

Breaking up can be hard but your super needn't be

This fact sheet looks at the process of splitting a superannuation benefit under the family law process and the types of benefits that may be affected, including:

- An overview of the family law process
- Making a request for information
- Flagging a super account
- Splitting a super account
- Glossary of terms

A **Request for Information Form** is also attached at the end of this fact sheet, which you must use to get information about a super account in the OSF.

Family law legislation is complex. This fact sheet provides general information about the family law process. It is important that you seek professional legal and financial advice if you are considering splitting super assets (see box below).

What is a property settlement?

When a relationship breaks down, couples may choose to separate their finances through a property settlement.

A property settlement is the legal process of splitting a couple's assets following a relationship breakdown. This settlement can be reached by mutual agreement or by a court if an agreement cannot be reached.

Assets may include the family home, investment properties, ownership in a business, valuables, investments, savings and superannuation.

The Family Law Superannuation Act (FLSA) enables all or part of a super benefit to be split from one spouse to the other in a property settlement. The FLSA applies to:

- Married couples who separated or divorced after 28 December 2002;
- Married couples who separated or divorced before 28 December 2002 but did not finalise their property settlement prior to that date; and
- Eligible de facto couples* who separate on or after 1 March 2009.

** Eligible de facto couples can split super benefits in all Australian states and territories except for Western Australia. To date, the WA State Government has not referred its power to legislate in respect to de facto couples to the Commonwealth, as is the case in other states and territories. Married couples can still split their super in WA.*

Couples can make an agreement about how they will distribute their property and maintain each other if their relationship was to break down. These are called **binding financial agreements** and can only be entered into after both parties have obtained independent legal advice. Binding financial agreements can be made before entering into or during a relationship.

Note: The legislation does not apply to people whose property settlements were legally finalised before 28 December 2002.

Getting advice is essential

The process of splitting super in the event of a relationship breakdown is complicated but can be made easier with the right advice.

Financial advice

For many people, a relationship breakdown can be stressful and the thought of making important decisions can be overwhelming. Obtaining professional financial advice can provide you with knowledge and guidance to help you feel more confident about the decisions you make. Financial advisers are familiar with super and investment issues, and can generally provide you with information about the impact of a relationship breakdown on your super entitlements, or those of your spouse.

You can find a list of licensed planners on the Financial Planning Association's website at www.fpa.asn.au.

Legal advice

In order to split a super benefit, both parties must appoint a legal adviser. Even if you do not go to court, the splitting process requires you to declare that you have received independent legal advice and requires your legal adviser to certify that they have provided advice.

A legal adviser can also assist you through a property settlement by:

- Advising you on the relevant laws and how they apply to your situation.
- Providing you with guidance on the division of assets and your entitlements.
- Assisting you with any documentation that you may need during the process.
- Representing you in court if necessary.

Understanding the division of assets

How property is divided by a court

PHASE 1: This is an information gathering exercise in which all financial assets and liabilities of each party are identified and valued.

PHASE 2: Each party's contribution toward the couple's total assets is assessed. This contribution is not based solely on who earned the money to acquire the assets; the role of child rearing and homemaker is viewed as an equal contribution, particularly in longer relationships.

PHASE 3: Any disparity in the financial positions of each party for the future is considered and adjusted (if justified). This may occur where one party has been out of the workforce raising children while the other has continued to build a career and is earning, or has the potential to earn, a higher income.

PHASE 4: The final phase is a check to see if the final result is fair.

What super payments can be split?

Splittable super payments are payments to or on behalf of a member. Under the FLSA, the following super payments can be split:

- accumulation super benefits (eg. benefits in OSF Division F)
- defined benefit super (eg. benefits in all other OSF divisions)
- account-based pensions, including transition to retirement pensions (eg. Division F pension)
- lifetime pensions (eg. pensions from an OSF defined benefit division)
- other complying pensions and annuities.

If you are not sure which type of super you or your former partner has with the OSF, please call OSF Investor Services on 1800 023 928.

