

Newsletter

Splitting Orders – for Family Law Practitioners

specialising in superannuation valuations for family law purposes since 2003

Abstract

One of the most common questions asked by family law practitioners is: “As superannuation orders only refer to splitting payments, how can the underlying interest be split before payment commences?”

This newsletter will answer this question and enhances the practitioner’s understanding of the process associated with the creation of a new interest as a consequence of a splitting order.

Separate and Non-Separate interests are explained.

How is it so? - Orders only refer to splitting the payment yet sometimes a new interest is created?

**When is a separate interest created?
What if I fail to inform the client that the interest is a non-separate interest?**

Why do some non-member spouses have to wait until the member retires before receiving any benefit from the superannuation split?

If you can answer the above question, your knowledge of superannuation splitting is excellent. If not, read on.

What Type of Splits are Provided in the FLA?

Almost all splitting orders are either for a base amount – being a dollar value, or a percentage split, such as 50%.

There is a third category, which most practitioners will rarely encounter. The

third category refers to percentage only schemes. The Attorney General must designate these schemes. They relate to some judges schemes on the (mistaken) belief that a valuation in the growth phase is not possible.

The authority to split comes from s 90MT.

The legislation provides for a base amount or a percentage split as follows – bold added!

1) A court, ... , may make the following orders in relation to a superannuation interest...

*(a) ...an order to the effect that, **whenever a splittable payment becomes payable** in respect of the interest, ..., the non-member spouse is entitled to be paid the amount ...*



*(b) an order to the effect that, **whenever a splittable payment becomes payable** in respect of the interest: (i) the non-member spouse is entitled to be paid a specified percentage of the splittable payment...*

It is the legislation that causes practitioners to refer to the base amount order as type a order – see s90MT (1) (a). Thus a type a order and a base amount order are used interchangeably.

In other words, the orders are either a type a order, which, is for a base amount (eg \$10,000), or a type b order, which is a percentage order (eg 50%).

Why the Wording in a Superannuation Splitting Order?

It is good practice for any order to reflect the exact wording of the relevant legislation. So the convoluted english in a splitting order comes about because the orders are following the exact wording of the legislation.

A typical base order might be:

In accordance with section 90MT(1)(a) of the Family Law Act 1975 (the Act), whenever a splittable payment within the meaning of section 90ME of the Act becomes payable to or on behalf of the husband, from his interest in the Commonwealth Superannuation Scheme (the CSS), the wife is entitled to be paid (by the Trustees of the CSS) the amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001, using a base amount of \$xxxx and there is a corresponding reduction in the entitlement of the husband would have had but for these Orders.

Note that the above order only applies whenever a splittable payment is made. So on the face of it, the superannuation split will only occur when the husband receives a superannuation payment. Yet for some schemes, the wife's interest is created 4 business days after the orders are served.

In any property split, the parties should be dis-entangled and be free to complete the post-married lives as individuals with separate property pools. This does not always occur in superannuation.

All accumulation schemes have a separate interest for the non-member spouse created at the time of the split. This is not the case for defined benefit schemes. An accumulation scheme is where the employer and/or the employee contribute and those moneys are invested. Accumulation funds go up and down in accordance with the investment market. They account for about 80% by number of superannuation plans. The remainder is defined benefit plans. For those, the retirement benefits are determined by a formula – normally salary by a multiple. The investment market does not affect the retirement benefits paid under a defined benefit plan. Practitioners can readily identify a defined benefit scheme by examining the member statement. If an accrued benefit multiple features on the member statement, it is almost certainly a defined benefit scheme. If in doubt, send me an email.

A regulated fund must comply with the *Superannuation Industry (Supervision) Regulations 1994 (SIS)*. It is the necessity to comply with SIS that allows the accumulation interest to be split and





a separate interest created for the non-member spouse. If the trustees of the accumulation fund chose not to create a separate interest, the fund would be non-complying and it would lose its tax-preferred status. So all accumulation funds create a separate interest by virtue of taxation consequences.

Whereas the actions of trustees for accumulation schemes are mandated in respect of separate interests, trustees of defined benefit schemes are free spirits. The trustees' can chose to create a separate interest.

For a defined benefit scheme to create a separate interest it must change its rules to allow a separate interest to be created. No action by the superannuation scheme means that the interest is a non-separate interest. The non-member spouse must wait until a payment is made to the member.

Non-Separate Interest Schemes.

The Form 6 information from Trustees (also referred as a Superannuation Information Form) does not identify the scheme as a non-separate interest. This omission can have serious consequences for the practitioner.

The easiest way of identifying these type of schemes is to ask the trustees whether it is possible to roll over the split for the non-member spouse into a separate scheme. If the interest created is not a separate interest, no rollover will be possible. The rollover would be immediate for funded schemes and for the unfunded Commonwealth schemes, the rollover would occur on reaching age 55.

The significance of having a non-separate interest is that the non-member spouse is completely dependent on the future actions of the member for their superannuation benefits. Neither the timing of the benefit nor the amount receivable is certain.

The following describes what happens when a base amount order is served on the Trustees of a non-separate interest scheme:

- Following receipt of court order (or superannuation agreement) by the Trustees, a base amount will be noted against the member's interest.
- The above base amount is indexed in line with the Average Weekly Ordinary Time Earnings (AWOTE) plus 2.5% until the first payment becomes payable. The index is about 7.5% at present. Note that the base amount is indexed even if the member's account is crediting with a negative rate.
- The adjusted base amount is deducted from the first payment made to the member.
- If the spouse's interest is not fully met from the first payment, and the member has a choice whether to take all lump sum or commute to a pension, then the spouse can force the member to take sufficient lump sum to meet the spouse's interest. If not, the spouse will receive a proportion of each subsequent payment until the spouse's interest is met.
- If the amount of the member's lump sum is insufficient to meet the spouse's interest, the spouse





R will not receive any further payments.

Impact of Death

If the member dies whilst in service, a death benefit would be payable to the estate or to binding death benefit beneficiaries. The non-member spouse would receive the base amount (as adjusted) or percentage of that payment as appropriate.

If the non-member spouse dies before the member, the payment split would continue to be payable to his or her estate.

Risks for the Non-Member Spouse

The non-member spouse will not receive any superannuation monies until the member retires, dies or is invalid out. The member may not choose to retire to the maximum retirement age 65. If this retirement age is extended, this would cause further delays to the receipt of superannuation monies for the non-member spouse.

A spouse cannot access any of the superannuation monies under hardship provisions.

Because of the uncertainties and risks, the non-member spouse should maximise the non-superannuation assets of the property pool.

A practitioner should communicate the consequences of a non-separate interest to the client.

When do you use base amount order and when percentage orders?

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Conventional wisdom is that a base amount is used in the growth phase whilst a percentage split applies to the payment phase.

If a percentage order applies to the growth phase, the order will capture all post separation contributions right up to the operative date of the order. This could favour the non-member spouse. However, where the investment market has materially declined from the date of the family law valuation to the operative date of the order, a percentage order might deliver a smaller split compared to a base amount.

The ideal order in terms of equity would be a base amount order with a formula that reflects movement in the investment market. Any formula should reflect how the superannuation changes over time. The formula would then reflect that movement. Not to take into account the changes in asset values between the date of valuation and the date of the orders is to give one party an unintended gain whilst the other party would suffer a loss. This is the most neglected aspect in family law.

In summary, a base amount in the growth phase delivers certainty of outcomes but practitioners need to be aware of the change in the investment markets between date of valuation and date of orders.

Any questions or feedback? Email [here](#)

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