



Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2002

No. 121, 2002

**An Act to amend the *Family Law Act 1975* and to
deal with matters consequential on the enactment
of the *Family Law Legislation Amendment
(Superannuation) Act 2001*, and for related
purposes**

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

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Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2002

No. 121, 2002

An Act to amend the *Family Law Act 1975* and to deal with matters consequential on the enactment of the *Family Law Legislation Amendment (Superannuation) Act 2001*, and for related purposes

[Assented to 2 December 2002]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2002*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	2 December 2002
2. Schedules 1 to 4	Immediately after the commencement of the <i>Family Law Legislation Amendment (Superannuation) Act 2001</i>	28 December 2002
Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.		

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- (2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.

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Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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—Amendment of the Family Law Act 1975

1AAA Section 90MD (at the end of paragraph (b) of the definition of *operative time*)

Add “or paragraph 90MLA(2)(c) as appropriate”.

1 Section 90MD

Insert:

reversionary beneficiary means a person who becomes entitled to a benefit in respect of a superannuation interest of a spouse, after the spouse dies.

1AA After subsection 90ML(4)

Insert:

(4A) Subsection (4) does not apply if the splittable payment is made in circumstances in which section 90MLA applies.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4A) (see subsection 13.3(3) of the *Criminal Code*).

1AB After section 90ML

Insert:

90MLA Some splittable payments payable if payment flag operating

(1) This section applies if:

- (a) a superannuation interest (*original interest*) a person has in an eligible superannuation plan (*old ESP*) is identified in a superannuation agreement; and
- (b) a payment flag under section 90ML is operating on the original interest; and
- (c) a splittable payment is made by the trustee of the old ESP to the trustee of another eligible superannuation plan (*new ESP*) in respect of the original interest as part of a successor fund transfer.

(2) If this section applies, then:

- (a) the new interest in the new ESP is taken to be the original interest identified in the superannuation agreement; and
- (b) the payment flag operates on the new interest; and
- (c) despite section 90MK, the operative time for the payment flag in respect of the new interest is the time that the payment to the trustee of the new ESP is made.

(3) In this section:

successor fund transfer means the transfer of a person's superannuation interest in the old ESP in circumstances where:

- (a) the new ESP confers on the person, in relation to the new interest, equivalent rights to the rights the person had in relation to the original interest; and
- (b) before the transfer, the trustee of the new ESP had agreed with the trustee of the old ESP to the conferral of such rights.

1A Subsection 90MT(2)

Repeal the subsection, substitute:

- (2) Before making an order referred to in subsection (1), the court must make a determination under paragraph (a) or (b) as follows:
 - (a) if the regulations provide for the determination of an amount in relation to the interest, the court must determine the amount in accordance with the regulations;
 - (b) otherwise, the court must determine the value of the interest by such method as the court considers appropriate.

(2A) The amount determined under paragraph (2)(a) is taken to be the value of the interest.

1B Subsection 90MT(3)

Omit “for the value”, substitute “for the amount”.

1C At the end of Division 3 of Part VIIIB

Add:

90MUA Some splittable payments may be made without leave of court

- (1) A flagging order made under subsection 90MU(1) in relation to a superannuation interest (*original interest*) a person has in an eligible superannuation plan (*old ESP*) does not apply to a splittable payment if the splittable payment is made by the trustee of the old ESP to the trustee of another eligible superannuation plan (*new ESP*) in respect of the original interest as part of a successor fund transfer.
- (2) If the splittable payment is made, then the flagging order is taken to be made in relation to the new interest from the time that the payment to the trustee of the new ESP is made.
- (3) In this section:

successor fund transfer means the transfer of a person's superannuation interest in the old ESP in circumstances where:

- (a) the new ESP confers on the person, in relation to the new interest, equivalent rights to the rights the person had in relation to the original interest; and
- (b) before the transfer, the trustee of the new ESP had agreed with the trustee of the old ESP to the conferral of such rights.

2 Subsection 90MX(3)

Omit "another person", substitute "a person other than the member spouse".

3 Subsections 90MZ(1), (2) and (3)

Omit "fund or RSA", substitute "fund, approved deposit fund, RSA or exempt public sector superannuation scheme within the meaning of the SIS Act".

4 Section 90MZC

Omit "date", substitute "time".