What cannot be split?

The following benefits are not splittable payments and therefore cannot be split under family law:

- a super benefit valued at less than \$5,000
- payments to a member on compassionate grounds
- payments to a member as a result of severe financial hardship
- regular payments to a member as a result of total but temporary incapacity within two years of the first payment (*Note: Payments made after two years are not exempt*)
- death benefits paid to or in respect of a child of the member where the child is under age 18
- death benefits paid to or in respect of a child of the member where the child is over age 18 but is in full-time education or requires special care as a result of physical or intellectual disability.

The superannuation splitting process

Step 1: Requesting information

For super to be considered as part of a property settlement, the first step is generally to determine the value of the benefit. This information must be requested in writing on the **Request for Information Form** (included at the end of this fact sheet).

A request can be made as part of an agreement prior to or during the relationship or as part of the relationship breakdown process.

The information we provide about the member's super benefit can be used by the parties involved or a court to determine the splitting instructions. Your legal and financial advisers can also make recommendations based on the information.

Who can request information?

Either the member or the spouse of a member can request information on a super benefit.

In the case of an agreement prior to a relationship, a person intending to enter into an agreement with the member regarding how super is to be split in the event of a relationship breakdown can also request information.

The information is only provided to the eligible person who makes the request.

What information is supplied?

The information we provide varies depending on whether the member has a super benefit or a pension. The information includes (where applicable) the member's account balance or benefit entitlement, taxation components, preservation status, eligible service period and other information to allow you or your financial adviser to accurately value the benefit. A financial adviser can help you interpret this information.

When you complete the **Request for Information Form**, you can nominate a date you would like the information to apply; otherwise we will provide the information as at the date we complete your request.

The member's address and contact details are NOT included in the information.

Note: If the request is made by someone other than the member, we are not permitted to inform the member that the request has been made.

Step 2: Flagging a super account

A payment flag is an optional step that prevents the Trustee from making any splittable payments from the super account. A flag is most likely to be used where the member is nearing retirement and a benefit is about to become payable, or as a precaution if a settlement cannot be reached immediately. It may also be used in cases where a benefit cannot be split immediately, such as for a defined benefit.

A flag can be placed by a Superannuation Agreement between the two parties or by a Court Order. A legal adviser can help with the documentation needed to flag an account.

Note: A flag continues to operate if either spouse dies.

Once we receive a valid request, an account is flagged within the period specified in the Agreement or Court Order. The member and their spouse will be notified once the flag is in place.

Payments exempt from flagging (or splitting)

A flag does not stop all payments or withdrawals from a super account. The following can still be paid from a flagged account:

- payments to the member on compassionate grounds.
- payments to the member as a result of severe financial hardship.
- regular payments to a member as a result of total but temporary incapacity within two years of the first payments (eg. income protection or salary continuance insurance benefits) (*Note: Payments made after two years are not exempt.*)
- some death benefit payments (see below).
- fees, insurance premiums, taxes and surcharge.
- pension payments to a member.

Death benefits exempt from flagging (or splitting)

Some death benefits cannot be flagged or split:

- a super benefit valued at less than \$5,000
- death benefits paid to or in respect of a child of the member spouse if the child is under 18 years of age
- death benefits paid to or in respect of a child of the member spouse if the child is over 18 but is in full time education or requiring special care as a result of physical or intellectual disability.

This means that a benefit could become payable even if the account is flagged. You should speak to your financial adviser if you think one of the situations shown above may apply to you.

Removing a flag

A payment flag can be removed by an Agreement or Court Order. If you and your spouse agree to lift a flag, you will need

to provide evidence that you have both sought advice from a legal adviser about the implications. This evidence must include:

- a statement by each party that they have received independent legal advice
- a statement by each party's legal adviser stating that advice was given.

Both parties will be sent notification once the flag has been removed.

Step 3: Splitting an account

Some couples reach a property settlement through a mutual Super Agreement. In other cases, the Family Court may impose a property settlement and divide super (and other assets) between the parties by Court Order.

