



Superannuation Regulation 2011

under the

Superannuation Act 1916

Her Excellency the Governor, with the advice of the Executive Council and on the recommendation of STC, has made the following Regulation under the *Superannuation Act 1916*.

GREG PEARCE, MLC
Minister for Finance and Services

Explanatory note

The object of this Regulation is to remake, with minor amendments, the provisions of the *Superannuation Regulation 2006*, which is repealed on 1 September 2011 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation makes provision with respect to the following matters:

- (a) the reduction of benefits payable in respect of contributors to whom a benefit has been released on the grounds of severe financial hardship or on compassionate grounds,
- (b) the superannuation contributions surcharge,
- (c) the reduction of benefits in cases where contributors fail to provide their tax file numbers to the SAS Trustee Corporation,
- (d) the making of family law superannuation payments in respect of spouses or former spouses of contributors,
- (e) the cancellation of breakdown pensions at the direction of the pensioner concerned,
- (f) savings and transitional matters.

This Regulation is made under the *Superannuation Act 1916*, including sections 33B (2A), 52, 61RA, 61RC, 61RH, 61WB–61WD and 86 (the general regulation-making power).

This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters of a machinery nature, matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

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Superannuation Regulation 2011

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Superannuation Act 1916

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Superannuation Regulation 2011*.

2 Commencement

This Regulation commences on 1 September 2011 and is required to be published on the NSW legislation website.

Note. This Regulation replaces the *Superannuation Regulation 2006*, which is repealed on 1 September 2011 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

additional surcharge amount means the amount of superannuation contributions surcharge assessed to be payable by a post-payment surcharge assessment notice.

Commissioner of Taxation means the person holding office for the time being as the Commissioner of Taxation under a law of the Commonwealth.

post-payment surcharge assessment notice means a notice of assessment of superannuation contributions surcharge under the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* of the Commonwealth in respect of the employer contributions paid to the Fund on behalf of a former contributor, being a notice that is received (on or after 25 June 2004) by the former contributor after a benefit has commenced to be paid, or has been paid, to the former contributor.

surcharge debt account has the same meaning as in section 61RA of the Act.

surcharge deduction cap means the maximum surcharge deduction amount that may be determined by STC under section 61RA (1C) of the Act in relation to a benefit payable to a former contributor.

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Part 1 Preliminary

the Act means the *Superannuation Act 1916*.

total surcharge amount, in respect of a former contributor, means the sum of:

- (a) the total amount of superannuation contributions surcharge that has been assessed to be payable in respect of employer contributions paid to the Fund on the contributor's behalf up to and including the date on which the former contributor receives a post-payment surcharge assessment notice, and
 - (b) the amount (if any) of general interest charged in respect of the additional surcharge amount payable under that notice, and
 - (c) the amount of interest (if any) payable in respect of the surcharge debt account kept in respect of the former contributor.
- (2) Notes included in this Regulation do not form part of this Regulation.

Part 2 Reduction of benefits

Division 1 General

4 Application of Division

The benefits under the following provisions of the Act may be the subject of a reduction under this Division:

- (a) section 27 (Amount of pension payable on retirement),
- (b) section 28A (Pension on retirement before reaching 60 years of age),
- (c) section 28AA (Pension on retirement before age 60—component pension),
- (d) section 29 (Breakdown pensions),
- (e) section 30 (Pensions to spouse or de facto partner on death of contributor),
- (f) section 37 (Retrenchment benefits payable to an employee who is retrenched after completing 10 years' service),
- (g) section 37A (Retrenchment benefits payable to contributors having not less than 3 years' contributory service),
- (h) section 37B (Deferral of payment of benefits on retrenchment),
- (i) section 38A (Withdrawal benefit),
- (j) section 47D (Benefits payable in respect of reduced value units),
- (k) Division 3A of Part 4 (Voluntarily deferred benefits),
- (l) Division 3B of Part 4 (Deferral of benefit for contributors aged 55 years and over in certain circumstances),
- (m) Division 3D of Part 4 (Compulsory preservation of benefits).

