



Family Law Legislation Amendment (Superannuation) Act 2001

No. 61, 2001



Family Law Legislation Amendment (Superannuation) Act 2001

No. 61, 2001

**An Act to amend legislation relating to family law,
and for related purposes**

Contents

| | | |
|------------------------------|-----------------------------------------------------------|----|
| 1 | Short title..... | 2 |
| 2 | Commencement..... | 2 |
| 3 | Schedule(s)..... | 2 |
| 4 | Definitions..... | 2 |
| 5 | Application of superannuation amendments..... | 3 |
| Schedule 1—Amendments | | 4 |
| | <i>Bankruptcy Act 1966</i> | 4 |
| | <i>Family Law Act 1975</i> | 4 |
| | <i>Superannuation Industry (Supervision) Act 1993</i> | 25 |
| | <i>Superannuation (Resolution of Complaints) Act 1993</i> | 26 |



Family Law Legislation Amendment (Superannuation) Act 2001

No. 61, 2001

An Act to amend legislation relating to family law, and for related purposes

[Assented to 28 June 2001]

The Parliament of Australia enacts:

1 Short title

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

2 Commencement

- (1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
- (2) If this Act does not commence under subsection (1) within the period of 18 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

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Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Definitions

In this Act, unless the contrary intention appears:

Family Law Act means the *Family Law Act 1975*.

marriage includes a void marriage.

section 79 order means an order (other than an interim order) made under section 79 of the Family Law Act.

section 87 agreement means an agreement approved under section 87 of the Family Law Act.

startup time means the time when Schedule 1 commences.

superannuation amendments means the amendments made by Schedule 1.

5 Application of superannuation amendments

- (1) Subject to this section, the superannuation amendments apply to all marriages, including those that were dissolved before the startup time.
- (2) Subject to subsections (3) and (4), the superannuation amendments do not apply to a marriage if a section 79 order, or a section 87 agreement, is in force in relation to the marriage at the startup time.
- (3) If a section 79 order that is in force at the startup time is later set aside under paragraph 79A(1)(a), (b), (c) or (d) of the Family Law Act, then the superannuation amendments apply to the marriage from the time the order is set aside.
- (4) If an approval of a section 87 agreement that is in force at the startup time is later revoked on a ground specified in paragraph 87(8)(a), (c) or (d) of the Family Law Act, then the superannuation amendments apply to the marriage from the time the approval is revoked.
- (5) Part VIIIB of the Family Law Act does not apply in relation to a financial agreement that was made before the startup time.

Schedule 1—Amendments

Bankruptcy Act 1966

1 After subparagraph 116(2)(d)(iv)

Insert:

- (iva) a payment to the bankrupt under a payment split under Part VIIIIB of the *Family Law Act 1975* where:
 - (A) the eligible superannuation plan involved is a fund or scheme covered by subparagraph (iii); and
 - (B) the splittable payment involved is not a pension within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

2 At the end of paragraph 116(2)(d)

Add:

- (vii) a payment to the bankrupt under a payment split under Part VIIIIB of the *Family Law Act 1975* where:
 - (A) the eligible superannuation plan involved is an RSA; and
 - (B) the splittable payment involved is not a pension or annuity within the meaning of the *Retirement Savings Accounts Act 1997*;

Family Law Act 1975

3 At the end of subsection 90K(1)

Add:

- ; or (f) a payment flag is operating under Part VIIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or
- (g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIIB.

4 After Part VIIIA

Insert:

Part VIII B—Superannuation interests

Division 1—Preliminary

Subdivision A—Scope of this Part

90MA Object of this Part

The object of this Part is to allow certain payments (splittable payments) in respect of a superannuation interest to be allocated between the parties to a marriage, either by agreement or by court order.

90MB This Part overrides other laws, trust deeds etc.

- (1) This Part has effect despite anything to the contrary in any of the following instruments (whether made before or after the commencement of this Part):
 - (a) any other law of the Commonwealth;
 - (b) any law of a State or Territory;
 - (c) anything in a trust deed or other instrument.
- (2) Without limiting subsection (1), nothing done in compliance with this Part by the trustee of an eligible superannuation plan is to be treated as resulting in a contravention of a law or instrument referred to in subsection (1).

90MC Extended meaning of *matrimonial cause*

A superannuation interest is to be treated as property for the purposes of paragraph (ca) of the definition of *matrimonial cause* in section 4.

