

FACT SHEET

Superannuation and the breakdown of relationships Superannuants

In this fact sheet you will find out what a breakdown of relationship means for super and where to find the supporting documentation

What is the effect of Part VIII B of the Family Law Act?

Part VIII B of the Family Law Act enables divorced or permanently separated married couples and permanently separated de facto couples to split and share their accrued superannuation interests in the same way as other property in a relationship. As part of the process of enabling the parties to determine how their property will be shared between them, a non-member spouse¹ may make application (on the relevant form) for access to information about the member spouse's superannuation interest. The parties themselves decide whether there will be a sharing of an accrued superannuation interest and how the superannuation entitlement will be split and shared. If the parties cannot come to an agreement, the Family Court can make an order to split superannuation entitlements.

The splitting of a member spouse's superannuation interest can be made in one of two ways:

- by agreement between the parties — giving the parties the flexibility to settle their own financial affairs, rather than engaging in costly and lengthy court procedures
- by Court Order.

The above are referred to as “splitting instruments” and must be served on the relevant superannuation board.

The splitting instrument must specify either a dollar amount (referred to as the “base amount”) which represents a share of the total value of the interest, or a specific percentage of the interest to be shared with the non-member spouse.

Does a superannuation entitlement have to be split just because the parties are permanently separating or divorcing?

No. It is up to the parties who are permanently separating to agree how they will share the property in the relationship, including their superannuation assets. They do not have to split a superannuation entitlement. By sharing other assets the parties may avoid splitting a superannuation interest.

The value of an accrued superannuation entitlement

The member or their spouse can make an application to obtain a valuation and we will calculate a value of the accrued interest for family law purposes.

The method and factors used for the valuation are as approved by the Commonwealth Attorney-General in terms of Regulation 43A of the *Family Law (Superannuation) Regulations 2001 (Cth)*. The *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* setting out the method and factors can be viewed by visiting www.legislation.gov.au.

Example

Peter and Mary separated on 31 December 2020. Mary (the non-member spouse) has lodged a request for information with Super SA on Peter's superannuation interest in the Pension Scheme at the date of separation. On receipt of a Request for Superannuation Interest Information (*Family Law Act 1975*) form or the forms contained in the Family Court of Australia Superannuation Kit, Super SA will provide Mary with details of Peter's annual pension entitlement at 31 December 2020.



There are risks for a non-member spouse taking a share of the member spouse pension which need to be considered.

1. See Glossary on last page.

Information that will be provided includes the rate of annual pension at the valuation date, for example \$30,000 gross per annum, the method of indexation, benefits payable on the death of the member and a statement indicating that it is a lifetime pension.

It is then up to Peter (the member spouse) and Mary to determine if they will split Peter's superannuation pension or leave it untouched and simply take account of the pension when sharing other assets. Any split should be expressed as a percentage. For example Peter and Mary may agree on a 50/50 split or a 60/40 split where they each receive a share of the ongoing annual pension.

There is no requirement to provide a value (ie convert the annual pension to a lump sum amount) when the parties request information on a pension in the payment phase. This is because, as the pension is already being paid, the non-member spouse initially has the right to a share of the ongoing pension only (the interest) and not a lump sum amount.

The non-member spouse has three options if the parties decide to split a pension in the payment phase:

1. Continue to receive a share of the member spouse's ongoing pension.
2. Commute the entire share of the member spouse's ongoing pension to a lump sum.
3. Convert the member spouse's pension to an "associate pension" which is a pension payable in the non-member spouse's own right.

Associate pension

The legislation provides an option for the non-member spouse to convert his or her share of an interest already being paid as a pension, to a pension payable in the non-member spouse's own right within a three-month period. Such a pension is known as an "associate pension" and will be indexed but have no reversionary or commutation rights attached to it. Details about the conversion factors to be applied in establishing an "associate pension" can be found in the regulations under the *Superannuation Act 1988*.

The legislation specifies that an "associate pension" will be determined by applying the following formula:

$$AP = \frac{P \times M_{x+m}}{N_{y+n}}$$

Where:

- AP is the amount of the "associate pension".
- P is the non-member spouse's share of the member spouse's pension.
- M_{x+m} is the conversion factor relating to the member spouse.
- N_{y+n} is the conversion factor relating to the non-member spouse.

A sample of the conversion factors at various ages and applicable to a "retirement pension" follows:

Age	Conversion Factor	
	Male	Female
40	20.949	21.535
50	18.469	19.362
55	16.884	17.971
60	15.072	16.350
70	10.905	12.371
80	6.696	7.858

"Associate pension" Examples

1. Bob is a superannuant currently receiving a pension of \$30,000 pa and is aged 60. Bob's ex-spouse, Joyce, is aged 55 and they have agreed to a 50/50 split of the pension. Joyce is therefore entitled to receive an ongoing share of Bob's pension of \$15,000 pa. Joyce is not willing to take the risk of Bob dying before her and therefore elects to convert her share of the pension to an "associate pension" payable for her own lifetime. Joyce's "associate pension" will be calculated as follows:

$$\text{Associate pension} = \frac{\$15,000 \times 15.072}{17.971}$$

2. Sue is a superannuant currently receiving a pension of \$40,000 pa and is aged 60. Sue's ex-spouse, Ron, is aged 70 and they have agreed to a 60/40 split of the pension with Ron receiving 40%. Ron is therefore entitled to receive an ongoing share of Sue's pension of \$16,000 pa. Ron is not willing to take the risk of Sue dying before him and therefore elects to convert his share of the pension to an "associate pension" payable for his own lifetime. Ron's "associate pension" will be calculated as follows:

$$\begin{aligned} \text{Associate pension} &= \frac{\$16,000 \times 16.350}{10.905} \\ &= \$23,989 \text{ pa} \end{aligned}$$

Risks associated with the non-member spouse electing to receive a share of the ongoing pension

There are risks for a non-member spouse taking a share of the member spouse's pension, and these need to be considered.

