



SUPERANNUATION AND RELATIONSHIP BREAKDOWN



FACT SHEET

The Family Law Act treats superannuation as a type of property when making property adjustments between parties following the breakdown of their marriage or de facto relationship. This means that a member spouse's superannuation interest can be split in favour of the non-member spouse in a property settlement.

The relevant family and superannuation laws and rules apply to:

- Married and divorced couples, and
- De facto couples, including same sex couples, whose relationship broke down on or after 1 March 2009.

The laws now apply to South Australian de facto couples whose relationship broke down on or after 1 July 2010.

The Trustee of the Nationwide Superannuation Fund (the Fund) is compelled by these laws to:

- Provide information to an eligible person making a formal enquiry about the value of a superannuation interest;
- Split a superannuation interest between the parties to a marriage or de facto relationship, either by agreement or by court order.

The laws in relation to superannuation splitting do not currently apply to de facto couples in Western Australia.

Obtaining superannuation information for family law purposes

A member of the Fund, their spouse, including de facto spouse and same sex de facto spouse, and a person who is intending to enter into a superannuation agreement (including a pre-nuptial agreement) with a member of the Fund, can apply to the Trustee for information about the member's interest and entitlement. The Trustee must provide that information if:

- A prescribed written application is submitted with a properly executed declaration. A fee of \$52 is payable by the information requestor by cheque/money order at the time of making the request.

The application and declaration (known as a "Form 6 Declaration") can be obtained from the following URL address:

- http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Do-it-yourself+kits/FCOA_form_diy_Superannuation_Info

Upon receipt of the executed forms and fees, the Trustee must provide information about the member's interest at the date of receipt of the application or on such other date as may be nominated in the application form. The Trustee must not disclose the member's address to their spouse and cannot inform the member that their spouse has applied for the information.

The information about the value of a member's superannuation interest can then be used to assist in the division by way of negotiation or court order of property and superannuation, and can also be of use if a party is entering into a superannuation agreement.

False declarations served on the Trustee may be subject to a penalty of up to 12 months imprisonment.



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Splitting a member's superannuation interest

A member and their non-member spouse must make a superannuation agreement or obtain a court order if they intend to split a member's superannuation interest.

Not all member superannuation interests can be split. The following member's superannuation interest cannot be split:

- Superannuation balances less than \$5,000
- If the amount to be split is the subject of:
 - a release of funds on compassionate grounds; or
 - a claim for release in the case of severe financial hardship; or
 - a death benefit payable to a dependent child under the Fund's rules;
 - a pension payment made because of the member's temporary ill health (but not permanent incapacity for less than 2 years); or
 - an existing payment split, in which event the amount still able to be split needs to be assessed or
 - an existing flagging order, in which event the Trustee cannot deal with the member's benefit until certain important conditions have been met.

The method of splitting a member's superannuation interest is generally expressed in 2 ways:

- by allocating a fixed dollar amount/specific base amount to be deducted from a member's entitlement when a split is to take effect; or
- by specifying a percentage sum of the member's interest to be paid to the non member spouse when a split is to take effect.

The effect of a superannuation split is that the member spouse's account balance is reduced by the amount of the benefit that is split off in favour of the non-member spouse. The non-member spouse becomes entitled to the benefit amount split off, but is not necessarily entitled to immediate payment of that amount if the legal superannuation standards for a benefit release have not yet been met.

Members and non-member spouses should obtain their own legal advice in respect to family law property settlements and superannuation splitting.

Superannuation agreements

Superannuation agreements must be in writing. Both the member and their non-member spouse need to instruct independent Australian lawyers to advise them in respect to the agreement prior to it being signed and each of the lawyers must sign Statements of Independent Advice to the effect that such independent legal advice about the meaning and effect of the agreement and its advantages and disadvantages has been given.

There is no legal requirement for a member or their spouse to provide an advanced copy of the agreement to the Trustee. However, it is prudent for the parties or their lawyers to do so, so that the Trustee can assess the agreement to see whether it is workable and complies with the family and superannuation legislation. This will avoid possible delays or difficulties that might occur if the agreement is found to be unworkable or not in compliance with the legislation.

