

# A Guide for Family Law Superannuation Splitting Agreements

## Family Law

Applicable to the Revised Scheme, New Scheme, SERB Scheme, Transport Scheme, Melbourne Transit Authority Superannuation Scheme and the Parliamentary Contributory Superannuation Fund

To enable members of the Funds administered by ESSSuper and practitioners acting on behalf of members to understand the requirements of ESSSuper regarding Family Law Superannuation splitting Agreements in relation to entitlements in the Emergency Services Superannuation Scheme (the Scheme), ESSSuper has prepared answers to some frequently asked questions and samples of commonly used wording.

Please refer to the *Family Law Information Sheet (FL131)* for general information on the operation of superannuation splitting at ESSSuper, including the clean break of a non-member spouse entitlement.

Please also refer to the relevant governing legislation to ensure you have considered the appropriate rules of the Fund before drafting the Agreement.

This document should not be interpreted as advice regarding legal requirements relating to family law superannuation splitting agreements; members should obtain professional advice regarding those.

## Frequently asked questions

### Who acts as Trustee and Administrator of the Emergency Services Superannuation Scheme?

The Emergency Services Superannuation Board (trading as ESSSuper) is the Trustee and Administrator of the Scheme. ESSSuper is established under the *Emergency Services Superannuation Act 1986*.

On 1 December 2005, the assets and liabilities of the State Superannuation Fund (SSF) were transferred to the Emergency Services Superannuation Scheme (ESSS). The SSF has ceased to exist, and all of the superannuation schemes that comprised it now form part of the Scheme.

The correct way to refer to an entitlement in the schemes formerly of the State Superannuation Fund is the "Emergency Services Superannuation Scheme – [name of scheme]". For example:

- Emergency Services Superannuation Scheme – New Scheme;
- Emergency Services Superannuation Scheme – Revised Scheme;
- Emergency Services Superannuation Scheme

– Transport Scheme;

- Emergency Services Superannuation Scheme – State Employees Retirement Benefits Scheme.

The funds under the *Parliamentary Salaries, Allowances & Superannuation Act 1968* can be referred to as:

- Parliamentary Contributory Superannuation Fund.

### What are the common problems with Superannuation Agreements?

The requirements for a valid Superannuation Agreement are set out in the *Family Law Act 1975* (FLA) Part VIII B and also include the requirements of a Financial Agreement in accordance with s90G FLA.

ESSSuper can only accept Superannuation Agreements as binding if they are worded in strict accordance with the FLA. If not, ESSSuper will require that the Agreement is amended and resubmitted.

Common problems include:

- The operative time, if included, is incorrect. The operative time is specified in s90XI FLA, and includes the provision of documents which must accompany the Agreement;
- A Separation Declaration or decree absolute is not provided;
- The Separation Declaration is incomplete. The specific requirements of a Separation Declaration vary, depending on the value of the superannuation entitlement, pursuant to s90XP and s90XQ FLA;
- No Annexure to the Agreement to certify that independent legal advice was given, is included;
- Wording regarding the giving of independent legal advice is not stated in the Agreement or is not worded in strict accordance with the s90G FLA;
- The Agreement is not signed by the Parties;
- The Agreement fails to specify the method of superannuation splitting by:
  - base amount pursuant to s90XJ(1)(c)(i) FLA; or
  - percentage pursuant to s90XJ(1)(c)(iii) FLA; or
  - method pursuant to s90XJ(1)(c)(ii) FLA.

### Should the comments of ESSSuper be sought before finalising a Superannuation Agreement that affects interests in a superannuation scheme within the Emergency Services Superannuation Scheme?

Yes. Although there is no legal obligation to do so, by seeking ESSSuper's view, you increase the likelihood that problems with a Superannuation Agreement will be identified and corrected before it is finalised. This will enable the split to be processed more promptly for the benefit of all parties. If ESSSuper is unable to put a Superannuation Agreement into effect, it will need to be amended and resubmitted.

If you choose to submit a Superannuation Agreement for review, we ask that we be given at least 14 days in which to respond.

### Does ESSSuper have any additional requirements in relation to the preparation of Superannuation Agreements?

In addition to any legal requirements, ESSSuper recommends that the following matters be considered in the drafting of a Superannuation Agreement:

- ESSSuper requests the inclusion of wording in the Superannuation Agreement to require the member spouse to lodge within 7 days, such documents as are necessary to enable ESSSuper to establish what benefit is payable if the member spouse becomes entitled to a benefit prior to the clean break taking effect (refer sample wording on page 3).
- It is suggested that a valuation of the superannuation interest to be split be obtained prior to drafting the Agreement. Details on how to apply for this information, pursuant to FLA s90XZB, can be obtained from the *Family Law Information Sheet (FL131)*, available on our website.
- An Agreement must not attempt to direct the Trustee in a way that is not in accordance with the governing rules of the Fund, such as in matters relating to the payment of death and disability benefits. It is recommended that the governing rules be referred to prior to the drafting of an Agreement (refer below for details).

