

## **EXPLANATORY STATEMENT**

*Issued by authority of the Minister for Finance and Deregulation*

*Judges' Pensions Act 1968*

*Judges' Pensions Order 2013*

The *Judges' Pensions Act 1968* (Judges' Act) provides retirement benefits to Federal Judges, and death benefits in respect of their eligible spouses and children.

Schedule 1 of the *Judges and Governors-General Legislation Amendment (Family Law) Act 2012* (Amendment Act) makes amendments to the Judges' Act to implement new superannuation splitting arrangements for Federal Judges.

The amendments will allow the superannuation benefits of a judge to be split with a former spouse in the event of a marital or relationship breakdown, at a time a superannuation splitting agreement or order is made. A former spouse will be able to receive his or her share of the benefit at this time, rather than payment of the benefit being linked to the retirement of the judge and being ceased upon their death. These arrangements will give certainty to both parties in property settlement negotiations and will provide each party with their own separate benefit at the time of the split.

Section 17AI of the Judges' Act provides that the Minister may make orders providing for matters required or permitted by the Act to be provided, or matters necessary or convenient to be provided, in order to carry out or give effect to the Act.

The purpose of the *Judges' Pensions Order 2013* (Judges' Order) is to set out the detailed methodology and factors for valuing interests in the Judges' Act and the steps for calculating benefits subject to a splitting agreement or order. Further detailed information on the Judges' Order is set out in the [Attachment](#).

The Judges Order is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA). Although section 44 of the LIA exempts superannuation instruments from disallowance, the Judges' Order is subject to possible disallowance under section 17AI of the Judges' Act.

Consistent with the Statement of Compatibility with Human Rights prepared for the Amendment Act, the GG Order is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Department of Finance and Deregulation consulted with the Attorney-General's Department on the development of the Amendment Act and the Judges' Order.

## **DETAILS OF THE JUDGES' ORDER**

### Section 1 – Name of Order

This section provides that the name of the order is the *Judges' Pensions Order 2013*.

### Section 2 – Commencement

The section provides for the order to commence on 15 March 2013.

### Section 3 – Authority

This section provides that the authority for the order is the *Judges' Pensions Act 1968* (Judges' Act).

### Section 4 – Definitions

This section includes definitions specific to the order. A range of other terms included in the order are defined in the Judges' Act.

### Section 5 – Scheme value – member spouse with no surcharge debt

This section operates in respect of a member spouse with no surcharge debt.

Under the Judges' Act, it is necessary to calculate the scheme value, in order to determine the transfer amount. The transfer amount is the amount being transferred to the former spouse to create his or her benefit.

Calculation of the scheme value is undertaken using the methods set out in Schedule 1 of the order.

### Section 6 – Scheme value – member spouse with surcharge debt

This section operates where a member spouse does have a surcharge debt.

Under the Judges' Act, it is necessary to calculate the scheme value, in order to determine the transfer amount. As mentioned above, the transfer amount is the amount being transferred to the former spouse to create his or her benefit.

Calculation of the scheme value is undertaken using the methods set out in Schedule 1 of the order. However, where the conditions set out in subsection 6(3) are satisfied, the scheme value is reduced by the amount of the member's surcharge debt as is shown in the relevant statement. This reflects that the surcharge debt does not form part of the value of the benefit for splitting purposes.

General note on judicial salaries for calculations under this Order

*Salary determinations of the Remuneration Tribunal in respect of judicial salaries are subject to parliamentary disallowance. In this Order, where it is necessary to calculate the scheme value of an interest in the Judges' Act (as above) or the value of pension benefits under a splitting agreement or order (as below) at a particular time, it is intended that the calculations would be undertaken on the basis that any Remuneration Tribunal determination that is subject to disallowance, is not disallowed.*

*However, the actual scheme value or pension payable from the operative time will depend upon whether any such determination is disallowed at a future date.*

Section 7 – Associate immediate pension for non-member spouse

This section sets out the steps for calculating an associate immediate pension for the non-member (that is, the former) spouse. An associate immediate pension is a pension that is payable immediately at the operative time – see subsection 17AA(2) of the Judges' Act.

The first step is to identify the transfer amount at the operative time, upon which the pension will be based. The transfer amount is calculated in accordance with the Judges' Act by reference to the splitting percentage or the base amount – see subsection 4(1) of the Judges' Act for the meaning of these terms.

The following steps calculate the annual rate of the non-member spouse's pension by dividing the transfer amount by a factor that represents the non-member spouse's age and gender in years and months (and thus reflects his or her life expectancy) at the operative time.

The annual amount is turned into a percentage of the Federal Court Judge's salary at the operative time. The pension is indexed by applying the percentage to the Federal Court Judge's salary. Step 5 provides for this calculation at all times after the operative time.

