



SUPER - IT PAYS TO TAKE INTEREST

TAXATION IMPACTS FOR INDIVIDUALS DUE TO DIVORCE

The Family Law Legislation Amendment (Superannuation) Act 2001 was introduced to amend the Family Law Act 1975 to provide for the division of superannuation interest following marriage breakdown. These changes took effect on 28 December 2002.

What are the Changes?

In the event of marriage breakdown, a superannuation agreement may be made or the Court may make an order, specifying the manner in which superannuation interests are to be divided. It will be possible to split the superannuation interests upon marriage breakdown, **'interest split'** or the split may occur when a payment is made, usually upon retirement **'payment split'**.

Upon marriage breakdown the couple may alternatively agree to "flag" the superannuation interest and make a decision on how it will be split at a later date, for example, retirement.

A **payment split** is a division of superannuation interest that occurs at the time a benefit becomes payable to the member spouse because they have satisfied a condition of release. In addition, a payment split applies even if they have elected to roll-over their interest to another superannuation provider.

For lump sum entitlements, payment results in two eligible termination payments (ETPs), one to the member spouse and the other to the non-member spouse.

Generally, the normal preservation rules will apply to the non-member spouse's ETP.

If they have not satisfied a condition of release, they will be required to either roll-over their entitlement to another provider or create an account with the same provider.

For pension entitlements, the pension itself may be split with each pension payment being a splittable payment. In some cases the non-member spouse may waive their rights to future pension payments for a lump sum.

The Superannuation Industry Supervision Regulations 1994 deals with **interest splits**.

Under an interest split, an interest, being an entitlement that has a monetary value, can be created in the same fund for the non-member spouse or an amount can be rolled-over to another fund. It may also be possible in certain circumstances for the non-member spouse to request payment of their entitlement as a lump sum (for example, retirement, attaining age 65 or, permanent incapacity or death of the non-member spouse). The member's interest is proportionately reduced by the non-member spouse's entitlement.

In general terms, an interest split must be of an accumulation interest, not a defined benefit interest that is in the growth phase. An interest split can also apply to an allocated pension that is being paid.

How are ETP components calculated when there is a payment split?

A lump sum payment made to a non-member spouse (or their legal representative after the non-member spouse's death) will generally be taken to be an ETP.

Certain components of the ETP will be split on a proportionate basis to the overall amount to which the payment split is to be applied. These components are the undeducted contributions, concessional component, post-June 1994 invalidity component, CGT exempt component and the untaxed element of the post-June 83 component.



For example, if parties agree to a 60/40 split of the member spouse's superannuation, all relevant fixed components of that superannuation interest will be split 60/40 between the parties.

The remainders of the ETP components will be calculated in the same manner ETP components are normally calculated. This means that the remainder will be post-June 83 taxed element unless the eligible service period (ESP) start date is prior to 1 July 1983. In this case there would also be a pre-July 1983 component.

However, for the non-member spouse, the number of days in the eligible service period for the payment split ETP is taken to be zero. Hence, there will be non pre-July 1983 component for the non-member spouse.

Is the ETP included in assessable income?

Yes. For ETPs taken as a cash payment, both the member and non-member spouse will receive an ETP payment summary for the ETPs and the assessable amount must be included in their respective low rate thresholds to reduce the tax payable on their ETP.

Are pension split payments included in assessable income?

If a pension is split due to a superannuation agreement or court order applying, the payments of the pension following the split are treated as assessable income for each spouse receiving the payments.

The superannuation provider will recalculate the annual deductible amount of the new pension. Draft Taxation Determination TD 2002/D14 explains how the deductible amount is to be calculated for the new pensions.

The normal rules apply to determine eligibility to the superannuation pension rebate. For more information please refer to the fact sheet Superannuation pension rebate and annuity rebate (NAT 4355).

Against whose RBL are the benefits from a payment split measured?

The RBL provisions will operate normally to measure any benefit paid to the non-member spouse either by splitting the pension payments or commuting the pension to pay a lump sum. Special rules apply. These are explained in the fact sheet RBLs - treatment of benefits paid as a result of marriage breakdown (NAT 7816)

How are ETP components calculated when there is an interest split?

The concessional component, post-June 1994 invalidity component, CGT exempt component and the undeducted contribution of the ETPs of both spouses need to be calculated. These components are calculated in respect of an amount (a "notional ETP")

That is equal to the value of the combined interests immediately before the interest split. Each component is then apportioned in the same proportion as the interest split.



The remaining components, the pre-July 1983 component and the post-June 83 component are not required to be calculated at the time of an interest split. For the non-member spouse the number of days in the eligible service period is taken to be zero.

Does an interest split result in ETPs for both spouses?

Yes. If an interest split occurs under a superannuation agreement or court order, it is taken to be an ETP when the new interest is created or when an amount is transferred to another provider for the non-member spouse.

In addition, if the non-member spouse is eligible to be paid a lump sum, it will be generally be an ETP (except for example, if paid by a non-complying superannuation fund).

There is also taken to be an ETP made to the member spouse for the amount remaining after deducting the member spouse's entitlement. The ETP is treated as being automatically rolled-over to the same superannuation provider.

Is the ETP from an interest split included in the income tax return?

Where there is no payment made to either the member spouse or non-member spouse at the time of the interest split, the ETPs are taken to have been rolled over and therefore there is no requirement to include the ETP in the income tax return for the relevant year.

Does the ETP from an interest split of an accumulation interest in growth phase count towards the RBL?

