



Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2001

Act No. 114 of 2001 as amended

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[This Act was amended by Act No. 51 of 2002]

Amendments from Act No. 51 of 2002

[Schedule 6 (item 3) amended Item 34 of Schedule 1

[Schedule 6 (item 4) amended Item 36 of Schedule 1

[Schedule 6 (item 5) amended Item 37 of Schedule 1

[Schedule 6 (item 6) amended Item 38 of Schedule 1

[Schedule 6 (item 7) amended Item 39 of Schedule 1

Schedule 6 (items 3-7) commenced on 29 June 2002]

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An Act to deal with matters consequential on the enactment of the *Family Law Legislation Amendment (Superannuation) Act 2001*, and for related purposes

[Assented to 18 September 2001]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2001*.

2 Commencement

This Act commences immediately after the commencement of the *Family Law Legislation Amendment (Superannuation) Act 2001*.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Family Law Act 1975

1 Subsection 90MB(1)

Omit “This Part”, substitute “Subject to subsection (3), this Part”.

2 At the end of section 90MB

Add:

- (3) This Part has effect subject to the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

2A Subsection 90ME(2)

Repeal the subsection, substitute:

- (2) A payment is not a splittable payment if it is prescribed by the regulations for the purposes of this subsection. The regulations may prescribe a payment either:
- (a) generally (that is, for the purposes of all payment splits in respect of a superannuation interest); or
 - (b) only for the purposes of applying this Part to a particular payment split in respect of a superannuation interest.

Income Tax Assessment Act 1936

3 After section 27AC

Insert:

27ACA Effect of payment split under the *Family Law Act 1975* on eligible termination payments

ETP for non-member spouse

- (1) If:
- (a) a payment split applies to a splittable payment; and

- (b) as a result, a payment is made to the non-member spouse (or to his or her legal personal representative if he or she has died); and
- (c) the payment, if it had been made to the original payee, would have been an eligible termination payment under a paragraph of the definition of *eligible termination payment* in subsection 27A(1);

then the payment is taken to be an eligible termination payment (the *new ETP*) in relation to the non-member spouse under that same paragraph.

Example: A has a superannuation interest that is subject to 2 payment splits in respect of A's marriages to B and C (in that order). The first payment split provides for a 60% share to B and the second payment split provides for a 50% share to C.

Assume that any payment to B or C would have been an eligible termination payment for A (if the payment had been made to A). A becomes entitled to a splittable payment of \$100.

By applying subsection (1) in relation to the first payment split, B gets an eligible termination payment of \$60.

By applying subsection (1) in relation to the second payment split, C gets an eligible termination payment of \$20.

Calculation of components of new ETP

- (2) Each identified component of the new ETP is to be worked out in accordance with the following formula:

$$\frac{\text{New ETP}}{\text{Pre-split amount}} \times \text{Corresponding amount}$$

where:

corresponding amount means the amount that would have been that component if the whole of the pre-split amount had been an eligible termination payment in relation to the original payee.

pre-split amount means the amount to which the payment split was applied.

Example: To continue the example in subsection (1), assume A's undeducted contributions (one of the identified components) are \$40.

In relation to B, the pre-split amount is \$100 (the amount of the splittable payment). The undeducted contributions component of B's eligible termination payment is:

$$\frac{\$60}{\$100} \times \$40 = \$24$$

The other identified components of B's eligible termination payment are worked out in a corresponding way.

In relation to C, the pre-split amount is \$40 (the original amount of \$100 less the \$60 paid to B under the first payment split). A's undeducted contributions have been reduced to \$16. The undeducted contributions component of B's eligible termination payment is:

$$\frac{\$20}{\$40} \times \$16 = \$8$$

The other identified components of C's eligible termination payment are worked out in a corresponding way.

- (3) For the purposes of working out all the components of the new ETP, the number of days in the eligible service period is taken to be zero.

ETP for original payee

- (4) If there is an eligible termination payment (the **original ETP**) in relation to the original payee in respect of the splittable payment, then each identified component of the original ETP is to be worked out in accordance with the following formula:

$$\frac{\text{Original ETP}}{\text{Pre-split amount}} \times \text{Corresponding amount}$$

where:

corresponding amount means the amount that would have been that component if the whole of the pre-split amount had been an eligible termination payment in relation to the original payee.

pre-split amount means the amount to which the payment split was applied.

Example: To continue the example in subsections (1) and (2), A has an eligible termination payment of \$20.

In relation to A, the pre-split amount is \$40 (the original amount of \$100 less the \$60 paid to B under the first payment split). The undeducted contributions component of A's eligible termination payment is:

$$\frac{\$20}{\$40} \times \$16 = \$8$$

The other identified components of A's eligible termination payment are worked out in a corresponding way.