### Where are the governing rules for the superannuation funds administered by ESSSuper?

The governing rules of the funds are found in Victorian State legislation, as follows:

- Revised and New Schemes – *State Superannuation Act 1988*;
- SERB Scheme – *State Employees Retirement Benefits Act 1979*;
- Transport Scheme – *Transport Superannuation Act 1988*;
- Parliamentary Contributory Superannuation Fund – *Parliamentary Salaries, Allowances and Superannuation Act 1968*.

### What is meant by “clean break” provisions?

In most cases, ESSSuper is required to pay out the non-member spouse benefit as a lump sum irrespective of whether the member spouse has become entitled to claim a benefit (i.e. ESSSuper is required to apply a “clean break”). This amount will either be rolled over to a complying superannuation fund or RSA, or paid directly to the non-member spouse, if he or she has satisfied a “relevant condition of release”, as defined in the *Superannuation Industry (Supervision) Regulations 1994*, or the member spouse is in receipt of a pension payable under the governing rules of the relevant scheme.

In the case of a member in receipt of a reviewable disability pension, ESSSuper has the discretion whether or not to apply the clean break provisions.

Each of the Acts referred to under the previous heading contain clean break provisions. These are:

- Revised and New Schemes, the clean break provisions are found in Part 7A *State Superannuation Act 1988*;
- SERB Scheme, the clean break provisions are found in Part IVA *State Employees Retirement Benefits Act 1979*;
- Transport Scheme, the clean break provisions are found in Part 7A *Transport Superannuation Act 1988*;
- Parliamentary Contributory Superannuation Fund – the clean break provisions are found in Part 3 *Parliamentary Salaries, Allowances and Superannuation Act 1968*.

### What happens to Superannuation Agreements to split a superannuation entitlement in the event of the death of the member prior to a clean break being finalised?

The payment of death benefits in relation to ESSSuper and Family Law is complex. ESSSuper can only pay out a death benefit in accordance with the governing rules of the fund, found in the relevant state Act, as above.

Points to note are:

- The eligible beneficiaries for death benefits are prescribed in the relevant legislation and cannot be varied - death benefit nominations by the member will only have effect in some of the funds ESSSuper administers and in limited circumstances;
- Pension payments are contingent upon the life of the beneficiary and therefore will cease on the death of the beneficiary (reversionary pensions may be payable in some circumstances to eligible beneficiaries);
- The value of a benefit paid on death may differ from the value calculated for Family Law purposes, this is because these calculations take into account particular assumptions, for example, that the member will work until retirement age.

### Can an entitlement under a superannuation split be paid directly to a non-member spouse or must it be rolled over?

Preservation standards apply to payments to a non-member spouse pursuant to a superannuation split. A non member spouse entitlement will be preserved and must be rolled over to a complying superannuation fund unless the non member spouse meets a condition of release at the time of payment.

Refer:

- *Superannuation Industry (Supervision) Regulations 1994*, Schedule 1, containing the Conditions of Release;
- The governing rules of the different Schemes forming part of the Scheme, found in the relevant State legislation.

## Commonly used wording for Family Law Superannuation Splitting Agreements

The following samples of standard wording are commonly included in the drafting of Superannuation Agreements and are consistent with ESSSuper's requirements.

### Sample 1

#### Where a base amount is to be specified:

*"That pursuant to section 90XJ(1)(c)(i) of the Family Law Act 1975, whenever a splittable payment becomes payable in respect of the superannuation interest of [name of member] in the Emergency Services Superannuation Scheme – [Name of Scheme]:*

- a. *[name of non-member spouse] shall be entitled to be paid an amount calculated in accordance with Part 6 of the Family Law (Superannuation) Regulations 2001 using the base amount (provided that such base amount shall not exceed the value of the interest determined under section 90XJ(4)(b)) FLA;*
- b. *there be a corresponding reduction in the superannuation interest of [name of member] to whom the splittable payment would have been made but for this Agreement."*

### Sample 2

#### Where a percentage split is to be specified:

*"That pursuant to section 90XJ(1)(c)(iii) of the Family Law Act 1975, whenever a splittable payment becomes payable from the superannuation interest held by [name of member] in the Emergency Services Superannuation Scheme – [name of Scheme], the trustee shall pay to [name of non-member spouse] [insert percentage required]% of each splittable payment and there be*

*a corresponding reduction in the entitlement [name of member] would have had but for this Agreement."*

### Sample 3

#### Operative Time to be specified:

*"That the operative time for this Agreement is four business days after service of a certified copy of the Agreement on ESSSuper, accompanied by a [decree absolute/separation declaration] and signed Certificates of Legal Advice"*

### Sample 4

#### Inclusion of clause for member to provide forms if a splittable payment becomes payable:

*"If as a result of termination of his/her employment [name of member] becomes entitled to a benefit prior to ESSSuper making a payment under section [insert clean break section of relevant Act], s/he shall provide to ESSSuper all such forms as shall be necessary to enable the Trustee to determine the nature and quantum of the superannuation entitlement and any other related information it may reasonably require, within 7 business days of that entitlement arising."*