Generally, no money is taken out of superannuation at this stage and therefore none of the interest split amount will count towards the RBL of either the member or non-member spouse. When benefits are subsequently paid to the spouses they will then be counted towards their respective RBLs.

How will the superannuation surcharge liability be treated where a payment split or interest split applies to a superannuation interest?

If a surcharge assessment is issued after a split but in respect of a period prior to the split, then the fund that holds those surcharge able contributions for the member spouse (which may occur if they have allocated all their benefit to the non-member spouse) then the member spouse will be liable to pay the surcharge.

Also the amendments to the surcharge legislation will ensure that a payment to a non-member spouse will trigger payment of the surcharge debt account by an unfunded defined benefits scheme (or the member in a constitutionally protected fund) if the benefit payment would have triggered payment of the debt account if it had been made to the member spouse.

Are there any capital gains tax issues in relation to the transfer of monies?

The actual transfer of an asset or making of a payment under a superannuation agreement or court order gives rise to a capital gain or loss. However, the amendments ensure that the capital gains tax rules will ignore the realisation of a capital gain or loss on the creation of rights or rights coming to an end in respect of a superannuation agreement.

Amendments have also been made to ensure that any capital gain or loss made by the non-member spouse is disregarded where the non-member spouse is receiving payment (whether in the form of cash or property) as a result of a superannuation agreement or court order.



BENNETT CARROLL

Established in April, 1974, Bennett Carroll is well known as one of the largest law firms outside of the Brisbane CBD. Our well-balanced practice has over 30 years' experience in many areas of specialty including Commercial Law, Conveyancing, Family Law, Estates, Planning and Environment Law, Litigation and Personal Injury. We dedicate ourselves to quality work in these diverse areas and make a point of being accessible to our clients.

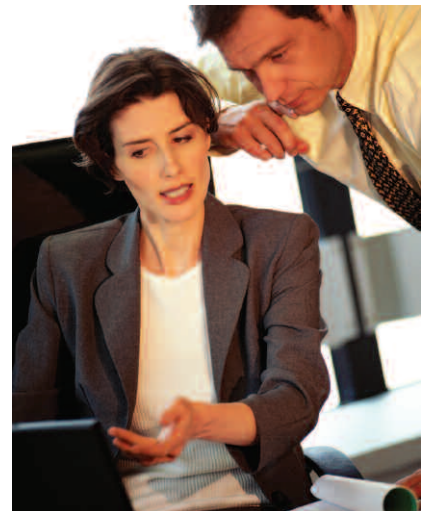
As the preferred solicitors for several National and International companies, we represent well known financiers and developers and hold a reputation for reliability that we intend to keep. Bennett Carroll prides itself on being prompt, accessible, and dealing with you in a language that you can understand; demystifying the law.

Bennett Carroll is in the process of expansion with continued focus on hands-on, up-front problem-solving.

We have offices at Upper Mt Gravatt, Stafford and Kawana.

We pride ourselves in being the market leaders in state-of-the-art technology combined with old-fashioned client service.

The solicitors in our family law section are Warren Tegg, Kate Murphy and Joanne Bennett



Warren Tegg

Warren was admitted to practice as a Solicitor of the Supreme Court of Queensland and the High Court of Australia in 1979. He ran his own legal practice specialising in Family Law and Business Advice from 1980 until 2001 before merging with Bennett Carroll. Warren has been helping people with their Family Law problems since the inception of the Family Law Act in 1976.

Warren is Department Head with the Family Law division of Bennett Carroll. He brings to the department a wealth of experience that includes some five years running his own call centre for people with Family Law problems, as well as acting as a sessional mediator with Relationships Australia Queensland from 1989 to 1994. He is also the General Manager of the Master Guidance Company, which is a counselling service owned by Bennett Carroll.

Warren has served on a number of Queensland Law Society committees during his career and is currently a member the Small Practice Management division where he has been called upon to speak at State conferences on legal practice.



Kate Murphy

Originally from Northern NSW, Kate studied at Queensland University of Technology graduating in 2005 with a Bachelor of Laws and a Bachelor of Business. She has a strong interest in Family Law, which extends to international law relating to marriage and children.

Kate was admitted to the Supreme Court of Queensland in 2006 and the High Court of Australia in 2007. Kate has over 4 years extensive experience in Family Law, as well as engaging in Criminal and Commercial Law. Kate has also had the benefit of being trained with Pauline Tesler, with a strong focus on negotiation.

Kate is a member of the Queensland young lawyers association.

Joanne Bennett

Joanne graduated from Deakin University before completing her Professional Legal Training at Bond University in 2003 and was admitted in December that year.

Joanne is an experienced family lawyer and can offer professional assistance and guidance in all types of family law matters including those involving children and financial issues, de facto relationships, pre-nuptials and parental orders.

Joanne also has extensive Commercial Law experience in vital areas such as property, company structures, franchise agreements, joint venture agreements and leases.

Family law is a very complex and emotional area of law; it will involve your whole family. This is why when things go wrong, you need an experienced team of friendly lawyers who are compassionate professionals with real life experience who understand your problems.



We can assist you with

- Commercial Law
- Business Advice
- Planning and Environment
- Conveyancing
- Litigation
- Family Law Matters
- Injury and Accident Claims
- Criminal Law
- Wills and Powers of Attorney
- Estate Planning

**Offices at Upper Mt Gravatt, Stafford and Kawana
Call us now for advice on 1300 334 566**