Definitions

(5) In this section:

identified component, in relation to an eligible termination payment, means any of the following:

- (a) the concessional component;
- (b) the post-June 1994 invalidity component;
- (c) the CGT exempt component;
- (d) the undeducted contributions;
- (e) the untaxed element of the post-June 83 component.

non-member spouse has the same meaning as in Part VIII B of the *Family Law Act 1975*.

original payee means the person to whom the splittable payment would have been made but for the payment split.

payment split means a payment split under Part VIII B of the *Family Law Act 1975*.

splittable payment has the same meaning as in Part VIII B of the *Family Law Act 1975*.

27ACB Interest splits while a payment split under the *Family Law Act 1975* applies

- (1) If, in respect of an interest (the ***original interest***) that a person (the ***first person***) has as a member of a superannuation fund, either of the following apply at a particular time (the ***relevant time***):
 - (a) an interest in a superannuation fund is created for the non-member spouse in relation to the original interest in circumstances prescribed by the regulations;

(b) an amount is transferred to a superannuation fund, in circumstances prescribed by the regulations, for the benefit of the non-member spouse in relation to the original interest;

then:

- (c) there is taken to be an ETP made in relation to the non-member spouse of an amount (the *new ETP amount*) equal to the value of the interest created for the non-member spouse or to the amount transferred (as the case may be); and
- (d) there is taken to be an ETP made in relation to the first person of an amount (the *remaining ETP amount*) equal to the value of the original interest immediately before the relevant time less the new ETP amount; and
- (e) there is taken to be a roll-over of those ETPs.

ETP in relation to non-member spouse

- (2) Each identified component of the ETP in relation to the non-member spouse is to be worked out in accordance with the following formula:

$$\frac{\text{New ETP amount}}{\text{Value of the original interest immediately before the relevant time}} \times \text{Corresponding amount}$$

where:

corresponding amount means the amount that would have been that component if an ETP had been made in relation to the first person of an amount equal to the value of the original interest immediately before the relevant time.

- (3) For the purposes of working out all the components of the ETP in relation to the non-member spouse, the number of days in the eligible service period is taken to be zero.

ETP in relation to first person

- (4) Each identified component of the ETP in relation to the first person is to be worked out in accordance with the following formula:

$$\frac{\text{Remaining ETP amount}}{\text{Value of the original interest immediately before the relevant time}} \times \text{Corresponding amount}$$

where:

corresponding amount means the amount that would have been that component if an ETP had been made in relation to the first person of an amount equal to the value of the original interest immediately before the relevant time.

Definitions

(5) In this section:

identified component, in relation to an eligible termination payment, means any of the following:

- (a) the concessional component;
- (b) the post-June 1994 invalidity component;
- (c) the CGT exempt component;
- (d) the undeducted contributions.

non-member spouse has the same meaning as in Part VIII B of the *Family Law Act 1975*.

4 Section 140C

Insert:

non-member spouse has the same meaning as in Part VIII B of the *Family Law Act 1975*.

5 Section 140C

Insert:

payment split means a payment split under Part VIII B of the *Family Law Act 1975*.

6 Section 140C

Insert:

splittable payment has the same meaning as in Part VIII B of the *Family Law Act 1975*.

7 After subsection 140M(1)

Insert:

(1A) If:

- (a) a payment split applies to a splittable payment in respect of an interest that a person has as a member of a superannuation fund; and
- (b) as a result, a payment is made to the non-member spouse in relation to that interest; and
- (c) the payment, if it had been made to the original payee, would have been a payment of a superannuation pension by a payer to the original payee; and
- (d) this subsection has not previously applied in relation to a payment made to the non-member spouse in relation to that interest;

then:

- (e) for the purposes of this Act, the payer is taken to have commenced to make payments of a superannuation pension to the non-member spouse; and
- (f) the payer must give the Commissioner a notice containing such information as is specified in the regulations.

Note 1: This Act contains various provisions dealing with superannuation pensions. For example, see section 27H (about assessable income including superannuation pensions) and Subdivision AAB of Division 17 of Part III (about rebates for certain superannuation pensions).

Note 2: If the payer also commenced to make payments of a superannuation pension to the original payee, then subsection (1) would apply in relation to the original payee.

(1B) For the purposes of subsection (1A), *original payee* means the person to whom the splittable payment would have been made but for the payment split.