5 Subsection 90MZD(2)

Omit "on any person who subsequently becomes the trustee of that eligible superannuation plan.", substitute:

on:

- (a) any person who subsequently becomes the trustee of that eligible superannuation plan; or
- (b) in a case where section 90MUA applies—a person who is the trustee, or any person who subsequently becomes the trustee, of the new ESP.

Schedule 2—Amendment of the Judges' Pensions Act 1968

1 At the end of section 21

Add:

- (2) The regulations may also prescribe accrued benefit multiples for the purposes of Part VIIIB of the *Family Law Act 1975* or regulations made under that Act.

Schedule 3—Amendment of the Social Security Act 1991

1 Subsection 9(1) (definition of *assessable growth component*)

Repeal the definition.

2 Subsection 9(1) (definition of *assessable period*)

Repeal the definition.

3 Subsection 9(1) (definition of *asset-tested income stream (long term)*)

After “income stream” (first occurring), insert “that is an asset-tested income stream (long term) under section 9D or an income stream”.

4 Subsection 9(1) (definition of *asset-tested income stream (short term)*)

After “income stream” (first occurring), insert “that is an asset-tested income stream (short term) under section 9D or an income stream”.

5 Subsection 9(1)

Insert:

family law affected income stream has the meaning given by subsection 9C(1).

6 Subsection 9(1) (after paragraph (f) of the definition of *income stream*)

Insert:

or (fa) a family law affected income stream;

7 Subsection 9(1)

Insert:

original family law affected income stream has the meaning given by subsection 9C(1).

8 Subsection 9(1)

Insert:

primary FLA income stream has the meaning given by subsection 9C(1).

9 Subsection 9(1) (definition of *realise*)

Repeal the definition.

10 Subsection 9(1)

Insert:

secondary FLA income stream has the meaning given by subsection 9C(1).

11 Subsections 9(10) and (11)

Repeal the subsections.

12 After subparagraph 9A(2)(h)(iv)

Insert:

- (iva) to the extent necessary to give effect to an entitlement of the person's spouse or former spouse under a payment split under Part VIIIB of the *Family Law Act 1975*; or

13 After subparagraph 9B(2)(h)(iv)

Insert:

- (iva) to the extent necessary to give effect to an entitlement of the person's spouse or former spouse under a payment split under Part VIIIB of the *Family Law Act 1975*; or

14 After section 9B

Insert:

9C Family law affected income streams

(1) If:

- (a) a relevant income stream is acquired or purchased (*original family law affected income stream*) by a person (*member*) from a relevant superannuation fund; and

- (b) the member's spouse or former spouse (*non-member*) becomes entitled to be paid some or all of that income stream under a payment split under Part VIIIB of the *Family Law Act 1975*;

then so much (if any) of the income stream paid to the non-member as a series of ongoing payments (*secondary FLA income stream*) and the remainder (if any) of the income stream paid to the member as such a series of payments (*primary FLA income stream*) are each *family law affected income streams*.

- (2) In subsection (1):

relevant income stream means an income stream of a kind referred to in paragraph (a), (b) or (c) of the definition of *income stream* in subsection 9(1).

relevant superannuation fund means:

- (a) a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993*; or
- (b) an approved deposit fund; or
- (c) a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997*.

9D Asset-tested status of secondary FLA income streams

If there is a primary FLA income stream

- (1) If a primary FLA income stream is, or would be if the income stream were assessed for the purposes of this Act:
 - (a) an asset-tested income stream (long term); or
 - (b) an asset-tested income stream (short term);then a secondary FLA income stream to which it is related is also to be treated as if it were assessed as an income stream of that kind.

If there is no primary FLA income stream

- (2) If:
 - (a) there is no primary FLA income stream in relation to a secondary FLA income stream; and
 - (b) had there been a primary FLA income stream in relation to that secondary FLA income stream it would have been

assessed for the purposes of this Act as either an asset-tested income stream (long term) or an asset-tested income stream (short term);

then the secondary FLA income stream is to be treated as if it were assessed as an income stream of that kind.

15 Subdivision A of Division 1C of Part 3.10

Repeal the Subdivision.

16 Subdivision B of Division 1C of Part 3.10 (heading)

Repeal the heading, substitute:

Subdivision B—Income streams that are not family law affected income streams

17 Before section 1098 in Subdivision B of Division 1C of Part 3.10

Insert:

1097A Scope of Subdivision

This Subdivision applies to income streams that are not family law affected income streams.