A superannuation agreement will be binding on the Trustee if it complies with the legislative requirements and is served on the Trustee together with:

- a certified copy of the certificate of divorce, or
- a separation declaration, and
- certified copies of the Statements of Independent Legal Advice for each party.

The operative time for a superannuation split resulting from a valid superannuation agreement is 4 business days after the service of the agreement on the Trustee.

Court order

The Family Courts and the Federal Circuit Courts of Australia can make orders splitting the superannuation interests of a member as part of a property settlement. Those orders can be by way of consent orders or by determination after a defended hearing.

Such orders will only be binding on the Trustee when there has been procedural fairness in relation to the making of the order. This means that before the defended court proceedings or before the court is asked to make a consent order, the Trustee has been given a copy of the draft orders and it has had 28 days in which to comment on, approve or object to the proposed orders. This provides the Trustee with an opportunity to check that the order can be implemented and is in compliance with the legislation.

The Trustee has observed that some common flaws in draft orders include errors in the name of the Trustee, or of the Fund; the orders specify a base amount that exceeds the value of the member's interest; and the payment is unsplittable for some reason. It is a mandatory legislative requirement to give a copy of the draft orders to the Trustee before orders can be made. A failure to give such notice might lead to orders being unenforceable and further court proceedings at the expense of the parties.

Sample court orders

There are legal requirements under the Family Law Act on what a court order splitting superannuation must contain. In order to facilitate the process of implementing a superannuation split, sample court orders can be found in Schedule 1 and Schedule 2 at the end of this document.

If your lawyers adopt this format when drafting court orders and if the other requirements of the legislation are met the Trustee should be better placed to promptly respond to the mandatory procedural fairness and this will be to the advantage of the parties and the Trustee.

Even if the sample court orders are adopted when preparing your consent orders or defended hearing orders, you must still send a copy of the proposed orders to the Trustee and allow it 28 days for a response before proceeding to have the superannuation orders made by the court.

These sample court orders are to be used as a guide only and are not a substitute for independent legal advice.

After court orders are made

Once final court orders are made a certified copy of the orders with a Regulation 72 Notice must be served on the Trustee.

The orders will include an operative time when the superannuation split will take effect. The Trustee suggests that the operative time be not less than 7 business days after service of the certified copies on the Trustee.

The Regulation 72 Notice is a written notice containing the following details:

- Full name of the Non Member Spouse
- Postal address
- Date of birth
- Whether the Non Member Spouse is a member of the Fund in their own right, and if so their membership number

The notice must be signed and dated by the Non Member Spouse.

The cost of a payment split is \$103.00 and is deducted from the account balance at the time of the request.

The Trustee must notify the member and non-member spouse when the member's interest in the Fund becomes subject to a superannuation split. This is called a Payment Split Notice and it is provided within 28 days after the date of effect of the payment split.

The Notice states that the superannuation interest of the member is subject to a payment split and the non-member spouse is entitled to a specified amount. The split notice issued to the non-member spouse will be accompanied by information that enables the non-member spouse to make a decision about their splitting options. The options include:

- If they are not already a member of the Nationwide Superannuation Fund they can write and apply to join the Fund as a member, with the appropriate split amount being transferred from the account of the member to their new account;
- They can rollover or transfer the transferrable benefit to another fund in which the non-member spouse has an interest; or
- They can apply for payment of the benefit subject to satisfaction that they have met 1 of the legal superannuation standards for a benefit release.

The non-member spouse will need to nominate one of these 3 options within 28 days after the date of issue of the benefit payment split notice. If the non-member spouse does not:

- Make a request to become a member of Nationwide Superannuation Fund; or
- Transfer their interest to another super fund; or
- Withdraw their benefit

within 3 months the non-member spouse may be at risk of the Trustee taking steps to transfer the transferrable benefits to a nominated eligible rollover fund

For more information...



