

Super and family law

FOR MEMBERS AND THEIR SPOUSES WHO WANT TO FIND OUT HOW SUPER INTERESTS CAN BE SPLIT UNDER THE FAMILY LAW ACT.

What this fact sheet covers

Following the breakdown of a marriage or de facto relationship, spouses can split their super interests by either applying for a court order or by executing a superannuation agreement.

This fact sheet explains how super interests can be split in the event of marriage or relationship breakdown. It's also intended to answer some questions you might have in relation to court orders, superannuation agreements and related concepts concerning family law and super.

Family law is complex and the information in this guide is of a general nature only. It doesn't cover all family law issues that may arise in relation to super. UniSuper can't provide you with legal advice and we strongly recommend you seek advice from a legal practitioner in order to understand your rights and entitlements following marriage or relationship breakdown, and in particular, in relation to super matters.

This information is current as at July 2020 and is based on our understanding of legislation at that date. Information is subject to change. If this guide contains information which is inconsistent with the UniSuper Trust Deed and Regulations, the Trust Deed will prevail.

Splitting super interests under the Family Law Act

Property decisions made by the Court under the *Family Law Act 1975 (Cth)* (**Family Law Act**) are guided by the 'clean break' principle under which the Court is required as far as possible to make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them. The aim of the principle is to avoid the need for unnecessary contact between the parties following marriage breakdown and to allow them to pursue independent lives as far as possible.

However, in the context of super, a 'clean break' may be possible where the value of super interests can be clearly measured and divided immediately, such as accumulation-style benefits. Defined benefits, on the other hand, are more complex and sometimes it may be preferable for the division of this type of benefit to be deferred in some cases (for example, by placing a payment flag over the benefit).

Since 28 December 2002, parties whose marriage has broken down have been able to split their super interests in the same way as they can divide other property of the marriage. Since 1 March 2009, parties to a de facto relationship (opposite sex or same sex) have been able to split their super interests after the breakdown of the relationship.

It's not mandatory for parties to split their super interests. The super interests of the parties may be used to offset the division of other property of the marriage or de facto relationship. It's important to note that if a super interest is split between the parties, it will be subject to the super law preservation requirements.

What super interests can be split?

The following super interests in UniSuper can be split:

- Accumulation 1, Accumulation 2, Defined Benefit Division and Personal Accounts
- Flexi Pensions, Term Allocated Pensions, Commercial Rate Indexed Pensions, Defined Benefit Indexed Pensions, Deferred Pensions and Partially Deferred Pensions, and
- Disablement benefits payable under the Fund's inbuilt benefit provisions.

What super interests can't be split?

The following super interests can't be split under the *Family Law Act*:

- A super interest with a withdrawal value of less than \$5,000.
- A Commercial Rate Indexed Pension or Defined Benefit Indexed Pension, where the amount of the annual benefit payable to the member is less than \$2,000.
- A payment made to the member spouse:
 - on APRA-approved compassionate grounds;
 - for severe financial hardship.
- A temporary incapacity benefit payable under the Fund's inbuilt benefit provisions.
- An income protection benefit being paid from external Income Protection cover for a period of less than 2 years.
- A contingent pension payable to a deceased member's surviving spouse under the Trust Deed.
- A payment made after the death of the member spouse:
 - to, or in respect of, a child under 18; or
 - to, or in respect of, a child over 18; who was dependent on the member spouse to complete his or her education or who had physical or intellectual disability.

How to split a super interest

STEP 1: APPLY FOR INFORMATION ABOUT THE SUPER INTEREST

An eligible person can seek information from the Trustee about a super interest in UniSuper. An eligible person includes:

- the member
- if the member has died, their legal personal representative
- the spouse (legal or de facto, same sex or opposite sex) of the member
- if the spouse has died, the spouse's legal personal representative, or
- a person who intends to enter into a superannuation agreement with a member.

The eligible person needs to apply to the Trustee for information about the member's super interest. The application can be made using the *Superannuation Information Request Form* and must be accompanied by a Form 6 Declaration, both available at www.familycourt.gov.au.