Section 8 – Associate deferred pension

This section sets out the steps for calculating an associate deferred pension for a non-member spouse. An associate deferred pension is a pension that is not immediately payable at the operative time – see subsection 17AA(3) of the Judges' Act.

The first step is to identify the transfer amount at the operative time, upon which the pension will ultimately be based. The transfer amount is calculated in accordance with the Judges' Act by reference to the splitting percentage or the base amount – see subsection 4(1) of the Judges' Act for the meaning of these terms.

Until the pension becomes payable to the non-member spouse, interest will be applied at the Treasury bond rate.

Accordingly, the next steps (2A to 2D) increase the transfer amount using the Treasury bond rate, from the operative time until the time the benefit becomes payable to the non-member spouse. The increases are applied at the end of the first financial year after the operative time, at the end of each financial thereafter (second period), and in the final period between the end of the last financial year before the benefit becomes payable to when the benefit actually becomes payable.

The increases are compounded period by period. That is, the total increase in the transfer amount will be the sum of the transfer amount at the operative time, and the increases in the transfer amount for all previous periods (if any) multiplied by the applicable Treasury bond rate calculated in steps 2B or 2C and 2D for the relevant period.

The following steps 3 to 5 calculate the annual rate of the non-member spouse's pension by dividing the transfer amount (increased as above where relevant) by a factor that represents the non-member spouse's age and gender in years and months (and thus reflects his or her life expectancy) at the time the associate deferred pension becomes payable.

The annual amount is turned into a percentage of the Federal Court Judge's salary at the time the pension becomes payable. The pension is indexed by applying the percentage to the Federal Court Judge's salary. Step 6 provides for this calculation at all times after the time the associate deferred pension becomes payable.

#### Section 9 – Associate deferred pension – death of non-member spouse

This section calculates the lump sum amount that is payable if a non-member spouse dies before the associate deferred pension becomes payable.

The lump sum amount payable is the transfer amount, increased by the Treasury bond rate in accordance with step 2A of section 8, as if the pension had become payable as at the date of the non-member spouse's death.

It is intended that if the non-member spouse's interest had been the subject of a splitting agreement or order, for example where subsection 10(2) of the order had previously applied to reduce that interest, then the transfer amount for this section would be the reduced amount, increased by the Treasury bond rate as applicable.

The above situation would occur where the non-member spouse of the original split has a subsequent splitting agreement or order arising from a subsequent marital or relationship breakdown, but then dies before the original deferred pension becomes payable. As the subsequent split has operated to reduce the amount of the associate deferred pension, this must be taken into account in any lump sum amount paid to the estate of the non-member spouse if he or she dies before the reduced associate deferred pension becomes payable.

#### Section 10 – Operative time during growth phase – reduction of associate deferred pension

This section deals with the reduction of an associate deferred pension as the result of a subsequent splitting agreement or order, where that split occurs before the pension had become payable. As above, this situation would occur where the non-member spouse of the original split has a subsequent splitting agreement or order arising from a subsequent marital or relationship breakdown, in the period before the associate deferred pension becomes payable.

The reduction to the associate deferred pension is calculated at the operative time (of the subsequent split), and is applied when the pension becomes payable.

As a first step, it is necessary to increase the transfer amount that was payable at the operative time, that is, the transfer amount in respect of the subsequent split.

As in section 8, interest will be applied at the Treasury bond rate from the operative time to the time the associate deferred pension becomes payable.

Accordingly, the next steps (2A to 2D) increase the transfer amount using the Treasury bond rate, from the operative time until the time the benefit becomes payable. The increases are applied at the end of the first financial year after the operative time, at the end of each financial thereafter, and in the final period between the end of the last financial year before the benefit becomes payable to when the benefit actually becomes payable.

The increases are compounded period by period. That is, the total increase in the transfer amount will be the sum of the transfer amount at the operative time and the increases in the transfer amount for all previous periods (if any) multiplied by the applicable Treasury bond rate calculated in steps 2B or 2C and 2D for the relevant period.

In steps 3 to 5, the lump sum value of the associate deferred pension is calculated at the time it becomes payable (disregarding the subsequent payment split). The calculation involves identifying the associate deferred pension at the time of payment and multiplying it by a factor that represents the member spouse's age and gender in years and months (and thus reflects his or her life expectancy) at the time the associate deferred pension becomes payable. These steps also take account of the fact that the lump sum value of the associate deferred pension would have increased by the bond rate over the period to the date of payment.

The result is reduced by the amount calculated in step 2A before it is converted back into an annual pension.

Note that it is intended that if the associate deferred pension has been previously reduced because of another prior split, the reduction must also be taken into account.