Once a decision has been reached, we are sent splitting instructions that specify how super will be divided.

In the case of an Agreement, we also require the following documents in order to apply the splitting instructions:

- a statement by each party that they have received independent legal advice
- a statement by each party's legal adviser stating that advice was given, and
- a copy of the separation declaration that is less than 28 days old or a Decree Absolute.

The member's super benefit is then split according to the method stated in the Agreement or Court Order. For a Super Agreement, the operative date is 4 days after we receive a copy of the Agreement together with the documents listed above. A Court Order will specify an operative date. Both parties are then notified of the split.

How does a payment split happen for an accumulation benefit (ie. OSF Division F)?

Once a split is calculated for a Division F benefit (including a Division F account-based or transition to retirement pension), the non-member spouse's entitlement can be:

- paid as a **cash lump sum** if the non-member spouse has satisfied a condition of release under super law or if the payment split applies to an account-based pension; AND/OR
- transferred to the non-member spouse's **OSF account** if they are an OSF member in their own right; AND/OR
- transferred to **another super fund**.

If the non-member spouse does not provide valid payment instructions within 28 days, their entitlement will be transferred to the OSF's selected eligible rollover fund (ERF), which is currently SuperTrace ERF.

How does a payment split happen for a Division F account-based pension or transition to retirement pension?

If a member is receiving an account-based or transition to retirement pension, the non-member spouse may request a lump sum payment of their entitlement without satisfying a relevant condition of release.

How does a payment split happen for an OSF defined benefit?

In the case of a defined benefit, the Superannuation Agreement or Court Order will allocate a base amount split or percentage payment split to the non-member spouse.

However, defined benefits cannot be split until the first splittable payment becomes payable to the member. This generally occurs when the member retires. In some OSF divisions, it may also occur if the member resigns, exercises choice of super fund or is retrenched. The defined benefit will continue to accrue in accordance with the OSF Rules and the adjusted base amount or specified percentage is deducted when the first splittable payment becomes payable to the member.

If a **base amount** is allocated, this amount is held against the member's benefit as an OSF Family Law account in the non-member's name. In accordance with family law provisions, the base amount is indexed in line with movements in a standard index of wage/salary increases plus 2.5% until the first splittable payment becomes payable. The non-member spouse receives a benefit statement effective 30 June each year with details of the adjusted base amount as at that date.

The non-member spouse receives a lump sum amount from the first lump sum payment to the member. If the member's lump sum payment is not sufficient to cover the non-member spouse's adjusted base amount, a proportion of any subsequent pension payments to the member will be paid to the non-member spouse until the full entitlement is paid. If the lump sum amount is not sufficient and no further benefits are payable to the member, the non-member spouse will not receive any further payment.

If a **percentage split** is allocated, the non-member spouse will receive that percentage of each splittable payment until pension payments are no longer payable in respect of the member (eg. upon the death of member and the death of their reversionary beneficiary, if any). (Refer to How are lifetime pensions treated as a result of a payment split? for information about payment splits on OSF lifetime pensions).

For some OSF defined benefit divisions, the member may have the option to commute a pension entitlement to a lump sum (or part lump sum) amount. If a benefit is subject to a payment split, the member's commutation rights may be limited. For example:

- The non-member spouse of a Division B or D member can require the member to take a lump sum instead of the non-indexed pension entitlement if that lump sum exceeds the base amount (or adjusted base amount).
- If a Division C member receives less than 50% of their total lump sum entitlement after a split is paid to the non-member spouse, the member will be unable to commute their remaining lump sum entitlement to a pension.

If the non-member spouse is also member of an OSF defined benefit division in their own right, their entitlement cannot generally be paid into their defined benefit account. Instead, an account in the OSF's accumulation division (ie. Division F) can be opened to receive the payment. Alternatively, the non-member spouse may transfer the payment to another super fund.