5 Reductions relating to early release of benefits

- (1) This clause applies to the reduction of benefits payable to or in respect of a contributor or former contributor (other than a benefit payable under section 61RF or 61RG of the Act) to whom a benefit has been previously released under:
 - (a) section 61RF (that is, on the grounds of the contributor's or former contributor's severe financial hardship), or
 - (b) section 61RG (that is, on compassionate grounds).

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Part 2 Reduction of benefits

- (2) If a benefit is released to a former contributor who has provided for a benefit under Division 3A or 3B of Part 4 of the Act, or had a benefit preserved under the Act, STC must, on and from the date of release:
 - (a) calculate the amount of any benefit provided for or preserved (in the case of both a pension and lump sum), and
 - (b) reduce that amount by the amount of benefit released.The amount of benefit payable when the benefit provided for or preserved is payable is to be reduced accordingly.
- (3) In any other case, STC must create a debt account in the Fund in respect of the contributor and must when a benefit is payable reduce the benefit that is payable by the amount debited to the debt account at the time the benefit is payable.
- (4) Despite subclause (3), if a benefit is deferred or preserved under the Act after the release of a benefit and before a benefit is otherwise payable to the contributor concerned, STC must, on and from the date the benefit is deferred or preserved:
 - (a) calculate the amount of benefit deferred or preserved (in the case of both a pension and lump sum), and
 - (b) reduce that amount by the amount debited to the debt account at the time the benefit is deferred or preserved.The amount of benefit payable when the deferred or preserved benefit is payable is to be reduced accordingly.
- (5) The amount debited to the debt account is to be the amount of benefit released together with interest on that amount at a rate determined by STC.
- (6) STC may obtain actuarial advice for the purpose of determining the amount of a reduced benefit.
- (7) For the purposes of subclauses (2) and (4), STC may determine which component or components of a benefit are to be reduced.

6 Consent to reduction relating to early release of benefit

Before releasing a benefit under section 61RF or 61RG of the Act, STC must obtain the written consent of the contributor or former contributor to the reduction of future benefits as a consequence of the early release.

7 Reduction for superannuation contributions surcharge: section 61RA (5)

- (1) STC may, at the request of a former contributor:
 - (a) adjust the amount of a benefit payable to the former contributor by reducing the benefit by an amount (the *reduction amount*) that is equivalent to the lesser of:
 - (i) the additional surcharge amount, and
 - (ii) the amount (not being less than nil) that is equal to the amount of the surcharge deduction cap less any previously met surcharge liability, and
 - (b) pay an amount that is equal to the reduction amount to the former contributor or the Commissioner of Taxation.
- (2) In subclause (1), *previously met surcharge liability* means the sum of:
 - (a) all amounts paid by the former contributor to STC or the Commissioner of Taxation in relation to the total surcharge amount of the former contributor, and
 - (b) all amounts in respect of which adjustments relating to the benefit of the former contributor have previously been made under this clause or the Act in relation to superannuation contributions surcharge.
- (3) For the purposes of determining an adjustment under this clause, STC may obtain actuarial advice or advice from any other persons, as STC thinks fit.
- (4) This clause does not authorise STC to pay any amount that would result in payments made to or on behalf of the former contributor exceeding the total benefits to which the former contributor is entitled.
- (5) This clause does not authorise STC to pay any amount of general interest charged in respect of an additional surcharge amount payable under a post-payment surcharge assessment notice unless the request for the payment is made by the former contributor within such period after receiving the notice as STC considers reasonable.

Note. Clauses 19 and 20 also relate to superannuation contributions surcharge.

8 Commutation of pensions for reduction of benefits

- (1) If a determination is made under this Division reducing a benefit that may be taken in the form of a pension, STC may, at its discretion and with the consent of the person to whom the pension is payable, commute part of the pension to a lump sum for the purposes of the payment to STC of the amount of the reduction.

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Part 2 Reduction of benefits

- (2) Commutation of part of the pension:
 - (a) does not affect any other right that the person has to commute the pension under the Act, and
 - (b) is not to be taken into account for the purpose of determining whether, and to what extent, any such other right may be exercised, and
 - (c) is to be done on a basis determined by STC.
- (3) STC may obtain actuarial advice for the purpose of determining the basis on which part of a pension is to be commuted under this clause.