Applications must be sent to:

UniSuper
Level 1, 385 Bourke Street,
Melbourne Vic 3000

The Trustee will provide information about the super interest to the eligible person, including a valuation of the super interest or information that will allow the super interest to be valued. This information is generally sent within 30 days of the request. The eligible person uses the information to decide whether to make a superannuation agreement, apply for a court order or assist in the division of the other property of the marriage or relationship.

If you're a UniSuper member whose interest may be split, the Trustee will not:

- give any of your address details to your spouse; or
- tell you if your spouse has applied for information about your super interest.

STEP 2: DECIDE THE METHOD OF SPLITTING THE SUPER INTEREST

The parties must make a superannuation agreement or obtain a court order in order to split a super interest.

Superannuation agreement

A superannuation agreement is a formal written agreement entered into between parties who both must obtain independent legal advice about the agreement.

A superannuation agreement:

- will usually take the form of dedicated clauses within a financial agreement which deals with other aspects of the property of the parties.
- can be made before, during or after a marriage or de facto (opposite sex or same-sex) relationship.
- is binding on the Trustee if it complies with legislative requirements and is served on the Trustee together with a certified copy of the Certificate of Divorce or a separation declaration, and certificates of independent legal advice for each party.

Court order

As part of a property settlement, the Family Court of Australia or the Federal Circuit Court of Australia can make a court order splitting the super interests of the parties.

- a consent order—where the parties agree on terms of the court order and it's registered by the court, or
- a contested order—where the terms of the court order are determined by the court.

Court orders are binding on the Trustee provided that the Trustee has been granted procedural fairness in relation to the making of the order. This means the Trustee must be given:

- notice that an order is being considered or sought, and
- the opportunity to be heard in relation to the making of the order.

The Trustee must be given at least 28 days' notice of any proposed court orders to be sought. A sealed court order must be served on the Trustee before it can give effect to the court order.

Methods of splitting a super interest

A super agreement or court order must specify how the member's super interest is to be divided with the ex-spouse.

This can be done by:

- allocating a base amount (fixed dollar amount) to the ex-spouse (also referred to as the 'non-member spouse')
- specifying a method of calculating a base amount, or
- specifying a percentage of the member's super interest to be paid to the ex-spouse.

STEP 3 - HOW IS A SUPER INTEREST SPLIT?

When the superannuation agreement or sealed court order and other required documentation is served on the Trustee, and provided these meet legal requirements, the Trustee can process the payment split. The Trustee must process the payment split at what's known as the 'operative time'.

The operative time for a payment split under a superannuation agreement is the beginning of the 4th business day after the day the superannuation agreement is served on the Trustee together with a certified copy of a Certificate of Divorce or Separation Declaration. If a method for calculating the base amount is specified in the superannuation agreement, the Trustee must also receive a document setting out the amount calculated using that method. The operative time for a payment split under a court order is specified in the court order.

Within 28 days of the operative time, the Trustee must notify both parties that the super interest is subject to a payment split (via a payment split notice) and provide prescribed information to the ex-spouse. The ex-spouse must provide the Trustee with prescribed information (Regulation 72 Notice) and their instructions for the payment split (by completing the options form) as soon as practicable after the superannuation agreement or court order has been served on the Trustee.

The Regulation 72 Notice and options form will be sent to the ex-spouse at the same time as the payment split notice, together with an *Accumulation 1 Product Disclosure Statement* and accompanying materials.

Options for the ex-spouse

Within 28 days of receiving the payment split notice, the ex-spouse can make a request to the Trustee to:

- become an Accumulation 1 member of UniSuper or if the ex-spouse is already a UniSuper member, transfer the payment split amount to their existing account
- roll over the payment split amount to a nominated super fund, or
- request the payment split amount be paid as a lump sum. This is only permitted if the payment split amount comprises unrestricted non-preserved benefits or the non-member spouse has met a condition of release, such as permanently retiring from the workforce on or after reaching preservation age.

If the Trustee doesn't receive a completed options form after 28 days from the date the information about their options was first sent to the ex-spouse, the Trustee will send another notice to the ex-spouse. The further notice will again set out the options available to the ex-spouse regarding the payment of the split amount.