The final steps provide for indexation of the pension by turning the annual amount into a percentage of the Federal Court Judge's salary. The pension is indexed by applying the percentage to the Federal Court Judge's salary.

**Example for section 10:**

*A member spouse has an entitlement to an associate deferred pension, which has not yet become payable. The scheme value of those benefits immediately before the operative time is \$300, 000. An agreement served on the Secretary specifies that 40% of the interest is to be transferred to the non-member spouse. Therefore, the transfer amount is \$120, 000.*

*Step 1 identifies the transfer amount to be \$120, 000.*

*Step 2 increases the transfer amount, by the Treasury bond rate, to the day on which the associate deferred pension becomes payable to the non-member spouse.*

*The \$120 000 is increased by the bond rate to \$132 000.*

*Steps 3 to 5 calculate the lump sum value of the associate deferred pension on the date of payment, before reduction for the current family law split.*

*This will take account of the fact that the \$300,000 has been increased by the bond rate over the period to the date of payment. The increase brings the amount to \$330,000.*

*Step 6 reduces the lump sum value of the associate deferred pension calculated above by the increased transfer amount calculated in step 2. So, \$330,000 is reduced by \$132,000, leaving \$198,000.*

*Step 7 turns this reduced amount back into an annual pension by multiplying it by the relevant age and gender factor.*

*Steps 8 and 9 provide for indexation of the pension amount after it has become payable.*

### Section 11 – Operative time during payment phase – reduction of standard pension

This section deals with calculating the reductions for pensions that are being paid at the operative time, that is, at the time of the split. In each case, the reduction will apply to the annual rate of the pension payable at the operative time and will therefore take into account any prior adjustment to the pension, including from another previous split.

Subsection 11(1) deals with the reduction of an associate immediate pension or an immediate transitional pension (see Part 2 of Schedule 1 of the Amendment Act in relation to immediate transitional pensions), as the result of a subsequent split of this pension.

The first step is to identify the annual rate of the associate immediate pension, or immediate transitional pension, payable at the operative time. It is intended that this would take into account any previous adjustment that had been made to the pension, such as a reduction arising from a previous split, that is, where a splitting agreement or order had previously applied.

The lump sum value of the associate immediate pension or immediate transitional pension is calculated by multiplying the annual pension amount by a factor that represents the age and gender of the member spouse, in years and months (and thus his or her life expectancy), at the operative time.

Note that in these circumstances, the person who was originally the non-member spouse will become the member spouse in respect of the subsequent split of the associate immediate pension or immediate transitional pension.

The transfer amount is subtracted from this amount before it is converted back to an annual pension amount by the same age and gender factor.

In step 6, the reduced associate immediate pension or immediate transitional pension is turned into a percentage of the Federal Court Judge's salary at the operative time. The pension is indexed by applying the percentage to the Federal Court Judge's salary. Step 7 provides for this calculation at all times after the operative time.

Subsection 11(2) deals with the reduction of an associate deferred pension (that is, an associate deferred pension that was being paid at the operative time) as the result of a subsequent split of that pension. Again, the person who was originally the non-member spouse will become the member spouse in respect of the subsequent split

The first step is to identify the annual rate of the associate deferred pension payable at the operative time. It is intended that this would take into account any previous adjustment that had been made to the pension, such as a reduction arising from a previous split, that is, where a splitting agreement or order had previously applied.

The lump sum value of the associate deferred pension is calculated by multiplying the annual pension amount by a factor that represents the age and gender of the member spouse, in years and months (and thus his or her life expectancy), at the operative time.

The transfer amount is subtracted from this amount before it is converted back to an annual pension amount by the same age and gender factor.

In step 6, the reduced associate deferred pension is turned into a percentage of the Federal Court Judge's salary at the operative time. The pension is indexed by applying the percentage to the Federal Court Judge's salary. Step 7 provides for this calculation at all times after the operative time.

Subsection 11(3) deals with the reduction of a retirement pension in respect of a retired judge who is a member spouse.

The first step is to identify the annual rate of the retirement pension payable at the operative time. It is intended that this would take into account any previous adjustment that had been made to the pension, such as a reduction arising from a previous split, that is, where a splitting agreement or order had previously applied. Under the Judges' Act, it also takes account of whether the annual rate of pension has been worked out under section 6A, 6B or 6C of the Act (to take account of the superannuation surcharge, where relevant).

The lump sum value of the pension is calculated by multiplying the annual pension amount by a factor that represents the age and gender of the member spouse, in years and months (and thus his or her life expectancy), at the operative time.

The transfer amount is subtracted from this amount before it is converted back to an annual pension amount by the same age and gender factor.

In step 6, the reduced retirement pension is turned into a percentage of the applicable judicial salary (that is, the salary applicable to the judge) at the operative time. The pension is indexed by applying the percentage to the applicable judicial salary. Step 7 provides for this calculation at all times after the operative time.

