

The purpose of this fact sheet is to provide general information only on how superannuation entitlements may be dealt with on the breakdown of a marriage or certain de facto relationship (including same-sex couples). When a marriage or relationship breaks down, splitting the assets of the couple involved, can be a significant issue.

This fact sheet explains how superannuation may be handled when a couple divides property after the breakdown in a marriage or de facto relationship (including same sex couples).

■ Overview

Since December 2002, couples whose marriage has broken down have been able to divide their superannuation in the same way that they can divide other property of the marriage. From March 2009, couples in a de facto relationship (opposite sex or same sex) are able to split their superannuation interests in the same way in the event that the relationship breaks down.

This means that separating couples can treat superannuation as a type of property, and split the superannuation interests by agreement or court order. Trustees of super funds are bound by these agreements or orders. The agreements or orders may split the superannuation interest directly, or may indicate (flag) that a split will be required when the interest matures

The split superannuation interest remains subject to superannuation law. For example, a split superannuation interest will usually not be available until retirement age.

Legislation requires that both parties obtain independent legal advice before preparing and signing an agreement or Court Order.

The splitting or flagging of superannuation benefits on the breakdown of a relationship is not compulsory. You may wish to consider other options when deciding on the division of assets. Splitting a superannuation entitlement will not convert it into a cash asset, but may be used to offset other property of the relationship.

■ Options for splitting Superannuation

Separating couples who intend to split superannuation assets can opt for either:

- a formal written superannuation agreement made by the couple under the Family Law Act (which must be accompanied by a copy of a Separation Declaration or the Decree Absolute, or); or
- a court order made by the Family Court.

Both of these options are binding on the relevant super fund(s). Legal advice from an appropriately qualified legal practitioner should be considered before making a decision about splitting or flagging a superannuation benefit.

■ Splitting and Flagging Superannuation Benefits

Splitting and Flagging are two terms that are used frequently when discussing the division of assets.

Please note: For the purposes of this Fact Sheet the term 'partner' refers to a spouse or a de facto partner (including same-sex couples).

Splitting

'Splitting' means that a decision has been made to split a member's superannuation benefit and allocate a specified amount of that benefit (either as a percentage or a whole dollar amount) to a superannuation account in the name of the member's partner.

Certain superannuation interests and payments are not splittable. These include the following:

- a superannuation interest with a withdrawal value of less than \$5,000;
- A payment made to a member:
 - on compassionate grounds,
 - on grounds of severe financial hardship,
 - for permanent incapacity,
 - for temporary incapacity, and
- insured benefits and payments to a reversionary beneficiary after the death of a member spouse.

Flagging

'Flagging' means that a decision on how to split a member's superannuation benefit has been deferred until a later date. If the benefit becomes payable to the member while a flag is in place, the benefit cannot be paid and the Fund must notify the parties or the Court. The Fund will then wait for further instructions from the parties or Court before paying the benefit.

Eligibility

A separating couple (whether married or de facto) who are entitled to access the Commonwealth Family Law Courts for property or maintenance matters can split superannuation.

Court Orders or financial agreements received prior to 28 December 2002 are non-binding on the Trustee of the Fund.

■ The Process of a Superannuation Family Law Split

Requesting information

The first step in a superannuation split is the initial request for information. This may be undertaken by the member, or by the member's partner. This request is confidential.

A superannuation agreement or Court Order must take into account the value of the superannuation interest(s), in order to do so, an accurate report of the value of each account must be requested.

There are restrictions on who may request such information, only an 'eligible person' may do so. An 'eligible person' is:

- the member;
- the spouse, former spouse, de facto partner or former de facto partner of the member, or
- a person who intends to enter into a superannuation agreement with the member (for example, a pre-nuptial agreement).

The person requesting the information must declare the information is needed to help them properly negotiate a superannuation agreement or to assist in connection with the administration of the Act.

Protection of information

Under section 90MZG of the Family Law Act 1975 (the Act), it is an offence to make a statement in a declaration provided to a Trustee knowing the statement is false and misleading. The offence is punishable by imprisonment for a period of up to twelve months.

The Fund Trustee is not permitted to:

- inform the member that an application for information has been received

- provide the partner with the address of the member, or
- provide the member with the address of the partner.

What must be provided to the Fund Trustee when requesting information?

