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SUPERANNUATION AND THE BREAKDOWN OF RELATIONSHIPS

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

What is the effect of Part VIIIIB of the *Family Law Act*?

Part VIIIIB 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's¹ 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.

The procedures for valuing an accrued superannuation entitlement are governed by the *Family Law (Superannuation) Regulations 2001*.

Does a superannuation entitlement have to be split 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

To enable the parties to a relationship to negotiate a property settlement, they will need to know the value of the accrued superannuation interest held by each spouse. 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 38 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 online at www.comlaw.gov.au.

Family Law legislation

State legislation complements the Commonwealth Family Law provisions.

In the event that a member spouse's benefit is split while he or she is in the growth phase, the legislation stipulates that the non-member spouse will receive a lump sum. This allows Super SA to create a separate interest for the non-member spouse immediately, which can be cashed (if the non-member spouse has met a cashing condition) or rolled out of the Scheme to a nominated complying fund, or rolled over to Triple S.

The non-member spouse interest initially created within the Pension Scheme or Lump Sum Scheme will be invested in the Growth option. If the non-member

¹ Refer to the Glossary on page 4

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spouse does not advise Super SA within 28 days of their preferred option, the interest will be rolled over to Triple S. The Triple S account will be established in the Balanced investment option until an investment choice is made.

The non-member spouse's interest is subject to Commonwealth preservation laws, which generally means the lump sum will not be available to be paid out until the non-member spouse retires.

For Pension members in the payment phase, please refer to the *Superannuation and the breakdown of relationships* fact sheet for superannuants, available on the Super SA website.

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 applies to de facto relationships that break down only 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
- temporary disablement pension entitlements which have been paid for less than two years.

Ensuring a former spouse does not take their superannuation entitlement before a splitting agreement or Family Court Order is finalised

A flagging order can be served on Super SA which effectively stops payment of any superannuation entitlement. You should contact your legal representative to ascertain whether issuing a flagging order is considered necessary and your options in this regard.

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

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

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

Fees are payable at the time of the request. Payments can be made by electronic fund transfer. Bank payment details are on the *Request for Superannuation Information (Family Law Act 1975)* and *Notification to Split a Superannuation Interest (Family Law Act 1975)* forms.

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 found at www.comlaw.gov.au and following the relevant links.

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Example for splitting an entitlement in the Lump Sum Scheme

Peter and Mary separated on 31 December 2019. Mary (the non-member spouse) has lodged a request for information with Super SA on Peter's superannuation interest in the Lump Sum Scheme at the date of separation. The Lump Sum Scheme retirement entitlement consists of an accumulation member contribution account including interest, plus an accumulation PSESS account (if any), plus a defined multiple of final annual salary (employer component). 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 a valuation of Peter's accrued employer component for family law purposes as well the value of the accumulation balances which make up the total superannuation interest.

Information that will be provided may include the following:

31 December 2019	
Accrued Benefit Multiple (as a multiple of annual salary)	1.25
Annual Salary, at valuation date	\$50,000
Family Law Value of the Employer Component	\$48,000
Value of the Member Contribution Account	\$22,000
Value of the PSESS Account	\$10,000
Total Value of the Superannuation Interest	\$80,000

It is then up to Peter (the member spouse) and Mary to determine if they will split Peter's superannuation or leave it untouched and simply take account of its value when sharing other assets. The split may be expressed as a dollar amount (known as the base amount), a percentage, or a method or formula to calculate a dollar amount. For example, Peter and Mary may agree on a 50/50 split or alternatively they may agree that Mary will receive \$45,000.

Example for splitting an entitlement in the Pension Scheme

Donald and Sally separated on 31 December 2019. Sally (the non-member spouse) has lodged a request for information with Super SA on Donald'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 Sally with a valuation of Donald's accrued superannuation interest for family law purposes.

Information that will be provided includes the following:

31 December 2019	
Accrued Benefit Multiple (as a percentage of annual salary)	52.75
Annual Salary, at valuation date	\$50,000
Family Law Value of the Superannuation Interest	\$325,000

It is then up to Donald (the member spouse) and Sally to determine if they will split Donald's superannuation or leave it untouched and simply take account of its value when sharing other assets. The split may be expressed as a dollar amount (known as the base amount), a percentage, or a method or formula to calculate a dollar amount. For example, Donald and Sally agree on a 50/50 split or alternatively they may agree that Sally will receive \$200,000.

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To obtain a *Request Superannuation Interest Information (Family Law Act 1975) form*

The form is available in the *Forms and Publications* section of the Super SA website, from the Super SA Member Centre at 151 Pirie Street, Ground Floor (enter from Pulteney Street) Adelaide, or 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) at 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 amounts payable from the Lump Sum Scheme will be taxed in accordance with the Australian Taxation Office 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 in relation to superannuation in the breakdown of relationships, please contact Super SA. If you have questions about the Family Law Act and the legal ramifications of its provisions, you should consult a lawyer practising in Family Law matters.

Glossary of terms

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

Member spouse: the partner or spouse 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*).

Disclaimer

The information in this document is intended to help you understand your entitlements in the Pension Scheme or the Lump Sum 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 and the Lump Sum Scheme, please refer to the *Superannuation Act 1988*. The Act and accompanying Regulations set out the rules under which the Pension Scheme and the Lump Sum Scheme are administered and entitlements are paid. You can access a copy from the Super SA website.

The Pension Scheme and the Lump Sum Scheme are exempt public sector superannuation schemes and not regulated by the Australian Securities and Investments Commission (ASIC) or the Australian Prudential Regulation Authority (APRA). Super SA is not required to hold an Australian Financial Services Licence to provide general advice about the Pension Scheme and/or the Lump Sum Scheme.

The information in this document is of a general nature only and has been prepared without taking into account your objectives, financial situation or needs. Super SA recommends that before making any decisions about the Pension Scheme or Lump Sum Scheme you consider the appropriateness of this information in the context of your own objectives, financial situation and needs and seek financial advice from a licensed financial adviser in relation to your financial position and requirements.

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 document.

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