If the ex-spouse fails to respond to the further notice within 28 days of the date the further notice was sent, the Trustee will, in the case of an ex-spouse who is already a UniSuper member, transfer the amount to that existing account (to the accumulation component); or if the ex-spouse is not a UniSuper member the Trustee will roll over the entitlement to AUSfund—UniSuper's eligible rollover fund—within 30 days. A notice confirming the rollover to AUSfund will be sent to the non-member spouse.

Payment flag

In some circumstances, the parties may wish to make a super agreement or obtain a court order to prevent a member's super interest from being paid out or rolled over until a property settlement has been finalised or the member becomes entitled to receive a super benefit. The Trustee will place a payment flag on the super interest at the operative time which is the beginning of the 4th business day after the day on which the superannuation agreement is served on the Trustee or the time specified in the court order. Once a member's super interest has a payment flag in place, most payments or withdrawals can't be made until the payment flag has been lifted by a flag lifting agreement or terminated by a court order.

Frequently asked questions about court orders

WHAT'S A COURT ORDER

As part of a property settlement, the Family Court of Australia or the Federal Circuit Court of Australia can make a court order splitting the super interests of the parties. The court order can be a 'consent order' (where the parties agree on terms of the court order and it's registered by the court) or a 'contested order' (where the terms of the court order are determined by the court).

WHEN DOES A COURT ORDER BECOME BINDING UPON THE TRUSTEE?

Court orders are binding on the Trustee provided that the Trustee has been accorded 'procedural fairness' in relation to the making of the order i.e. the Trustee must have been given notice that an order is being considered or sought, and the opportunity to be heard in relation to the making of the order. The Trustee must be given at least 28 days' notice of any proposed order to be sought.

The Trustee will review the draft court order and advise the parties of any problems from UniSuper's perspective, such as a failure to comply with the legislative requirements or there being practical issues that would prevent it from being implemented. The Trustee has 28 days from the date the draft court order is provided to let the parties know that amendments are required.

It's open to the Trustee to object to the draft court order or request that the terms of the draft court order be amended. The Trustee can also appear before the court seeking to have the draft court order varied on various grounds.

A draft court order that's deficient and which isn't rejected at the procedural fairness stage may end up as a final court order with which the Trustee can't comply. For this reason, it's important to ensure the Trustee is given an opportunity to review the draft court order.

A sealed court order must be served on the Trustee before the Trustee can give effect to it.

Acceptable wording for court orders

The following samples of standard wording are often included in the drafting of court orders and satisfy UniSuper's requirements.

SAMPLE 1: WHERE A BASE AMOUNT IS SPECIFIED

"That pursuant to section 90XT(1)(a) of the Family Law Act 1975 (Cth), whenever a splittable payment becomes payable in respect of the superannuation interest of [member] in UniSuper:

a. [non-member spouse] shall be entitled to be paid an amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001 (Cth) using the base amount of \$..... (provided that such base amount shall not exceed the value of the interest determined under section 90XT(2)); and

b. there be a corresponding reduction in the superannuation interest of [member] to whom the splittable payment would have been made but for the Order."

SAMPLE 2: WHERE A PERCENTAGE SPLIT IS SPECIFIED

"That pursuant to section 90XT(1)(b) of the Family Law Act 1975 (Cth), whenever a splittable payment becomes payable from the superannuation interest held by [member] in UniSuper, the Trustee shall pay to [non-member spouse] [insert percentage required]% of each splittable payment and there be a corresponding reduction in the entitlement [member] would have had but for the Order."

SAMPLE 3: INCLUSION OF LIBERTY TO APPLY

"That each party and the Trustee has liberty to apply on not less than three (3) business days, notice."

Frequently asked questions regarding superannuation agreements

WHAT'S A SUPERANNUATION AGREEMENT?

A superannuation agreement is a formal written agreement entered into between the parties to a marriage or a de facto (opposite sex or same sex) relationship. The agreement may be a stand-alone document or it may take the form of dedicated clauses within a Financial Agreement which also deals with other aspects of the property of the parties. There's no requirement that a superannuation agreement be approved or sealed by the court. A superannuation agreement can be made before, during or after a marriage or de facto (opposite sex or same sex) relationship.

While there's no legal obligation to provide the Trustee with procedural fairness before executing a superannuation agreement, it can be beneficial to seek the Trustee's comments as the Trustee will require the parties to amend and resubmit a superannuation agreement which does not satisfy the necessary legal requirements. The Trustee requires a minimum of two weeks to review a proposed superannuation agreement and provide comments.