Division 2 Reductions relating to no-TFN tax

9 Benefit reductions relating to no-TFN tax

- (1) For the purposes of section 61RC (1) (d) of the Act, the benefits provided under sections 27, 28A, 28AA, 29, 30, 37, 37A, 37B, 38A and 47D of the Act and Divisions 3A, 3B and 3D of Part 4 of the Act are prescribed.
- (2) STC must create a debt account in the Fund in respect of each contributor or former contributor in respect of whom a benefit is liable to be reduced under section 61RC of the Act.
- (3) STC must have regard to the debt account when determining the amount of the reduced benefit.

Note. Under section 61RC (3) of the Act, the amount of the reduced benefit is to be determined by STC after obtaining actuarial advice.

10 Provision of information

STC must at least once a year:

- (a) provide each contributor and former contributor with a statement as to the balance of the debt account created by STC in respect of that contributor or former contributor, and
- (b) request that a contributor or former contributor provide his or her tax file number to STC if the number has not previously been provided.

Part 3 Family law provisions

11 Interpretation

- (1) In this Part:
 - approved valuation method* means Part 8 of Schedule 2 to the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* made under the *Family Law (Superannuation) Regulations 2001* of the Commonwealth.
 - contributor* includes a former contributor.
 - deferred benefit* means a benefit under section 37B of the Act.
- (2) Words and expressions used in this Part have the same meanings as they have in Part 4A of the Act.

12 Valuation of superannuation interests

- (1) This clause applies for the purposes of Part 4A of the Act and the family law superannuation legislation.
- (2) The value of a superannuation interest (other than of a deferred benefit) of a contributor is to be determined in accordance with the approved valuation method.
- (3) The value of a superannuation interest relating to a deferred benefit is to be determined in accordance with Part 7 of Schedule 2 to the *Family Law (Superannuation) Regulations 2001* of the Commonwealth.

13 Notice to contributor and non-contributor spouse when entitlement becomes payable

- (1) If a superannuation interest of a contributor becomes subject to a payment split, STC must notify the contributor and the non-contributor spouse in relation to the interest, in writing, that the interest is subject to a payment split.
- (2) The notice must be given:
 - (a) in the case of a payment split under a superannuation agreement or flag lifting agreement—within 28 days after the operative time for the payment split, or
 - (b) in the case of a payment split under a splitting order—within 28 days after the operative time for the payment split or after STC receives a copy of the order (whichever is the later).
- (3) The notice given to the contributor must:
 - (a) specify the estimated amount of the entitlement of the non-contributor spouse and how it was calculated, and

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Part 3 Family law provisions

- (b) specify the period within which payment of that entitlement is to be made, and
 - (c) specify the estimated effect of the payment on the entitlement of the contributor under the State Superannuation Scheme.
- (4) The notice given to the non-contributor spouse must:
- (a) specify the estimated amount of the entitlement of the non-contributor spouse and how it was calculated, and
 - (b) specify the circumstances in which the amount may be paid or released to the non-contributor spouse or must be transferred or rolled over to a complying superannuation fund or an RSA, and
 - (c) require the non-contributor spouse to nominate, within 28 days:
 - (i) whether the non-contributor spouse meets a circumstance for payment or release, or
 - (ii) if the non-contributor spouse does not meet a circumstance for payment or release—a complying superannuation fund or an RSA to which the amount is to be paid, and
 - (d) specify that the amount will be credited to the First State Superannuation Fund if the nomination is not made within that period.
- (5) For the purposes of section 61WB (5) (b) of the Act, the prescribed period within which a nomination must be made by a non-contributor spouse is 28 days after the giving of the notice under this clause.
- (6) STC is not required to give the notice if the superannuation interest ceases to be subject to a payment split within the notice period.

14 Payment of family law superannuation entitlements

- (1) If the amount of a family law superannuation entitlement is to be paid or released to a non-contributor spouse, the amount must be paid or released by STC when, or as soon as practicable after, a nomination is received under clause 13 (4).
- (2) If the amount of a family law superannuation entitlement is to be transferred or rolled over, the amount must be transferred or rolled over:
 - (a) to a complying superannuation fund or an RSA nominated under this Part within 90 days of the nomination being made, or
 - (b) if no nomination is made within the period prescribed by this Part, to the First State Superannuation Fund within 90 days of the end of the period.
- (3) Nothing in subclause (2) (b) prevents STC from transferring or rolling over the amount of a family law superannuation entitlement to a complying superannuation fund or an RSA if a nomination is made by

a non-contributor spouse after the end of the period referred to in clause 13 (5).

