member spouse and the non-member spouse in equal parts. However, currently the Trustee has not set any fees for the flagging process.

Splitting of superannuation interests

What is a benefit split?



A benefit split is the method by which a member spouse's superannuation interest is allocated or shared between the parties to a marriage or de facto relationship.

The effect of a benefit split is when:

- the member spouse account balance or benefit entitlement is reduced by the amount of the benefit that is split off
- the non-member spouse is entitled to the benefit amount split off from the member spouse's account but not necessarily to immediate payment of that amount.

Are there benefits that cannot be split?

Yes – where a member spouse's accrued superannuation benefit is valued at less than \$5,000. Benefit payments that cannot be split, include those made to the member spouse on financial hardship or compassionate grounds, as well as payments of insured income protection benefits, temporary incapacity benefits and death benefits to or for a child under age 18.

How can a benefit split be imposed?

A benefit split can be imposed by agreement (either a superannuation agreement or a benefit payment flag lifting agreement) or by Court Order. Members can provide an agreement or order to split a superannuation interest before a benefit becomes payable to the member spouse. In this case, the benefit entitlement will be split between the

parties while the member spouse is still a current member of the Fund (even though the benefit is not yet payable).

What documents are required for a benefit split?

Before a benefit can be split, we must receive the following documents.

1. Splitting by agreement between the marriage or de facto relationship partners:

- Superannuation agreement or flag lifting agreement, and an annexure to the agreement stating that both parties have been provided with legal advice from a legal practitioner; and
- Notice to the Trustee setting out the calculation of the base amount i.e. the value of the non-member spouse's share of the benefit; and
- Separation declaration or decree absolute; and
- Regulation 72 notice from the non-member spouse.

2. Splitting by Court Order:

- an order of the Court; and
- documents in the second and last points.

Generally, the order will only be binding on the Trustee where there has been procedural fairness in relation to the making of the order. Procedural fairness, in this context, means that before the Court proceedings, the Trustee has been given a copy of draft orders and 28 days in which to comment or object to the proposed orders. This provides the Trustee with an opportunity to check that the order can actually be implemented at an administrative and practical level and is in line with relevant legislation.



What is a Regulation 72 notice?

A Regulation 72 notice (from Regulation 72 of the Family Law Regulations) is the title given to information provided by the non-member spouse to the Fund.

The non-member spouse must provide to the Trustee a written notice containing their details, as follows:

- Full name
- Postal address
- Date of birth
- Whether the non-member spouse is a member of the Fund in their own right in which the benefit to be split is held, and if so their membership number
- The notice must be signed and dated by the non-member spouse.

If not submitted with the other benefit splitting documents the non-member must provide a Regulation 72 notice as soon as possible thereafter.

What types of benefit split are there?

There are three types of benefit split and each one uses a different method. If the benefit split is imposed under an agreement, it must specify, among other things, the basis of the split. For this purpose, the agreement must specify a:

- base amount; or
- method by which the base amount can be calculated;
- percentage split that is to apply to all splittable payments.

A Court Order will provide for splitting of the benefit by one of the above methods.

What notice of a benefit payment split is provided to the parties?

We will notify the member spouse and the non-member spouse if the member spouse's interest in the fund becomes subject to a benefit payment split. This is called a payment split notice. Generally, the payment split notice must be provided within 28 days after the date of effect of the payment split.

The notice will state that the superannuation interest (benefit) of the member spouse is subject to a payment split and that the non-member spouse is entitled to a specified amount.

The split notice issued to the non-member spouse will be accompanied by information that enables the non-member spouse to make a decision about their splitting options.

When does the benefit split take effect?

The benefit split's effective date is determined as follows:

- Splitting agreement* – must be effective by no later than the beginning of the 4th business day after the day we receive the agreement notice and other appropriate documentation.
- Court Order – the effective date of the split is the day specified by the Court or, if later, the day on which the order is received.

* The splitting agreement may be contained within either a superannuation agreement or benefit payment flag lifting agreement.

What options does the non-member spouse have for their share of the benefit?

Options available to the non-member spouse for their share of an interest split are to:

- leave the benefit in Aware Super in their own name. If they are not already a member of the fund, they can join the Fund as a member in their own right, with the appropriate split amount being transferred from the account of the member spouse. If the non-member spouse is already a member in their own right, the appropriate split amount being transferred from the account of the member spouse can be allocated to the existing account;
- roll over or transfer the benefit to another fund;
- apply for payment of the benefit, subject to satisfaction of one of the Federal Government superannuation standards for superannuation benefit release (Proof will be required for release on the basis of age, invalidity, death, financial hardship etc.).

The non-member spouse should make a request to one of the three options within 28 days after the date of issue of the benefit payment split notice.

What if the non-member spouse does not choose an option?

If the Trustee does not receive payment instructions from the non-member spouse, we will create a new interest (i.e. an account) in the Fund for the non member spouse.

Can we charge a fee for a payment split?

The Trustee can charge a reasonable fee for the payment split. The fee is generally payable by the member and the non-member spouse in equal parts. However, if the non-member spouse is entitled to the whole of the amount of a splittable payment, the entire fee is payable by the non-member spouse.

Get in touch

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