If the non-member spouse receives a share of the member spouse's pension the continuing payment of that pension is subject to the ongoing eligibility of the member spouse to a pension, or a new spouse entitled to a derivative right.

For example, if the member spouse died, the non-member spouse share of the pension could cease if no reversionary pension was payable. If the non-member spouse died before the member then the non-member spouse share of the pension would continue to be paid to the Estate of the non-member spouse. If the member commenced a new relationship then died and a two thirds

reversionary pension was payable to the new spouse, the non-member spouse's share of the pension would also be reduced to two thirds, and cease on the death of the new spouse.

The non-member spouse has an option to commute his/her share to a lump sum using current commutation factors within a three-month period.

Lifetime pensions may impact on the amount any member or associate member can hold in other retirement accounts. We recommend you seek financial advice before taking action.

What will happen to existing property settlements?

The Family Law legislation applies to all relationship breakdowns, irrespective of whether a divorce takes effect. However, where a property order (Section 79 of the *Family Law Act*) or maintenance agreement (Section 87) was in place prior to 28 December 2002, the Family Law superannuation splitting provisions will not apply unless those property settlement orders or agreements are revoked.

Family Law property settlement legislation only applies to de facto relationships that break down on or after 1 July 2010.

Supporting documentation

Where parties enter into a splitting agreement which includes sharing of superannuation assets, supporting documentation must be provided to Super SA with the agreement.

If the parties were married and the marriage has been dissolved, the splitting agreement must be accompanied by a certified copy of the divorce papers.

Where the parties are married and there is no divorce or where a de facto relationship has ceased, the splitting agreement must be accompanied by a "separation agreement" made by at least one of the spouses in terms of Section 90XP of the *Family Law Act*. The declaration must state that the spouses separated and thereafter lived separately and apart for a period of at least 12 months and there is "no reasonable likelihood of cohabitation being resumed". The declaration must be signed and dated no more than 28 days before the service of the agreement on Super SA.

Superannuation entitlements that cannot be split

In general, any superannuation entitlement can be split except for the following:

- superannuation entitlements less than \$5,000
- pension payments to dependent children.

It is up to the parties who are permanently separating to agree how they will share the property in the relationship, including their superannuation assets.

Fees payable for Super SA's services in relation to superannuation and relationship breakdowns

Fees are permitted to be charged in terms of Part VIII B of the *Family Law Act*. Fees will be charged for the following services:

Pension Scheme

- Lodgement of Request for Information form \$176 each request
- Splitting of superannuation entitlement \$176 each party

Fees are payable at the time of request. Super SA does not accept cash or cheque payment of fees. Contact Super SA for more details.

Where to obtain copies of the Commonwealth legislation

A copy of the *Family Law Act 1975*, and the *Family Law (Superannuation) Regulations 2001* can be viewed on the internet by visiting www.comlaw.gov.au and following the relevant links.

Where to obtain a Request Superannuation Interest Information (Family Law Act 1975) form

The form is available from Super SA:

- In the "Forms and Publications" section of the Super SA website at supersa.sa.gov.au
- By appointment only, 151 Pirie St, Adelaide (enter from Pulteney Street)
- Over the phone by calling 1300 369 315.

Taxation implications of splitting a superannuation interest

Information about the taxation implications should be referred to the Australian Taxation Office (ATO) (www.ato.gov.au) or to your financial adviser.

Members should also note that superannuation balances are always quoted as gross (before tax) amounts.

Relevant taxation information will be provided with the superannuation interest information and in accordance with the *Family Law Act* so that the parties can work out the net after-tax balance if necessary.

All lump sum amounts payable from the Pension Scheme will be taxed in accordance with the ATO rules applicable to untaxed funds.

If you believe you have a surcharge debt account with the ATO, you should contact them to find out the balance (if any), and take the surcharge debt into account in any family law split. The surcharge debt itself cannot be split and will remain the liability of the member spouse.

Further questions

If you have any questions, please do not hesitate to contact Super SA. If you have questions about the *Family Law Act* and the legal ramifications of its provisions, you should consult a lawyer practicing in Family Law matters.

Glossary of terms

Associate pension: a pension payable to a non-member spouse in their own right for their own lifetime but with no reversionary or commutation rights.

Interest: the value of an accrued benefit in the superannuation scheme.

Payment phase: period during which a fortnightly pension income is being paid.

Member spouse: the partner who is a member of the relevant superannuation scheme.

Non-member spouse: the superannuation member's spouse who is not a member of the relevant superannuation scheme.

Member spouse and non-member spouse may include partners who are married or de facto (as per the *Family Law Act 1975*).

We're here to help



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Disclaimer: This fact sheet provides a general summary to help you understand your entitlements in the Pension Scheme. Super SA does its best to make sure the information is accurate and up to date. However, you need to be aware that it may not include all the technical details relevant to the topic. For the complete rules of the Pension Scheme, please refer to the Superannuation Act 1988. The Act and accompanying Regulations set out the rules under which the Pension Scheme is administered and entitlements are paid. You can access a copy from the Super SA website.

Super SA and the State Government disclaim all liability for all claims, losses, damages, costs or expenses whatsoever (including consequential or incidental loss or damage), which arise as a result of or in connection with any use of, or reliance upon, any information in this fact sheet.