WHEN WILL THE TRUSTEE ACT IN ACCORDANCE WITH A SUPERANNUATION AGREEMENT?

The Trustee will act in accordance with a superannuation agreement if it's served on the Trustee with a certified copy of the Certificate of Divorce or a 'Separation Declaration', and meets the following requirements:

- The agreement must be signed by all parties;
- Before signing the agreement, each spouse party must be provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party, and about the advantages and disadvantages to that party of making the agreement;
- The agreement must contain a statement to the effect that, before signing of the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party, and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement;
- Either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in the dot point above was provided to that party (whether or not the statement is annexed to the agreement), and each spouse party has given to the other spouse party (or to the other spouse party's legal practitioner) a copy of the statement;
- The agreement has not been terminated or set aside by the court; and
- The agreement specifies the method in which the member's super interest is to be divided with the spouse (see the section 'How do I split a super interest?').

WHAT'S A SEPARATION DECLARATION?

A Separation Declaration is a declaration that the parties to a marriage or de facto relationship have separated. The declaration must be signed by at least one of the parties. The date on which the declaration is signed must be no more than 28 days before it's served on the Trustee. The form of the declaration depends on the total withdrawal value of the member's super interests and whether it's more or less than the low rate threshold. The low rate threshold is \$215,000 for the 2020-21 financial year.

SEPARATION DECLARATION: SPOUSES WHO ARE PARTY TO A MARRIAGE

Total withdrawal value less than low rate threshold

If the total withdrawal value is less than the low rate threshold, the declaration must state the spouses are married, but are separated at the declaration time.

If either or both of the spouses have died, then the declaration must state that the spouses were married, but separated, at the most recent time when both spouses were alive.

Total withdrawal value more than low rate threshold

If the total withdrawal value is more than the low rate threshold, the declaration must state:

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

If either or both of the spouses have died, then the declaration must state that at the most recent time when both spouses were alive:

- the spouses were married; but
- the spouses were separated and had lived separately and apart for a continuous period of at least 12 months immediately before that time.

SEPARATION DECLARATION: SPOUSES WHO ARE PARTIES TO A DE FACTO RELATIONSHIP

Total withdrawal value less than low rate threshold

If the total withdrawal value is less than the low rate threshold, the declaration must state the spouses lived in a de facto relationship; but are separated, at the declaration time.

If either or both of the spouses have died, the declaration must state that the spouses lived in a de facto relationship but were separated at the most recent time when both spouses were alive.

Total withdrawal value more than low rate threshold

If the total withdrawal value is more than the low rate threshold the declaration must state:

- the spouses lived 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 declaration time; and
- in the opinion of the spouse (or spouses) making the declaration, there's no reasonable likelihood of cohabitation being resumed.

If either or both of the spouses have died, the declaration must state that at the most recent time when both spouses were alive:

- the spouses lived in a de facto relationship; but
- the spouses were separated and had lived separately and apart for a continuous period of at least 12 months immediately before that time.

Acceptable wording for superannuation agreements

The following samples of standard wording are often included in the drafting of superannuation agreements and satisfy UniSuper's requirements.

SAMPLE 1: WHERE A BASE AMOUNT IS SPECIFIED

"That pursuant to section 90XJ(1)(c)(i) of the Family Law Act 1975 (Cth), whenever a splittable payment becomes payable in respect of the superannuation interest of [member] in UniSuper:

- c. [non-member spouse] shall be entitled to be paid an amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001 (Cth) using the base amount of \$..... (provided that such base amount shall not exceed the value of the member's interest); and*
- d. there be a corresponding reduction in the entitlement of [member] to whom the splittable payment would have been made but for this Agreement."*

SAMPLE 2: WHERE A PERCENTAGE SPLIT IS SPECIFIED

"That pursuant to section 90XJ(1)(c)(iii) of the Family Law Act 1975 (Cth), whenever a splittable payment becomes payable from the superannuation interest held by [member] in UniSuper, the Trustee shall pay to [non-member spouse] [insert percentage required]% of each splittable payment and there be a corresponding reduction in the entitlement of [member] to whom the splittable payment would have been made but for this Agreement."

