

Guide to Family Law and super

This fact sheet provides information on the splitting of superannuation interests under Family Law property settlements.

What is superannuation “splitting” and “flagging”?

The Family Law legislation regulates the division of property (including super) of married couples and couples (including persons of the same sex) in a bona fide de facto relationship.

The legislation allows couples who are separated or divorcing, to “split” or “flag” their superannuation benefits in a Family Law property settlement.

Splitting or flagging can occur by way of a Family Law Court Order (Order) or a Superannuation Agreement (Agreement).

By law, the APSS must implement an Order or give effect to a valid Agreement between a member and a non-member spouse.

A non-member spouse is the spouse (wife, husband or partner) or former spouse of the member. In some cases the spouse or former spouse may also be a member of the APSS, but will still be referred to as a non-member spouse in this fact sheet.

What is the effect of splitting a superannuation benefit?

When a benefit is split under an Order or Agreement, it means the super benefit must be split with the non-member spouse. This entitlement will often be an agreed dollar amount (a base amount split). Otherwise, it might be a percentage of the member’s benefit when it is paid, including any future benefit accruals after the date of the split (a percentage split).

If you have an APSS Defined Benefit, the family law value of that benefit is calculated using the method and valuation factors set out in the Family Law legislation.

What is the effect of flagging a superannuation benefit?

A flag stops the APSS from paying all or part of a member’s benefit until the flag has been lifted. A flag can be set by a Court Order or on request by both parties. Some types of payments can’t be split (for example, payments to the member on compassionate grounds, for severe financial hardship and certain death benefits paid to children). So even if a flag is in place, these payments can still be made.

Any flags on a member’s interest must be lifted before a Family Law split can be made.

Important

This fact sheet reflects the law as at July 2021. This document contains general information only. It is not intended to be advice and has been prepared without taking into account your objectives, financial situation or needs. Therefore, before acting on this information, you should consider the appropriateness of it having regard to your objectives, financial situation and needs. You should also obtain professional advice that applies to your specific circumstances before making any decisions.

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How do I request a Family Law split?

1. Make a request for information

The member or non-member spouse needs to request information on the member's superannuation interest using a *Family Law request for information form*.*

Upon receiving your request, the APSS will provide a response that specifies the value of the member's interest for Family Law purposes.

Please see *Requesting information about the member's benefit* below for more information.

2. Provide Draft Order or Agreement to the APSS

Your solicitors can assist you in drafting an Order or Agreement that complies with the relevant legislation.

The Order or Agreement will prescribe either:

- **A base amount split** – where a base amount is allocated to the non-member spouse from the member's superannuation interest; or
- **A percentage split** – where the non-member spouse will receive an allocated percentage of the member's final benefit (including any future benefits the member accrues after the Order or Agreement is made).

Once the draft Order is available, one of the parties needs to provide it to the APSS. This is known as "procedural fairness". If an Agreement is sought, procedural fairness does not apply but it is

suggested that the draft Agreement be provided to the APSS for comment.

The APSS will confirm whether the wording in the draft Order or Agreement can be implemented or whether changes are required to ensure the APSS can comply.

3. Provide the final Order or Agreement to the APSS

Once the final Order is made by the court (or the Agreement is agreed by the parties) the parties need to provide the final Order or Agreement to the APSS. It must be an original or certified copy.

If the member is an employee member with a Defined Benefit in the APSS, and both parties agree to the split being implemented immediately, consent forms should also be provided (see *Timing of a Family Law split* on page 3).

An Agreement (but not an Order) needs to be accompanied by specific documents that your solicitor can advise you about.

4. The non-member spouse provides payment instructions to the APSS

The non-member spouse provides payment instructions (see *Access to the split entitlement* on page 4). Whether this can occur immediately after the APSS receives the final Order or Agreement depends on the circumstances as explained in *Timing of a Family Law split* on page 3.

Requesting information about the member's benefit

The member or non-member spouse will need to request information about the member's superannuation in the APSS before entering into an Agreement, or becoming subject to an Order, that splits or flags the super. To request this information, a member or non-member spouse must:

- Complete the *Family Law request for information form*.*
- Return the form to the APSS (contact details page 4).

The APSS Privacy Policy (available online at apss.com.au or by calling SuperPhone on **1300 360 373**) applies to the details supplied on the *Family Law request for information form*.*

By law, a non-member spouse can ask the APSS for certain information about a member's super by completing and returning the *Family Law request for information form*. By law, the APSS must provide this information. The law does not allow the APSS to seek the member's permission or to notify the member that an application for this information has been made.

The non-member spouse must pay a fee (currently \$220, including GST, payable by cheque to Australia Post Superannuation Scheme) for every date for which this information is requested. No fee is charged for a member seeking information about his/her own super. No other Family Law fees apply in the APSS.

*The *Family Law request for information form* can be downloaded at apss.com.au in the *Print a form* section under the main menu *Publications & Forms* tab. Alternatively, call **1300 360 373** and we can send you a copy.

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Timing of a Family Law split

Immediate split

For APSS Rollover, Pension and Spouse members, the non-member spouse's entitlement can generally be paid or transferred to them shortly after the APSS receives a finalised Order or Agreement. There may be restrictions on the non-member spouse's access to their entitlement, as outlined in *Access to the split entitlement* on page 4.