(1C) If:

- (a) a payer commences or has commenced to make payments of a superannuation pension to a person (the *first person*) in

respect of an interest that a person has as a member of a superannuation fund; and

- (b) the pension counts or counted towards the first person's RBLs; and
- (c) a payment split then applies to a splittable payment in respect of that interest; and
- (d) as a result, a payment is made to or for the benefit of the non-member spouse in relation to that interest; and
- (e) this subsection has not previously applied in relation to that payment split;

then:

- (f) the payer must give the Commissioner a notice containing such information as is specified in the regulations; and
- (g) if the payer also makes a payment of the pension to the first person as a result of the splittable payment becoming payable—for the purposes of this Act, the payer is taken to have commenced to make payments of another superannuation pension to the first person.

8 Subsection 140M(2)

After “regulations”, insert “for the purposes of this section”.

9 Subsection 140M(3)

Omit “The notice”, substitute “A notice under this section”.

10 After subsection 140Q(1)

Insert:

- (1A) Subsection (1) does not apply to an ETP made in relation to the non-member spouse in circumstances referred to in paragraph 140UA(1)(c).

11 At the end of section 140R

Add:

- (5) This section is subject to section 140UA.

12 At the end of section 140T

Add:

(4) This section is subject to section 140UA.

13 After section 140U

Insert:

140UA Commutation of pension under payment split

(1) If:

- (a) a payer commences or has commenced to make payments of a superannuation pension to a person (the *first person*) in respect of an interest that a person has as a member of a superannuation fund; and
- (b) there is a commutation or partial commutation of the pension at a time when a payment split applies in relation to that interest;

then:

- (c) if an ETP is made in relation to the first person, or in relation to the non-member spouse in relation to that interest, as a result of the commutation or partial commutation of the pension—subsections 140R(1) and 140T(1) apply in relation to that ETP and subsections 140R(1A) and 140T(2B) do not apply; and
- (d) if a residual pension is payable to the first person, or to the non-member spouse in relation to that interest, on the commutation or partial commutation of the pension—subsections 140R(1) and 140T(1) apply in relation to that residual pension and subsections 140R(1B) and 140T(2C) do not apply.

(2) If:

- (a) paragraph (1)(c) or (d) applies in relation to the non-member spouse; and
- (b) paragraph 140ZC(2)(b) or (c) would otherwise apply in relation to the ETP or residual pension concerned;

then paragraph 140ZC(2)(b) or (c), as the case may be, does not apply.

14 After section 140ZF

Insert:

140ZFA Payment split under Family Law Act—assessment of benefits against pension RBL

If:

- (a) a payer is taken to have commenced to make payments of a superannuation pension (the *new pension*) to a person as mentioned in paragraph 140M(1C)(g); and
- (b) the pension mentioned in paragraph 140M(1C)(a) was assessed against the person’s pension RBL;

then the new pension is to be assessed against the person’s pension RBL.

15 At the end of section 140ZP

Add:

(3) If:

- (a) a payer commences or has commenced to make payments of a superannuation pension to a person (the *first person*) in respect of an interest that a person has as a member of a superannuation fund; and
- (b) the pension counts or counted towards the first person’s RBLs; and
- (c) a payment split then applies to a splittable payment in respect of that interest; and
- (d) as a result, a payment is made to or for the benefit of the non-member spouse in relation to that interest;

then the capital value of the pension is taken to be reduced by an amount worked out in accordance with a method determined by the Commissioner in writing in relation to the pension.

Note: The heading to section 140ZP is altered by omitting “—roll-overs”.

Income Tax Assessment Act 1997

16 Section 112-150 (at the end of the table)

Add:

7	Transfer of a CGT asset from one small superannuation fund to another because of a marriage breakdown	Subdivision 126-D
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17 At the end of section 118-305

Add:

- (3) Subsection (2) does not apply if:
 - (a) a *payment split applies to a *splittable payment; and
 - (b) as a result, a payment is made to the *non-member spouse (or to his or her *legal personal representative if the non-member spouse has died).

18 After section 118-310

Insert:

118-315 Superannuation agreements under the Family Law Act

A *capital gain or *capital loss you make from *CGT event C2 or D1 relating directly to any of the following is disregarded:

- (a) the making of a superannuation agreement (within the meaning of Part VIIIIB of the *Family Law Act 1975*);
- (b) the termination, or setting aside, of such an agreement;
- (c) such an agreement otherwise coming to an end.

19 At the end of Division 126 of Part 3-3

Add:

Subdivision 126-D—Small superannuation funds

Table of sections

126-140 CGT event involving small superannuation funds

126-140 CGT event involving small superannuation funds

Payment splits under Family Law Act

- (1) There is a roll-over if:
 - (a) an interest in a *small superannuation fund is subject to a *payment split; and
 - (b) the *non-member spouse in relation to that interest serves a waiver notice under section 90MZA of the *Family Law Act 1975* in respect of that interest; and

-
- (c) as a result of serving the notice, the trustee (the *transferor*) of the fund transfers a *CGT asset to the trustee (the *transferee*) of another small superannuation fund for the benefit of the non-member spouse.