18 Sections 1098, 1099 and 1099A

Omit “asset-test exempt income stream”, substitute “asset-test exempt income stream to which this Subdivision applies”.

19 Sections 1099B, 1099C and 1099D

Omit “asset-tested income stream (long term)”, substitute “asset-tested income stream (long term) to which this Subdivision applies”.

20 At the end of Division 1C of Part 3.10

Add:

Subdivision C—Family law affected income streams

1099DA Scope of Subdivision

This Subdivision applies to family law affected income streams.

1099DB Income from asset-test exempt income streams

For the purpose of working out the annual rate of ordinary income of a person from an asset-test exempt income stream to which this Subdivision applies, the person is taken to receive from that income stream each year the amount worked out under:

- (a) if the income stream is not a defined benefit income stream—the guidelines determined by the Secretary for the purposes of this paragraph; or
- (b) if the income stream is a defined benefit income stream—the guidelines determined by the Secretary for the purposes of this paragraph.

1099DC Income from asset-tested income stream (long term)

For the purpose of working out the annual rate of ordinary income of a person from an asset-tested income stream (long term) to which this Subdivision applies, the person is taken to receive from that income stream each year the amount worked out under:

- (a) if the income stream is not a defined benefit income stream—the guidelines determined by the Secretary for the purposes of this paragraph; or
- (b) if the income stream is a defined benefit income stream—the guidelines determined by the Secretary for the purposes of this paragraph.

1099DD Determination of guidelines is a disallowable instrument

A determination of guidelines under section 1099DB or 1099DC is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

21 At the end of subsections 1119(1) and 1120(1)

Add “and it is not a family law affected income stream”.

22 After section 1120

Insert:

1120A Value of asset-tested FLA income streams

- (1) This section applies to family law affected income streams.
- (2) The value of an income stream that is not a defined benefit income stream is, for the purposes of the assets test, worked out in accordance with guidelines determined by the Secretary for the purposes of this subsection.
- (3) The value of an income stream that is a defined benefit income stream is, for the purposes of the assets test, worked out in accordance with guidelines determined by the Secretary for the purposes of this subsection.
- (4) A determination of guidelines is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Schedule 4—Amendment of the Veterans' Entitlements Act 1986

1 Section 5 (index of definitions)

Insert in their appropriate alphabetical positions, determined on a letter-by-letter basis:

family law affected income stream	5JC(1)
original family law affected income stream	5JC(1)
primary FLA income stream	5JC(1)
secondary FLA income stream	5JC(1)

2 Section 5 (index of definitions)

Repeal the following entries:

assessable growth component	5J(1)
assessable period	5J(1)

3 Subsection 5J(1) (definition of *assessable growth component*)

Repeal the definition.

4 Subsection 5J(1) (definition of *assessable period*)

Repeal the definition.

5 Subsection 5J(1) (definition of *asset-tested income stream (long term)*)

After “income stream” (first occurring), insert “that is an asset-tested income stream (long term) under section 5JD or an income stream”.

6 Subsection 5J(1) (definition of *asset-tested income stream (short term)*)

After “income stream” (first occurring), insert “that is an asset-tested income stream (short term) under section 5JD or an income stream”.

7 Subsection 5J(1)

Insert:

family law affected income stream has the meaning given by subsection 5JC(1).

8 Subsection 5J(1) (after paragraph (f) of the definition of *income stream*)

Insert:

or (fa) a family law affected income stream;

9 Subsection 5J(1)

Insert:

original family law affected income stream has the meaning given by subsection 5JC(1).

10 Subsection 5J(1)

Insert:

primary FLA income stream has the meaning given by subsection 5JC(1).

11 Subsection 5J(1)

Insert:

secondary FLA income stream has the meaning given by subsection 5JC(1).