1800 025 241



enquiries@nationwidesuper.com.au



nationwidesuper.com.au

NSF Nominees Pty Limited ABN 29 053 228 667 AFSL 253129 Trustee of Nationwide Superannuation Fund ABN 15 201 768 813

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Date of issue: 02/17

SCHEDULE 1
Superannuation Splitting Orders – Fixed dollar Base Amount

1. That for the purposes of these orders it be noted:
 - 1.1 *..... is a member (the member spouse) of the Nationwide Superannuation Fund (the Fund).
 - 1.2 * *..... is the non-member spouse (the non-member spouse);
 - 1.3 The trustee of the Fund is NSF Nominees Pty Limited (the trustee);
 - 1.4 That the value of the member spouse's interest in the Fund is determined to be \$.....
 - 1.5 The member spouse warrants that no requests for payment of his/her interest in the Fund have been made to reduce the balance below the sum referred to in Notation 1.4
2. That with respect to the member spouse's interest in the Fund:
 - 2.1 That a base amount of \$..... is allocated, as required by Section 90MT(4) of the Family Law Act (1975) (The Act) to the non-member spouse out of the member spouse's interest in the Fund provided that such base amount does not exceed the value of the interest determined under s90MT(2) and referred to in Notation 1.4.
 - 2.2 That in accordance with paragraph 90MT(1)(a) of the Act:
 - 2.2.1 The non-member spouse is entitled to be paid the amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001 (the Regulations); and
 - 2.2.2 The member spouse's entitlement, and the entitlement of such other person to whom a splittable payment may be made to payments out of the member spouse's interest in the Fund, is correspondingly reduced.
 - 2.3 That the trustee of the Fund shall do all such acts and things and sign all such documents as may be necessary to:
 - 2.3.1 Calculate in accordance with the requirements of the Act and the Regulations the entitlement for the non-member spouse created by order 2.1 and 2.2; and
 - 2.3.2 Pay the entitlement whenever the trustee makes a splittable payment out of the member spouse's interest in the Fund.
 - 2.4 That this order have effect from the operative time.
 - 2.5 That the operative time is 7 working days from the date of service of the order upon the trustee.

NOTES TO SCHEDULE 1

We have suggested the operative date to be 7 days. It is commonly 4 days.

SCHEDULE 2

Superannuation Splitting Orders – percentage only interest

3. That for the purposes of these orders it be noted:
 - 3.1 *..... is a member (the member spouse) of the Nationwide Superannuation Fund (the Fund).
 - 3.2 * *..... is the non-member spouse (the non-member spouse);
 - 3.3 The trustee of the Fund is NSF Nominees Pty Limited (the trustee);
 - 3.4 That the value of the member spouse's interest in the Fund is determined to be \$.....
 - 3.5 The member spouse warrants that no requests for payment of his/her interest in the Fund have been made to reduce the balance below the sum referred to in Notation 1.4
4. That with respect to the member spouse's interest in the Fund:
 - 4.1 That the specified percentage for the purposes of clause 2.2 of this order is specified to be%.
 - 4.2 That in accordance with paragraph 90MT(1)(b) of the Act:
 - 4.2.1 the non-member spouse is entitled to be paid the specified percentage whenever a splittable payment becomes payable out of the member spouse's interest in the Fund; and
 - 4.2.2 The member spouse's entitlement, and the entitlement of such other person to whom a splittable payment may be made to payments out of the member spouse's interest in the Fund, is correspondingly reduced.
 - 4.3 That the trustee of the Fund shall do all such acts and things and sign all such documents as may be necessary to:
 - 4.3.1 Calculate in accordance with the requirements of the Act and the Regulations the entitlement for the non-member spouse created by order 2.1 and 2.2; and
 - 4.3.2 Pay the entitlement whenever the trustee makes a splittable payment out of the member spouse's interest in the Fund.
 - 4.4 That this order has effect from the operative time.
 - 4.5 That the operative time is 7 working days from the date of service of the order upon the trustee.