SAMPLE 3: OPERATIVE TIME

"That the operative time for this Agreement is four business days after service of the Agreement on UniSuper, accompanied by a [Certificate of Divorce/Separation Declaration]".

SAMPLE 4: STATEMENT REGARDING INDEPENDENT LEGAL ADVICE

"The parties acknowledge that before signing the Agreement, they have each had individual and independent legal advice from separate legal practitioners in relation to:

- the effect of the Agreement on the rights of that party; and
- about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement.

In the knowledge of that advice, the parties freely and willingly enter into this Agreement, and acknowledge that they have each received a copy of this statement."

Common problems with court orders and superannuation agreements

THE OPERATIVE TIME IS INCORRECT

The relevant provisions in the *Family Law Act* regarding super splitting came into effect on 28 December 2002 (for married couples) and 1 March 2009 (for de facto couples). Any court order or superannuation agreement which specifies an operative date before the commencement of the relevant provisions is ineffective and the Trustee will object to it.

THERE'S NO LIBERTY TO APPLY CLAUSE

The liberty to apply provision is included to permit persons having an interest under the court order to make a subsequent application to the court for assistance to work out or implement the court order. It can't be used to vary orders made.

IT DOESN'T IDENTIFY THE TRUSTEE OR THE FUND CORRECTLY

The correct way to refer to the Fund is 'UniSuper'.

The correct way to refer to the Trustee is 'UniSuper Limited'.

A draft court order or superannuation agreement that incorrectly identifies the Fund or the Trustee will be referred back to the parties.

IT SPLITS AN UNSPLITTABLE SUPER INTEREST

A draft court order or superannuation agreement that seeks to split an unsplitable super interest will be referred back to the parties.

IT'S IMPRACTICAL TO IMPLEMENT

If a draft court order or superannuation agreement cannot be acted upon because of subsequent circumstances (for example, the member has exited the Fund), it will be referred back to the parties.

IT DOESN'T CLEARLY IDENTIFY THE MEMBER SPOUSE WHOSE SUPER INTEREST IS THE SUBJECT OF THE COURT ORDER OR SUPERANNUATION AGREEMENT

If an appropriate identifier for the member spouse (such as the member spouse's Fund membership number or date of birth) isn't included in the draft court order or superannuation agreement, it will be referred back to the parties.

IT SPECIFIES A BASE AMOUNT THAT EXCEEDS THE VALUE OF THE MEMBER SPOUSE'S SUPER INTEREST

If a draft court order or superannuation agreement specifies a base amount which is greater than the value of the member spouse's super interest in the Fund, it will be referred back to the parties.

THE SEPARATION DECLARATION IS INCOMPLETE

If the separation declaration is incomplete, it will be referred back to the parties. Refer to the section 'What's a Separation Declaration' for content requirements.

IT DOESN'T COMPLY WITH THE FAMILY LAW ACT

If a draft court order or superannuation agreement doesn't comply with the requirements in the *Family Law Act* regarding super splitting, it will be referred back to the parties. For example, a draft court order or superannuation agreement won't comply with the *Family Law Act* if it:

- specifies the payment of a lump sum payment to the non-member spouse when the super interest is preserved; or
- doesn't specify a percentage split to which the non-member spouse is entitled; or
- specifies that the base amount will be paid to the non-member spouse rather than specifying that the non-member spouse will be entitled to be paid an amount calculated under Part 6 of the *Family Law (Superannuation) Regulations 2001 (Cth)* using the base amount.

This information is of a general nature only and includes general advice. It has been prepared without taking into account your individual objectives, financial situation or needs. Before making any decision in relation to your UniSuper membership, you should consider your personal circumstances, the relevant product disclosure statement for your membership category and whether to consult a licensed financial adviser. This information is current as at August 2020 and is based on our understanding of legislation at that date. Information is subject to change. To the extent that this fact sheet contains information which is inconsistent with the UniSuper Trust Deed and Regulations (together the Trust Deed), the Trust Deed will prevail. Issued by: UniSuper Management Pty Ltd ABN 91 006 961 799, AFSL No. 235907 on behalf of UniSuper Limited the trustee of UniSuper, Level 1, 385 Bourke Street, Melbourne Vic 3000.

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