When seeking information about the superannuation interest of a member of the Fund, you must provide the Fund Trustee with:

- a Form 6 Declaration (for the purpose of satisfying the Fund Trustee that you are entitled to seek the information)
- a Superannuation Information Request Form (together with the appropriate Superannuation Information Form), and
- our fee of \$100

Please note: The \$100 fee only applies if you are the partner or a member requesting information about another member of the Fund.

Further details about requesting information from the Trustee and copies of these documents are available in the Superannuation Information Kit issued by the Family Court of Australia at familylawcourts.gov.au. Alternatively you may choose to seek independent legal advice to obtain this information.

How does ESI Super calculate the value of a superannuation benefit?

Accumulation account

Calculating the value of the interest to be split in an Accumulation account is based on the balance of the account at the Appropriate Date (as defined below). The balance of the account is the contributions paid in, the effect of investment returns, less fees, taxes, and insurance premiums (if applicable).

Defined Benefit account

Valuing an interest in a Defined Benefit account is more complex, as the calculation is based on a formula that takes into account the member's salary, accrued benefit multiple, and period of account membership at the Appropriate Date (as defined below).

For both an accumulation account and a defined benefit account, the Appropriate Date is:

- the date when the application for the information is received by the Trustee, or
- if an earlier date is specified in the application, that date.

Pension account

The value of the interest to be split in a Pension account is the current withdrawal benefit.

What happens when a superannuation split occurs?

The formal superannuation splitting agreement or court order, which must be served on the Trustee, will provide instructions to the Trustee as to how the superannuation interest is to be split. On receipt of a court order or superannuation agreement and appropriate documents, ESI Super will split the member's account accordingly.

Unrestricted non-preserved, restricted non-preserved and preserved benefits are shared between the parties in proportion to their share of the overall benefits. Following a split of the member's superannuation, the member's ESI Super account will be reduced by the specified amount. Any surcharge liability arising prior to the split will remain in the member's ESI Super account.

No tax is payable when a superannuation benefit is split unless the non-member spouse satisfies a condition of release and elects to receive the entitlement in cash.

Splitting of a pension is treated as a commutation and will affect pension rebates and the undeducted purchase price (UPP) for both parties. Each party will be entitled to their own Eligible Termination Payment (ETP) once a pension is split.

What happens to the non-member partner's superannuation interest?

The member's former partner will have an ESI Super account opened for them in the Fund. They can retain this individual account in the Fund or exercise the available option of rolling over their entitlement to another complying superannuation fund.

A receiving partner of a family law split whose partner is in the Defined Benefit Fund will get 100% of their splittable monies invested in the Cash Enhanced option, unless the partner has actively made an investment choice, in which case the partner's investment choice will apply to the non-member partner's account.

A receiving partner of a family law split whose partner is in the Defined Contribution Fund will have their splittable monies invested in their partner's investment choice.

If any percentage of the member's investment option is invested in the Smoothed or the Capital Guaranteed investment options then that percentage will be transferred to the Balanced investment choice.

The non-member partner has the ability to change the investment option applied to their account at any time, including prior to the account being established.

A partner who has met a condition of release may choose to receive the payment of the split superannuation benefit in cash.

Fees and Charges

A fee of \$100 is payable by the non-member partner or if a member is making the request for information about another member of the Fund. This fee is to be paid at the time the request is made. There is no charge if the member is making the request for information about their own account.

A final payment split fee of \$100 is divided between both parties; \$50 will be deducted from the member's account and \$50 will be deducted from the amount transferred to the partner's account.

Independent advice

The information contained in this fact sheet is of general nature only. Government legislation may be amended in the future and you are strongly advised to seek independent advice before making any decisions.

More information

Call us on **1300 363 240**

Email us at super@esisuper.com.au or visit esisuper.com.au

This document provides general financial product advice only and should not be relied on as legal or taxation advice, nor does it take the place of such advice. It has been prepared for the general information of members of ESI Super. It does not take into account any member's individual financial objectives, financial situation or needs. Any statements of law or proposals are based on our interpretation of the law or proposals as at 23 June 2010. We recommend that you seek help from a licensed financial adviser before acting on any information or making any decision on the splitting or flagging of superannuation benefits contained in this document. While all due care and diligence has been taken in the preparation of this document, the Trustee reserves the right to correct errors or omissions. If there are inconsistencies between the terms of ESI Super's Trust Deed and this document, the terms of the Trust Deed prevail.

Electricity Supply Industry Superannuation (Qld) Ltd (ABN 30 069 634 439 AFSL 336567) the Trustee of Electricity Supply Industry Superannuation Fund (ESI Super) (ABN 33 761 363 685)