Subdivision B—Interpretation

90MD Definitions

In this Part, unless the contrary intention appears:

approved deposit fund has the same meaning as in the SIS Act.

business day means any day except:

- (a) a Saturday or Sunday; or
- (b) a day that is a public holiday in the place concerned.

declaration time means the time when the declaration was signed by a spouse (or last signed by a spouse, if both spouses have signed).

eligible superannuation plan means any of the following:

- (a) a superannuation fund within the meaning of the SIS Act;
- (b) an approved deposit fund;
- (c) an RSA;
- (d) an account within the meaning of the *Small Superannuation Accounts Act 1995*.

flagging order means an order mentioned in subsection 90MU(1).

flag lifting agreement has the meaning given by section 90MN.

in force, in relation to an agreement, has the meaning given by section 90MG.

interest includes a prospective or contingent interest, and also includes an expectancy.

marriage includes a void marriage.

member, in relation to an eligible superannuation plan, includes a beneficiary (including a contingent or prospective beneficiary).

member spouse, in relation to a superannuation interest, means the spouse who has the superannuation interest.

non-member spouse, in relation to a superannuation interest, means the spouse who is not the member spouse in relation to that interest.

operative time:

- (a) in relation to a payment split under a superannuation agreement or flag lifting agreement—has the meaning given by section 90MI; or

- (b) in relation to a payment flag under a superannuation agreement—has the meaning given by section 90MK; or
- (c) in relation to a payment split under a court order—means the time specified in the order.

payment flag means:

- (a) the application of section 90ML in relation to a superannuation interest; or
- (b) the application of a flagging order in relation to a superannuation interest.

payment split means:

- (a) the application of section 90MJ in relation to a splittable payment; or
- (b) the application of a splitting order in relation to a splittable payment.

percentage-only interest means a superannuation interest prescribed by the regulations for the purposes of this definition.

regulated superannuation fund has the same meaning as in the SIS Act.

reversionary interest has the meaning given by section 90MF.

RSA means a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997*.

secondary government trustee means a trustee that:

- (a) is the Commonwealth, a State or Territory; and
- (b) is a trustee only because of the operation of section 90MDA.

separation declaration has the meaning given by section 90MP.

SIS Act means the *Superannuation Industry (Supervision) Act 1993*.

splittable payment has the meaning given by section 90ME.

splitting order means an order mentioned in subsection 90MT(1).

spouse means a party to a marriage.

superannuation agreement has the meaning given by section 90MH.

superannuation interest means an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest.

trustee, in relation to an eligible superannuation plan, means:

- (a) if the plan is a fund that has a trustee (within the ordinary meaning of that word)—the trustee of the plan; or
- (b) if paragraph (a) does not apply and a person is identified in accordance with the regulations as the trustee of the plan for the purposes of this definition—the person identified in accordance with the regulations; or
- (c) in any other case—the person who manages the plan.

unflaggable interest means a superannuation interest prescribed by the regulations for the purposes of this definition.

unsplittable interest means a superannuation interest prescribed by the regulations for the purposes of this definition.

90MDA Extended meaning of trustee

If a person who is not the trustee of an eligible superannuation plan nevertheless has the power to make payments to members of the plan, then references in this Part to the trustee of the plan include references to that person.

90ME Splittable payments

- (1) Each of the following payments in respect of a superannuation interest of a spouse is a *splittable payment*:
 - (a) a payment to the spouse;
 - (b) a payment to another person for the benefit of the spouse;
 - (c) a payment to the legal personal representative of the spouse, after the death of the spouse;
 - (d) a payment to a reversionary beneficiary, after the death of the spouse;

-
- (e) a payment to the legal personal representative of a reversionary beneficiary covered by paragraph (d), after the death of the reversionary beneficiary.
 - (2) A payment is not a splittable payment if it is prescribed by the regulations for the purposes of this subsection.
 - (3) If a payment is made to another person for the benefit of 2 or more persons who include the spouse, then the payment is nevertheless a splittable payment, to the extent to which it is paid for the benefit of the spouse.

90MF Reversionary interest

For the purposes of this Part, a person's interest in an eligible superannuation plan is a *reversionary interest* at any time while the person's entitlement to benefits in respect of the interest is conditional on the death of another person who is still living.

90MG Meaning of *in force*

- (1) A financial agreement is *in force* at any time when it is binding on the parties in accordance with section 90G.
- (2) A superannuation agreement is *in force* at any time when the relevant financial agreement is in force.
- (3) A flag lifting agreement is *in force* if, and only if:
 - (a) it meets the requirements set out in subsection 90MN(3); and
 - (b) it has not been set aside by a court and has not been terminated.