Deferred split

Where the member has a Defined Benefit in the APSS, a deferred split applies. This means the split will generally not occur until the member ceases employment with Australia Post or an Associated Employer. When the split occurs, there may be restrictions on the non-member spouse's access to their entitlement, as outlined in *Access to the split entitlement* on page 4.

However, the timing of the split can be brought forward in the following situations:

(a) Immediate split can occur where both parties provide consent

If the Order or Agreement prescribes a base amount split (not a percentage split), the member and non-member spouse can agree for the split to occur immediately.

How do I request an immediate split?

All draft Orders and Agreements are sent to the APSS for review. The APSS will then send an information pack. For members with an APSS Defined Benefit, this pack will contain the relevant consent forms for an immediate split. Consents from **both** parties need to be received by the APSS for the split to occur immediately.

(b) Immediate split – special circumstances

There are some special circumstances where the Trustee may exercise its discretion to make an immediate split even if both parties do not consent, as follows:

- the non-member spouse meets, or is likely to meet in the next six months, the financial hardship condition of release; or
- the non-member spouse meets, or is likely to meet in the next six months, any of the other conditions of release specified in superannuation legislation – refer to *Access to the split entitlement* on page 4; or

- there are other special circumstances that the Trustee believes warrant an immediate split.

However, if an employee member also has an APSS Rollover or an APSS Pension account, different considerations apply. In such circumstances the member effectively has two separate superannuation interests in the APSS that are treated differently under the Family Law legislation. It is recommended that you contact SuperPhone **1300 360 373** if the employee member has any of these APSS accounts.

What if the circumstances change?

If any of the above special circumstances arise, the non-member spouse can write to the APSS requesting the Trustee consider the immediate split request. The Trustee may require further information about the non-member spouse's circumstances at that time.

Does a crediting rate apply up to the time of payment?

Base amount splits

For APSS Rollover, Pension and Spouse members, the base amount allocated to a non-member spouse will be adjusted using the Crediting Rate(s) applicable to the relevant member's APSS Member Savings or APSS Pension account for the period up to payment or transfer.

Where a member has a Defined Benefit in the APSS, the base amount allocated to a non-member spouse will be adjusted using the rate of Average Weekly Ordinary Times Earnings (AWOTE) plus 2.5%, as prescribed by legislation, for the period up to payment or transfer. The Member Savings choices made by the member will have no impact on the adjustment to the non-member spouse's entitlement.

Percentage splits

Crediting Rates do not apply directly to percentage splits because the allocated percentage is applied to the amount of the splittable benefit when it is paid to the member, including any future benefit accrual after the date of the split. Therefore, the non-member spouse's entitlement will not be separately adjusted using Crediting Rates prior to payment or transfer, although the Member Savings choices made by the member may still affect the total amount of the member's splittable benefit.

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Access to the split entitlement

A benefit split does not necessarily mean that a non-member spouse will receive their entitlement in cash. The law requires that superannuation is kept or “preserved” in a superannuation fund and the non-member spouse will only be able to request a lump sum payment directly from the APSS if he/she has satisfied a relevant condition of release.

Conditions of release include the following:

- permanent incapacity
- death
- terminal medical condition as defined in super law
- reaching age 65
- severe financial hardship as defined in super law (partial release only - limits apply)
- specific compassionate grounds approved by the ATO (ATO decides amount, based on needs)
- ceasing gainful employment with an employer after reaching age 60
- permanent departure from Australia if you are a temporary resident (except New Zealand residents)
- reaching “preservation age” and permanently retiring from the workforce (preservation age is set out in the table opposite).

Your Preservation Age depends on the date you were born:

| Your date of birth | Preservation Age |
|----------------------------|------------------|
| Before 1 July 1960 | 55 |
| 1 July 1960 - 30 June 1961 | 56 |
| 1 July 1961 - 30 June 1962 | 57 |
| 1 July 1962 - 30 June 1963 | 58 |
| 1 July 1963 - 30 June 1964 | 59 |
| After 30 June 1964 | 60 |

When the non-member spouse’s entitlement can be paid or transferred, the APSS will request payment instructions from the non-member spouse.

If the non-member spouse has met a full condition of release, the entitlement can be paid in cash. Otherwise, it must be transferred to a complying superannuation fund nominated by the non-member spouse.

If no payment instructions are received from the non-member spouse within 60 days of the APSS writing to seek those instructions, then the entitlement will be automatically transferred to an APSS Rollover Account. This will mean the non-member spouse becomes an APSS member by default.

Remember

The splitting and flagging of superannuation benefits are not the only ways that a superannuation benefit can be dealt with as part of a property settlement. You should speak to your solicitor for more information about how your super benefit should be dealt with in your particular property settlement. Your solicitor can also explain the technical requirements of Superannuation Agreements and Court Orders and how they work.

More information

This fact sheet provides general information on how the Family Law regime applies to the APSS. If you have any questions you can contact the APSS by calling **SuperPhone 1300 360 373**, visiting us online at apss.com.au, or writing to us at APSS Locked Bag A5005, Sydney South NSW 1235.

This fact sheet contains general information about the Australia Post Superannuation Scheme (APSS). It is not intended to be financial product advice and does not take your personal circumstances into account. Before acting on any information contained in this document you should first consider its appropriateness to your own circumstances. You may wish to seek the advice of a licensed financial adviser. PostSuper Pty Limited is not licensed to provide you with financial product advice regarding your interest in the APSS. Neither Australia Post nor any Associated Employers holds an Australian Financial Services Licence and, therefore, neither is licensed to provide you with financial product advice.

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