- (4) STC must give to the contributor, within 28 days after an amount of family law superannuation entitlement is paid, released, transferred or rolled over, a notice in writing stating:
- (a) that the amount has been paid, released, transferred or rolled over, and
 - (b) the amount paid, released, transferred or rolled over and how it was calculated, and
 - (c) the estimated effect of that action on the benefit of the contributor.
- (5) STC must give to the non-contributor spouse, within 28 days after an amount of family law superannuation entitlement is paid, released, transferred or rolled over, a notice in writing stating:
- (a) that the amount has been paid, released, transferred or rolled over, and
 - (b) the amount paid, released, transferred or rolled over and how it was calculated, and
 - (c) the name and contact details of the superannuation fund or RSA, if any, to which the amount was transferred or rolled over.

Note. Under regulation 59 of the *Family Law (Superannuation) Regulations 2001* of the Commonwealth, STC may charge reasonable fees in respect of payment splits, payment flags, flag lifting and other related matters. Such fees are generally payable in equal parts by the contributor and the non-contributor spouse.

15 Reduction of benefits of contributors

- (1) This clause applies if the amount of the family law superannuation entitlement of a non-contributor spouse is paid, released, transferred or rolled over under Part 4A of the Act (a *family law superannuation payment* is made).
- (2) A benefit payable to the contributor (including a benefit transferred under the Act), other than a deferred benefit, is to be reduced in accordance with this clause at the time it is paid to the contributor or transferred.
- (3) A deferred benefit of the contributor is to be reduced in accordance with this clause:
 - (a) if the election to take the benefit was made before the superannuation entitlement of the non-contributor spouse was

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- paid, released, transferred or rolled over—at the time the entitlement is paid, released, transferred or rolled over, or
- (b) in any other case—when the election to take the benefit takes effect.
- (4) The amount of the reduced benefit is to be calculated as follows:
$$r = v \times (1 - A \times C)$$
where:
r is the amount of the reduced benefit.
v is the amount of the benefit that would have been payable to the contributor if the family law superannuation payment had not been made.
A is the ratio of the amount paid in respect of the non-contributor spouse to the value of the benefit of the contributor when the payment split occurred.
C is the ratio of the benefit accrual when the payment split occurred to the benefit accrual when the benefit is payable or deferred or transferred (as the case requires).
- (5) If family law superannuation payments are made in respect of more than one spouse of the contributor, the amount of the reduced benefit (other than a deferred benefit) is to be calculated by applying to the amount of the benefit payable (as referred to in subclause (4)) the reduction factor for each family law superannuation payment. Each reduction factor is to be calculated as follows:
$$f = 1 - A \times C$$
where:
f is the reduction factor.
A and *C* have the same meanings as in subclause (4).
- (6) In this clause:
benefit accrual at any point in time means the benefit accrual as at that time as determined by STC on actuarial advice.
value of a benefit means the value of the benefit as determined by STC on actuarial advice.

16 Effect of benefit reductions on pensions and other benefits

- (1) STC may commute part of a pension payable to a contributor for the purposes of payment of the family law superannuation entitlement of a non-contributor spouse and the amount of the pension is to be reduced in accordance with clause 15.

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- (2) Any benefit payable under the Act to a person on the death of a contributor whose benefit has been, or is to be, reduced as a result of a family law superannuation payment is to be based on the amount of the benefit as so reduced.
 - (3) Nothing in this Part affects any other right of a contributor or other person to commute a pension or part of a pension under the Act.

17 Apportionment of benefits between reserves

For the purposes of section 33B (2A) of the Act, the portion of a payment to be made from the contributors' reserve and the portion to be made from the employers' reserve is to be determined by STC on actuarial advice.

18 Transitional provisions relating to existing family law superannuation entitlements

- (1) This clause applies to a family law superannuation entitlement that arose under a superannuation agreement, flag lifting agreement or splitting order in force before 19 December 2008 (an *existing entitlement*).
- (2) If an existing entitlement consists of an interest that is not able to be calculated until a benefit becomes payable to a contributor or other person, it is taken to be operative for the purposes of section 61WB of the Act when the benefit becomes so payable.
- (3) For the purposes of the application of clause 13 to an existing entitlement, a non-contributor spouse must make a nomination under clause 13 within 3 months of being given notice under that clause.