Note: If your defined benefit is affected by a Court Order or Superannuation Agreement and you exercise super choice, this may result in the split taking effect, and therefore an amount becoming payable to your spouse, earlier than might have been the case if you had not exercised choice. If there is a payment flag on your benefit and you exercise super choice, no payment can be made to you (or the non-member spouse) from the OSF until the flag is lifted.

How does a payment split happen for a defined benefit lifetime pension?

There are significant implications for the member and the non-member spouse where an OSF lifetime pension is affected (or may be affected in the future) by a payment split. The entitlements of a reversionary beneficiary (if any) after the member's death may also be affected by the existence of a payment split. These implications apply to splits imposed by either Superannuation Agreement or Court Order, and to base amount and percentage splits. It is important to take this into account when considering a payment split as part of a property settlement, particularly if the payment split specifies a base amount to the non-member spouse.

Where a member is receiving a lifetime pension from an OSF defined benefit division, pension payments are only payable to the non-member spouse under a payment split while a pension is payable in respect of the member:

- **While the member is alive and receiving pension payments:** the non-member spouse will receive their entitlement from each pension payment.
- **If the member dies and a pension is then payable to a reversionary beneficiary:** the non-member spouse's entitlement will continue to be paid from the new reversionary pension. (*Note: While the percentage entitlement remains the same, the amount of the non-member spouse's pension may change as the pension*

amount is recalculated for the reversionary beneficiary.)

- **If the member has no reversionary beneficiary, or if both the member and the reversionary beneficiary die:** the non-member spouse's pension payments will cease even if their entitlement has not yet been fully satisfied. No further payments to the non-member spouse will be made.

If the non-member spouse dies before the member or reversionary beneficiary (if any), pension entitlements will continue to be paid to the non-member spouse's estate until the death of the pensioner and reversionary beneficiary (if any), or until the non-member spouse's entitlement is satisfied.

Note: How a payment split impacts on an OSF lifetime pension depends on the rules for the relevant OSF division, the circumstances of each case and the family law provisions. This is general information only. The consequences of a payment split in relation to a lifetime pension will need to be carefully considered by both parties.

Is a non-member spouse's entitlement adjusted for investment returns or earnings before being paid or transferred out of the OSF?

A base amount payable from an OSF Division F account (including Division F pensions) is adjusted for investment returns (which may be positive or negative) until the split is effected.

A base amount held against an OSF defined benefit account is indexed in line with movements in a standard index of wage/salary increases plus 2.5% until the first splittable payment is made.

What preservation and tax components apply to a payment split?

The preservation and tax components that make up the member's benefit also apply proportionally to the non-member spouse's entitlement.

How is a surcharge liability affected by a payment split?

A surcharge liability (if any) remains with the member. The OSF Trustee is entitled to deduct any surcharge amounts before making a splittable payment.

If any further surcharge assessments are received in relation to the member's contributions, the non-member spouse is not liable even if their entitlement included part of the relevant surchargeable contributions.

If a benefit comprising surchargeable contributions has been paid to the member, the member is personally liable to pay the surcharge to the Australian Taxation Office (ATO).

Note: Superannuation surcharge (a tax on surchargeable contributions that were accrued by higher income earners after 20 August 1996) was abolished from the 2005/06 financial year. However, the ATO can make surcharge assessments after 1 July 2005 for surchargeable contributions in previous years.

Do fees apply to family law services in the OSF?

The OSF does not charge any fees to request information about a super benefit or to split or flag an account under family law provisions. In addition, there are no withdrawal or transfer fees.

If the non-member spouse is an OSF defined benefit member in their own right and a Division F account is opened in order to receive a payment split, an administration fee will not apply for that Division F account if it remains solely for the purposes of the payment split. (*Note: Investment management fees will still apply.*)

The OSF reserves the right to introduce or change fee arrangements at our discretion but we will give you advance notice of any fee changes within the time period specified by law.