Note: CGT event E2 may apply to the transfer.

Payment splits under the Superannuation Industry (Supervision) Regulations

- (2) There is also a roll-over if:
- (a) an interest in a *small superannuation fund (the *first fund*) is subject to a *payment split; and
 - (b) as a result of the payment split, there is a transfer or roll over of benefits, for the benefit of the *non-member spouse, from the first fund to another small superannuation fund; and
 - (c) the transfer is under provisions of the Superannuation Industry (Supervision) Regulations 1994 dealing with superannuation interests that are subject to payment splits; and
 - (d) in order to give effect to the payment split, the trustee (the *transferor*) of the first fund transfers a *CGT asset to the trustee (the *transferee*) of the other fund for the benefit of the non-member spouse.

Note: CGT event E2 may apply to the transfer.

Roll-over consequences

- (3) A *capital gain or *capital loss the transferor makes from the transfer of the asset is disregarded.
- (4) If the transferor *acquired the asset on or after 20 September 1985:
 - (a) the first element of the asset's *cost base (in the hands of the transferee) is the asset's cost base (in the hands of the transferor) at the time the transferee acquired it; and
 - (b) the first element of the asset's *reduced cost base (in the hands of the transferee) is worked out similarly.
- (5) If the transferor *acquired the asset before 20 September 1985, the transferee is taken to have acquired it before that day.

Note: A capital gain or loss you make from a CGT asset you acquired before 20 September 1985 is generally disregarded: see Division 104. This exemption is removed in some situations: see Division 149.

21 Subsection 995-1(1)

Insert:

non-member spouse has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

22 Subsection 995-1(1)

Insert:

payment split means a payment split under Part VIIIIB of the *Family Law Act 1975*.

23 Subsection 995-1(1)

Insert:

small superannuation fund means a *complying superannuation fund with 4 or fewer members.

24 Subsection 995-1(1)

Insert:

splittable payment has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

Small Superannuation Accounts Act 1995

25 At the end of section 15

Add:

Payment split under Family Law Act

- (3) If an account is subject to a payment split, then the Commissioner may open an account in the name of the non-member spouse.
- (4) The balance of the account when it is opened is an amount worked out in accordance with the regulations.

- (5) The balance of the member spouse's account is to be reduced by the amount worked out under subsection (4).
- (6) The Commissioner must give the member spouse a written notice setting out the balance (if any) of the member spouse's account after the reduction.
- (7) In this section:

member spouse has the same meaning as in Part VIII B of the *Family Law Act 1975*.

non-member spouse has the same meaning as in Part VIII B of the *Family Law Act 1975*.

payment split means a payment split under Part VIII B of the *Family Law Act 1975*.

Superannuation Contributions Tax (Assessment and Collection) Act 1997

26 After subsection 8A(1)

Insert:

- (1A) This section is subject to section 10A.

27 After subsection 10(1)

Insert:

- (1A) This section is subject to section 10A.

28 After section 10

Insert:

10A Payment splits or interest splits on marriage breakdown

Liability to pay surcharge

- (1) If:
 - (a) in respect of an interest (the *original interest*) that a person has as a member:
 - (i) a payment split applies to a splittable payment; or

- (ii) an interest in a superannuation fund, an approved deposit fund or an RSA is created for the non-member spouse in relation to the original interest in circumstances prescribed by the regulations; or
 - (iii) an amount is transferred to a superannuation fund, an approved deposit fund or an RSA, in circumstances prescribed by the regulations, for the benefit of the non-member spouse in relation to the original interest; and
- (b) an assessment is then made that surcharge is payable on the surchargeable contributions of the member in respect of the original interest;
- then:
- (c) if a superannuation provider holds those contributions for the member—the provider is taken to be the **holder** of those contributions and liable to pay the surcharge; or
 - (d) otherwise—the member is taken to be the **holder** of those contributions and liable to pay the surcharge.

(2) In this section:

non-member spouse has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

payment split means a payment split under Part VIIIIB of the *Family Law Act 1975*.

splittable payment has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

29 Subsection 16(6)

Omit “When”, substitute “Subject to subsection (6A), when”.

30 After subsection 16(6)

Insert:

(6A) If:

- (a) a payment split applies to a splittable payment in respect of an interest that a person has as a member; and
 - (b) the splittable payment becomes payable in circumstances where the member’s surcharge account is in debit;
-

then the superannuation provider concerned must pay to the Commissioner, within one month after the day the splittable payment became payable, the amount by which the account is in debit (which discharges the provider's liability for the surcharge).

