

# SUPERANNUATION AND FAMILY LAW FACT SHEET



## WHO SHOULD READ THIS FACT SHEET

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 de facto relationships. When a marriage or relationship breaks down, splitting the assets of the couple involved can be a significant issue.

Please note: For the purposes of this fact sheet, the term 'partner' refers to a spouse who you are married to valid under the Marriage Amendment Act 2017 (Cth) or a de facto partner (including same-sex couples).

## OVERVIEW

Since 28 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 1 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, with the exception of de facto relationships in Western Australia.

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. Court Orders or financial agreements received prior to 28 December 2002 are non-binding on the Trustee of the Fund. 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 you have reached preservation age and have retired from the workforce or have met another condition of release. See the *How Super Works* Guide for more information.

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 automatically convert it into a cash asset, but may be used to offset other property of the relationship.

## WHO CAN UTILISE THE SUPERANNUATION SPLITTING LAWS?

The superannuation splitting laws are not restricted to married and de facto couples who are separating.

Married and de facto couples may utilise the superannuation splitting laws in case of a future relationship breakdown. Similarly, couples contemplating marriage or entering into a de facto relationship may request information about their future partner's superannuation interest. However, such an agreement will not be valid unless the marriage or de facto relationship does take place.

## 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
- a consent order lodged with the Family Court; or
- a court order made by the Family Court.

These options are binding on the relevant super fund(s). Advice from an appropriately qualified legal practitioner, tax agent and financial adviser 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.

### 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;
- insured benefits and payments to a reversionary beneficiary after the death of a member spouse;
- a non-commutable pension or annuity from which a payment of \$2,000 p.a. or less is made.

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## 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.

## 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; or
- the spouse, former spouse, de facto partner or former de facto partner of the member; or
- 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 (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 Family Law Act 1975.

### Protection of information

Under section 90MZG of the Family Law Act 1975, it is an offence to make a statement in a declaration provided to a Trustee knowing that the statement is false and misleading. The offence is punishable by imprisonment for a period of up to 12 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 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 \$40.

Please note: The \$40 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](http://familylawcourts.gov.au)

Alternatively you may choose to seek independent legal advice to obtain this information.

### How does Energy Super calculate the value of a superannuation benefit?

#### Accumulation account

Calculating the value of the interest to be split in an Accumulation (also known as Defined Contribution) 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 earlier of:

- the date when the application for the information is received by the Trustee; or
- the date specified in the application (if applicable).

#### 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, Energy Super will split the member's account accordingly.

Following a split of the member's Accumulation, Income Stream, Transition to Retirement Income Stream or Market Linked Pension account, the member's Energy Super account will be reduced by the specified amount. Income Stream and Pension members with a transfer balance account, administered by the Australian Taxation Office, will also have that account reduced by the amount of the split.

Where a Defined Benefit member has a Family Law split, the amount payable to the receiving partner is withdrawn from the member's Accumulation account first. Any remaining split is offset against the member's Defined Benefit and accumulates with interest at the Three Year Average unit price as a Family Law Offset. On rare occasions where market returns are negative, the offset amount may decrease.

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The balance of this offset is then deducted from the member's benefit at the time the benefit is paid. However, if the Defined Benefit member has funds in an Accumulation account, makes additional contributions, or rolls in other super benefits, they can request in writing to have some or all of the offset cleared at any time. With agreement from your employer, you can close your Defined Benefit account and transfer the remaining amount to an Accumulation account. This effectively removes the exposure to the Three Year Average unit price. However, you need to think about things like your age, salary, personal circumstances, insurance differences and the expected growth rate of your Accumulation account. You will also need to consider the appropriate investment strategy for your Accumulation account. You will not be able to transfer back to a Defined Benefit account at any time in the future, and your entire benefit will be subject to the net earning rates of the investment option your Accumulation account is invested in.

Unrestricted non-preserved, restricted non-preserved and preserved benefits are shared between the parties in the same proportion to their share of the overall benefits.

The tax-free and taxable components of the superannuation benefit are calculated immediately before the family law split, and divided between the member and the receiving partner in the same proportion. No tax is payable when a superannuation benefit is split unless the receiving partner satisfies a condition of release and elects to receive the entitlement in cash.

We understand these are complex options for you to consider. That is why we strongly recommend that you seek appropriate financial advice. As an Energy Super member, you have access to financial advice services that can help you make a decision on your Family Law Offset that is right for you. Depending on your circumstances some, or all, of the cost of this advice may be provided at no additional cost to you.

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

## What happens to the receiving partner's superannuation interest?

The receiving partner has three options available to them. They can:

1. have an Energy Super account opened for them and the benefit transferred to that account. If they are already a member, they can have the benefit transferred to their existing Energy Super account;
2. transfer the benefit to another superannuation fund of their choice; or
3. have their benefit paid as a lump sum (only available if they have satisfied a condition of release. See the *How Super Works* Guide for more information).

The receiving partner must advise which option they would like to take, in writing, within 28 days of receiving their payment split notice.

If the receiving partner chooses to transfer their benefit to a new or existing Energy Super Accumulation account, and their partner is an Accumulation member, their splittable monies will be invested in the MySuper investment option until they make an investment choice.

If the receiving partner chooses to transfer their benefit to a new or existing Energy Super Accumulation account, and their partner is a Defined Benefit, Income Stream, Transition to Retirement Income Stream or Market Linked Pension member, their splittable monies will be invested in the Cash Enhanced investment option until they make an investment choice.

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

If the receiving partner starts a new Income Stream account, the new Income Stream account will count towards their transfer balance cap.

## FEES AND CHARGES

A fee of \$40 is payable by the receiving 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 \$135 is divided between both parties; \$67.50 will be deducted from the member's account and \$67.50 will be deducted from the amount transferred to the partner's account.

**We're here to help – Call 1300 436 374**

**Email [info@energysuper.com.au](mailto:info@energysuper.com.au) or visit [energysuper.com.au](http://energysuper.com.au)**

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