Subsection 11(4) provides for the reduction of a spouse pension in the case where the pension has become payable to the spouse because the judge has died, and where that spouse has a subsequent splitting agreement or order in respect of that pension (that is, because of a subsequent marital or relationship breakdown).

The first step is to identify the annual rate of the spouse pension payable at the operative time. It is intended that this would take into account any previous adjustment that had been made to the pension, such as a reduction arising from a previous split, that is, where a splitting agreement or order had previously applied.

The lump sum value of the pension is calculated by multiplying the annual pension amount by a factor that represents the age and gender of the member spouse, in years and months (and thus his or her life expectancy), at the operative time.

The transfer amount is subtracted from this amount before it is converted back to an annual pension amount by the same age and gender factor.

In step 6, the reduced spouse pension is turned into a percentage of the applicable judicial salary at the operative time. The pension is indexed by applying the percentage to the applicable judicial salary. Step 7 provides for this calculation at all times after the operative time. Note that the applicable judicial salary is the salary that previously applied in respect of the deceased judge.

### **Schedule 1 – Methods and factors**

Schedule 1 sets out the method for calculating the scheme value of interests under the Judges' Act.

Division 1.2 of Schedule 1 deals with the valuation of interests in the growth phase (that is, interests that have not commenced to be paid at the time of the split).

Relevant interests include:

- 1 a judge who is to cease to hold office at a particular age and will, by the time he or she reaches that age, have served as a Judge for not less than 6 years; and
- 2 a judge who is to cease to hold office at a particular age and will, by the time he or she reaches that age, have served as a Judge for less than 6 years; and
- 3 a judge who is not to cease to hold office on the attaining of a particular age; and
- 4 an interest of a person entitled to an associate deferred pension in accordance with section 17AB of the Judges Act.

The scheme value of these interests is determined using the formulas set out in the Division and the relevant factors set out in Division 1.4.

The valuations take account of the person's age and gender (and thus his or her life expectancy) at the time of valuation.

Valuation of a Judge's interest in item 1 above also takes account of the degree to which the Judge's benefit has accrued, which will depend upon the length of time the Judge has served and the length of time it would take for the Judge to fully accrue his or her benefit.

The valuation includes a component for the benefit that would have been payable under section 12A of the Judges' Act, if the person had died on the relevant date and no spouse or child pension had been payable.



The scheme value of this interest is therefore calculated by firstly determining the accrued pension factor, as defined in subsection 17AD(6) of the Judges' Act, and then subtracting any component in the formula in subsection 17AD(5) of the Judges Act, as modified under section 17AE if applicable. The latter takes account of any previous splits of the interest before it has become payable.

The factor is multiplied by 0.6 (the rate of fully accrued pension), the judicial salary at the relevant date and the age and gender factor as at the relevant date. Added to this is the lump sum value, which is calculated by multiplying the benefit that would have been payable under section 12A of the Act (after taking into account any reduction under section 17AF of the Judges' Act, if the person had died on the relevant date and no spouse or child pensions had been payable), by an age and gender factor in respect of the lump sum.

Valuation of a Judge's interest in item 2 above also takes account of the benefit that would have been payable under section 12A of the Judges' Act, after taking into account any reduction under section 17AF of the Judges' Act, if the person had died on the relevant date and no spouse or orphan pension had been payable. The scheme value of this interest is therefore calculated by reference to section 12A of the Judges' Act.

Valuation of a Judge's interest in item 3 above also takes account of the annual rate of pension that would be payable had the person retired on the relevant date. The scheme value is therefore calculated by multiplying this amount by the relevant age and gender factor. Note that item 3 covers circumstances where a judge has served beyond the compulsory retirement age.

Valuation of an associate deferred pension also takes account of the addition of interest at the Treasury bond rate, as calculated under step 2A of section 8 of this Order.

The scheme value of this interest is therefore calculated by multiplying the amount calculated in 2A of section 8, with the relevant date taken to be when the time when the associate deferred pension becomes payable, by the amount calculated by the formula that applies the age and gender factors (noting that, in this case, as the age and gender factors are the same, the result will be 1).

Division 1.3 deals with interests in the payment phase (that is, pensions already being paid at the time of the split). The scheme value of these interests is determined using the formulas set out in this Division and the relevant factors set out in Division 1.4.

In this case, the scheme value takes account of the annual rate of the pension payable to a person at the relevant date and also their age and gender (and thus his or her life expectancy) at the time of valuation.

Accordingly, the scheme value of this interest is calculated by multiplying the annual rate of the pension that is or was payable under the Judges' Act at the relevant date, by the relevant age and gender factor.