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Part 4 Miscellaneous

Part 4 Miscellaneous

19 Payment by STC in relation to post-payment surcharge assessment notice received by former contributor

- (1) If the total surcharge amount in respect of a former contributor who has paid an additional surcharge amount to the Commissioner of Taxation exceeds the surcharge deduction cap, STC may reimburse the former contributor by paying to the former contributor an amount equal to the amount by which the total surcharge amount exceeds the surcharge deduction cap, less any amount previously reimbursed to or paid in respect of the former contributor by STC under this clause or the Act for the purposes of superannuation contributions surcharge.
- (2) STC may, at the request of a former contributor who has received a post-payment surcharge assessment notice with respect to an additional surcharge amount that would, if paid, result in, or that has resulted in, the total surcharge amount exceeding the surcharge deduction cap, pay to the Commissioner of Taxation on behalf of the former contributor an amount equal to the amount by which the total surcharge amount exceeds the surcharge deduction cap, less any amount previously reimbursed to or paid in respect of the former contributor by STC under this clause or the Act for the purposes of superannuation contributions surcharge.
- (3) This clause does not authorise STC to pay any amount of general interest charged in respect of an additional surcharge amount payable under a post-payment surcharge assessment notice unless the request for the payment is made by the former contributor within such period after receiving the notice as STC considers reasonable.

Note. Clause 7 provides for further reduction of certain benefits resulting from the liability of a former contributor for superannuation contributions surcharge.

20 Maximum surcharge deduction amount

For the purposes of section 61RA (1C) of the Act, the surcharge deduction amount determined by STC must not exceed the sum of:

- (a) an amount that is 15% of the employer-financed portion of that part of the benefit payable to the contributor or former contributor that accrued after 20 August 1996 and before 1 July 2003, and
- (b) an amount that is 14.5% of the employer-financed portion of that part of the benefit payable to the contributor or former contributor that accrued on or after 1 July 2003 and before 30 June 2004, and
- (c) an amount that is 12.5% of the employer-financed portion of that part of the benefit payable to the contributor or former

contributor that accrued on or after 1 July 2004 and before 30 June 2005.

21 Cancellation of breakdown pension at direction of pensioner

- (1) A pensioner in receipt of a breakdown pension that is not payable for the remainder of the pensioner's life may direct STC, by notice in writing, to cancel the pension.

Note. The pensioner concerned may wish to apply for the pension to be cancelled for the pensioner's term of office as a Member of Parliament to avoid disqualification under the *Constitution Act 1902*.

- (2) The notice may direct that the cancellation have effect only for the period stated in the notice and that STC re-determine the grant of the pension at the end of that period. The period stated in the notice may be a period ending on a specified date or ending on the happening of a specified event.
- (3) If STC receives a notice under this clause, the breakdown pension is cancelled on the date of receipt of the notice or, if a future date is specified in the notice for that purpose, on that future date.
- (4) Subject to subclause (5), when the breakdown pension is cancelled, entitlement to a further pension or other benefit under the Act is to be determined on the basis that the pensioner ceased on the cancellation to be on leave of absence without pay as provided by sections 48 and 49 of the Act.
- (5) If the notice directs that the cancellation have effect only for the period stated in the notice:
- (a) a breakdown pension is not payable to the person concerned during that period (other than a breakdown pension payable for the remainder of the person's life), and
 - (b) at the end of that period STC may, on application, grant a breakdown pension (or other pension or benefit) for which the person concerned is eligible as if the person had continued during that period as an employee on leave of absence without pay in accordance with sections 48 and 49 of the Act.

The person may, at any time during that period, by further notice in writing to STC, extend or reduce that period.

- (6) In this clause, *breakdown pension* means a pension payable under section 29 or section 52E of the Act.

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Part 4 Miscellaneous

22 Saving provision

Any act, matter or thing that, immediately before the repeal of the *Superannuation Regulation 2006*, had effect under that Regulation continues to have effect under this Regulation.