12 After subparagraph 5JA(2)(h)(iv)

Insert:

(iva) to the extent necessary to give effect to an entitlement of the person's spouse or former spouse under a payment split under Part VIIIB of the *Family Law Act 1975*; or

13 After subparagraph 5JB(2)(h)(iv)

Insert:

- (iva) to the extent necessary to give effect to an entitlement of the person's spouse or former spouse under a payment split under Part VIIIIB of the *Family Law Act 1975*; or

14 After section 5JB

Insert:

5JC Family law affected income streams

(1) If:

- (a) a relevant income stream is acquired or purchased (*original family law affected income stream*) by a person (*member*) from a relevant superannuation fund; and
- (b) the member's spouse or former spouse (*non-member*) becomes entitled to be paid some or all of that income stream under a payment split under Part VIIIIB of the *Family Law Act 1975*;

then so much (if any) of the income stream paid to the non-member as a series of ongoing payments (*secondary FLA income stream*) and the remainder (if any) of the income stream paid to the member as such a series of payments (*primary FLA income stream*) are each *family law affected income streams*.

(2) In subsection (1):

relevant income stream means an income stream of a kind referred to in paragraph (a), (b) or (c) of the definition of *income stream* in subsection 5J(1).

relevant superannuation fund means:

- (a) a superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993*; or
- (b) an approved deposit fund; or
- (c) a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997*.

5JD Asset-tested status of secondary FLA income streams

If there is a primary FLA income stream

- (1) If a primary FLA income stream is, or would be if the income stream were assessed for the purposes of this Act:
- (a) an asset-tested income stream (long term); or
 - (b) an asset-tested income stream (short term);
- then the secondary FLA income stream to which it is related is also to be treated as if it were assessed as an income stream of that kind.

If there is no primary FLA income stream

- (2) If:
- (a) there is no primary FLA income stream in relation to a secondary FLA income stream; and
 - (b) had there been a primary FLA income stream in relation to that secondary FLA income stream it would have been assessed for the purposes of this Act as either an asset-tested income stream (long term) or an asset-tested income stream (short term);
- then the secondary FLA income stream is to be treated as if it were assessed as an income stream of that kind.

15 Subdivision A of Division 4 of Part IIIB

Repeal the Subdivision.

16 Subdivision B of Division 4 of Part IIIB (heading)

Repeal the heading, substitute:

Subdivision B—Income streams that are not family law affected income streams

17 Before section 46T in Subdivision B of Division 4 of Part IIIB

Insert:

46SA Scope of Subdivision

This Subdivision applies to income streams that are not family law affected income streams.

18 Sections 46T, 46U and 46V

Omit “asset-test exempt income stream”, substitute “asset-test exempt income stream to which this Subdivision applies”.

19 Sections 46W, 46X and 46Y

Omit “asset-tested income stream (long term)”, substitute “asset-tested income stream (long term) to which this Subdivision applies”.

20 At the end of Division 4 of Part IIIB

Add:

Subdivision C—Family law affected income streams

46Z Scope of Subdivision

This Subdivision applies to family law affected income streams.

46ZA Income from asset-test exempt income streams

For the purpose of working out the annual rate of ordinary income of a person from an asset-test exempt income stream to which this Subdivision applies, the person is taken to receive from that income stream each year the amount worked out under:

- (a) if the income stream is not a defined benefit income stream—the guidelines determined by the Commission for the purposes of this paragraph; or
- (b) if the income stream is a defined benefit income stream—the guidelines determined by the Commission for the purposes of this paragraph.

46ZB Income from asset-tested income stream (long term)

For the purpose of working out the annual rate of ordinary income of a person from an asset-tested income stream (long term) to

which this Subdivision applies, the person is taken to receive from that income stream each year the amount worked out under:

- (a) if the income stream is not a defined benefit income stream—the guidelines determined by the Commission for the purposes of this paragraph; or
- (b) if the income stream is a defined benefit income stream—the guidelines determined by the Commission for the purposes of this paragraph.

46ZC Determination of guidelines is a disallowable instrument

A determination of guidelines under section 46ZA or 46ZB is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

21 At the end of subsections 52A(1) and 52B(1)

Add “and it is not a family law affected income stream”.

22 After section 52B

Insert:

52BA Value of asset-tested FLA income streams

- (1) This section applies to family law affected income streams.
- (2) The value of an income stream that is not a defined benefit income stream is, for the purposes of the assets test, worked out in accordance with guidelines determined by the Commission for the purposes of this subsection.
- (3) The value of an income stream that is a defined benefit income stream is, for the purposes of the assets test, worked out in accordance with guidelines determined by the Commission for the purposes of this subsection.
- (4) A determination of guidelines under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

*[Minister's second reading speech made in—
House of Representatives on 27 June 2002
Senate on 25 September 2002]*

(140/02)

22 *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act*
2002 *No. 121, 2002*