Documents required for family law

In order to...	You will need these documents...
Request information	<ul style="list-style-type: none"> • A Request for Information Form (attached to this fact sheet)
Flag an account	<ul style="list-style-type: none"> • Payment Flagging Agreement* OR Payment Flagging Court Order
Lift a flag on an account	<ul style="list-style-type: none"> • Payment Flag Lifting Agreement* OR Payment Flag Lifting Court Order • A statement from both parties stating that they have independent legal advice • A statement from each party's legal adviser stating that the advice was given
Split an account by Superannuation Agreement	<ul style="list-style-type: none"> • A signed Superannuation Agreement* • A statement from both parties stating that they have received independent legal advice • A statement from each party's legal adviser stating that the advice was given • Separation Declaration* OR a copy of the Decree Absolute
Split an account by Court Order	<ul style="list-style-type: none"> • Court Order sealed by the Family Court

** These documents have specific requirements under family law provisions. Your legal adviser will be able to advise you on this.*

You can provide originals or certified copies of the required documents. To be correctly certified, each page of the copy must be clearly authorised as a true copy of the original by a Justice of the Peace, solicitor or police officer (or for a complete list of OSF approved certifiers, contact OSF Investor Services on 1800 023 928).

Remember to update your details

- If you previously nominated your former spouse as a beneficiary for your super account (if applicable under the rules of your OSF division), you may wish to update your nomination.
- You may also wish to consider updating your will. You should consult a legal adviser to discuss your options.
- If you have moved, make sure you let us know your new contact details.
- If you have changed your name, make sure you change the details on your account.

Terms explained

BASE AMOUNT The dollar amount (as specified in the Superannuation Agreement or Court Order) allocated to the non-member spouse (as an alternative to a 'percentage amount' split). The amount is adjusted for earnings until it is paid out of the OSF.

ELIGIBLE ROLLOVER FUND (ERF) An approved fund into which the Trustee is entitled to roll money that cannot remain in the OSF and for which no payment instructions have been received. The OSF's selected ERF is currently SuperTrace ERF.

OPERATIVE TIME For a Super Agreement, the operative time is four business days after the Agreement is served on the Trustee. A Court Order specifies the operative time.

PAYMENT FLAG An instruction identifying a super account in order to stop splittable payments being made from the account pending final property settlement.

PERCENTAGE SPLIT The basis of a split expressed as a percentage or proportion of each splittable payment (as an alternative to a 'base amount' split).

PRESERVED SUPER These funds cannot be taken in cash, but must remain in a super fund until a condition of release is met (eg. retirement, reaching age 65, total and permanent disablement or death).

REVERSIONARY BENEFICIARY A person who becomes entitled to an OSF pension upon the death of a member who is receiving a lifetime pension from an OSF defined benefit division.

SPLITTABLE BENEFIT A super benefit that can be divided under the family law legislation between parties as part of a property settlement upon a marriage or relationship breakdown.

SPLITTABLE PAYMENT A benefit payment that can be split under the family law legislation (see 3).

Useful websites

- The Attorney-General's Department website has fact sheets, frequently asked questions and valuation examples: www.familylaw.gov.au (search for 'superannuation') or tel: +61 2 6250 6666.
- The Family Court of Australia website has information about the family court process: www.familycourt.gov.au or tel: 1300 352 000
- The Department of Families, Housing, Community Services and Indigenous Affairs website has useful information in relation to social security policy: www.facsia.gov.au (search for 'superannuation splitting') or tel: 1300 653 227.
- The Financial Planning Association website has a list of financial advisers. You can also check if your adviser is a member of the FPA: www.fpa.asn.au or tel: 1800 626 393.

OSF Investor Services

PHONE	1800 023 928 between 8.30am and 5.00pm (Sydney time) Monday to Friday
EMAIL	osfms@colonialfirststate.com.au
FAX	(02) 9303 7700
MAIL	GPO Box 4758, Sydney NSW 2001
INTERNET	www.osfsuper.com.au
INTRANET	http://commnet.cba/staffsuper/funds
	<i>Or find us at: HR Intranet > Pay & Leave > Pay > Superannuation > OSF</i>

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