31 At the end of section 16

Add:

Definitions

(11) In this section:

payment split means a payment split under Part VIII B of the *Family Law Act 1975*.

splittable payment has the same meaning as in Part VIII B of the *Family Law Act 1975*.

32 Section 43 (definition of holder)

Omit "section 8A", substitute "sections 8A and 10A".

Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997

33 Subsection 12(3)

Repeal the subsection, substitute:

Superannuation provider that pays out contributed amounts

(3) If, after 7.30 pm by legal time in the Australian Capital Territory on 20 August 1996, any of the contributed amounts in relation to the member were or are paid by a superannuation provider:

(a) to the member; or

(b) to the member, or to a person other than a member, under a payment split;

then the provider must, not later than the notification date for the financial year in which the payment was or is made or such later date (if any) as the Commissioner allows, give the Commissioner a statement setting out:

- (c) the member's name, the address of the member's place of residence or place of business or employment, the date of the member's birth and, if given to the provider in connection with the operation or the possible future operation of this Act, the member's tax file number; and
- (d) the particulars referred to in subsection (5); and
- (e) the date of the payment; and
- (f) any other information required by the regulations.

34 Subsection 12(6)

Repeal the subsection, substitute:

(6) If:

- (a) a lump sum, or a pension, becomes payable by a superannuation provider for the benefit of a member; or
- (b) a payment split applies to a splittable payment in respect of an interest that a person has as a member;

then the provider must give the Commissioner a statement setting out:

- (c) the member's name, the address of the member's place of residence or place of business or employment, the date of the member's birth and, if given to the provider in connection with the operation or the possible future operation of this Act, the member's tax file number; and
- (d) the date on which the lump sum or pension became payable; and
- (e) the particulars in relation to the benefits referred to in paragraph 15(6)(b) or (6AA)(d) (as the case requires); and
- (f) any other information required by the regulations.

35 At the end of section 12

Add:

Definitions

(8) In this section:

payment split means a payment split under Part VIIIIB of the *Family Law Act 1975*.

splittable payment has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

36 Subsection 15(6)

Omit “When”, substitute “Subject to subsection (6AA), when”.

37 After subsection 15(6)

Insert:

(6AA) If:

- (a) a payment split applies to a splittable payment in respect of an interest that a person has as a member; and
 - (b) the splittable payment becomes payable in circumstances where the member’s surcharge account is in debit;
- then the member is liable to pay to the Commissioner the lesser of:
- (c) the amount by which the account is in debit; and
 - (d) 15% of the employer-financed component of that part of the benefits that would have been payable to the member but for the payment split and that accrued after 20 August 1996.

38 Subsection 15(7)

After “subsection (6)”, insert “, (6AA)”.

39 Paragraph 15(8A)(a)

After “subsection (6)”, insert “or (6AA)”.

40 At the end of section 15

Add:

Definitions

(11) In this section:

payment split means a payment split under Part VIIIIB of the *Family Law Act 1975*.

splittable payment has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

***Superannuation (Unclaimed Money and Lost Members) Act
1999***

41 At the end of section 12

Add:

(2) If:

- (a) a payment split applies to a splittable payment in respect of an interest that a person has as a member of a fund; and
- (b) as a result, the non-member spouse (or his or her legal personal representative if he or she has died) is entitled to be paid an amount; and
- (c) after making reasonable efforts and after a reasonable period has passed, the superannuation provider concerned is unable to ensure that the non-member spouse or his or her legal personal representative, as the case may be, receives the amount;

then the amount payable is taken to be ***unclaimed money***.

(3) In this section:

non-member spouse has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

payment split means a payment split under Part VIIIIB of the *Family Law Act 1975*.

splittable payment has the same meaning as in Part VIIIIB of the *Family Law Act 1975*.

42 Subsection 13(1)

Omit “12(a)”, substitute “12(1)(a)”.

43 After subsection 13(1)

Insert:

- (1A) If paragraphs 12(2)(a) and (b) are satisfied, the superannuation provider must make reasonable efforts to ensure that the non-member spouse or his or her legal personal representative, as the case may be, receives the amount.

(1B) For the purposes of subsection (1A), *non-member spouse* has the same meaning as in Part VIII B of the *Family Law Act 1975*.

44 Subsection 13(2)

After “subsection (1)”, insert “or (1A)”.

[*Minister’s second reading speech made in—
House of Representatives on 27 June 2001
Senate on 29 August 2001*]

(132/01)