Division 2—Payment splitting or flagging by agreement

Subdivision A—Superannuation agreements

90MH Superannuation agreement to be included in financial agreement

- (1) A financial agreement under Part VIIIA may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property. It does

not matter whether or not the superannuation interests are in existence at the time the agreement is made.

- (2) The part of the financial agreement that deals with superannuation interests is a *superannuation agreement* for the purposes of this Part.
- (3) A superannuation agreement has effect only in accordance with this Part. In particular, it cannot be enforced under Part VIIIA.
- (4) A superannuation agreement that is included in a financial agreement under section 90B (in contemplation of marriage) has no effect unless and until the parties marry.
- (5) In applying sections 90B, 90C and 90D for the purposes of this Division, a superannuation interest of a party to a financial agreement is treated as being acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest.

Subdivision B—Payment splitting

90MI Operative time for payment split

The *operative time* for a payment split under a superannuation agreement or flag lifting agreement is the beginning of the fourth business day after the day on which a copy of the agreement is served on the trustee, accompanied by:

- (a) either:
 - (i) a copy of the decree absolute dissolving the marriage; or
 - (ii) a separation declaration with a declaration time that is not more than 28 days before the service on the trustee; and
- (b) if the agreement specifies a method for calculating a base amount—a document setting out the amount calculated using that method; and
- (c) if a form of declaration is prescribed for the purposes of this paragraph—a declaration in that form.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

90MJ Payment split under superannuation agreement or flag lifting agreement

- (1) This section applies to a superannuation interest if:
 - (a) the interest is identified in a superannuation agreement or flag lifting agreement; and
 - (b) if the interest is a percentage-only interest—the agreement does one of the following:
 - (i) it specifies a percentage that is to apply for the purposes of this sub-paragraph;
 - (ii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
 - (c) if the interest is not a percentage-only interest—the agreement does one of the following:
 - (i) it specifies an amount as a base amount in relation to the interest for the purposes of this Part;
 - (ii) it specifies a method by which such a base amount can be calculated at the time when the agreement is served on the trustee under section 90MI;
 - (iii) it specifies a percentage that is to apply to all splittable payments in respect of the interest; and
 - (d) the agreement is in force at the operative time; and
 - (e) the interest is not an unsplittable interest.

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

- (2) The following provisions begin to apply to the interest at the operative time.
- (3) Whenever a splittable payment becomes payable in respect of the interest:
 - (a) the non-member spouse is entitled to be paid the amount (if any) that is calculated under subsection (4); and
 - (b) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the payment split.
- (4) The amount is calculated as follows:
 - (a) if the agreement specifies a percentage as mentioned in subparagraph (1)(b)(ii) or subparagraph (1)(c)(iii)—the

amount is calculated by applying the specified percentage to the splittable payment; or

- (b) otherwise—the amount is calculated in accordance with the regulations.
- (5) Subject to section 90MV, this section continues to apply to the superannuation interest even if the agreement referred to in subsection (1) later ceases to be in force.

Subdivision C—Payment flagging

90MK Operative time for payment flag

- (1) The *operative time* for a payment flag under a superannuation agreement is:
 - (a) the service time, if the eligible superannuation plan is a self-managed superannuation fund; or
 - (b) otherwise, the beginning of the fourth business day after the day on which the service time occurs.
- (2) In this section:

self-managed superannuation fund has the same meaning as in the SIS Act.

service time means the time when a copy of the agreement is served on the trustee, accompanied by:

- (a) either:
 - (i) a copy of the decree absolute dissolving the marriage; or
 - (ii) a separation declaration with a declaration time that is not more than 28 days before the service on the trustee; and
- (b) if a form of declaration is prescribed for the purposes of this paragraph—a declaration in that form.

90ML Payment flag

- (1) This section applies to a superannuation interest if:
 - (a) the interest is identified in a superannuation agreement; and
 - (b) the agreement provides that the interest is to be subject to a payment flag under this Part; and
-

- (c) the agreement is in force at the operative time; and
 - (d) the interest is not an unflaggable interest.
- (2) A payment flag starts to operate on the superannuation interest at the operative time and continues to operate until either:
- (a) a court terminates the operation of the payment flag by an order mentioned in section 90MM; or
 - (b) a flag lifting agreement is served on the trustee as mentioned in section 90MI in respect of the superannuation interest.
- (3) If a payment flag ceases to operate because of paragraph (2)(b), the cessation is not affected by a later termination of the flag lifting agreement.
- (4) While a payment flag is operating on a superannuation interest, the trustee must not make any splittable payment to any person in respect of the interest.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (5) If a splittable payment becomes payable in respect of a superannuation interest while a payment flag is operating, the trustee must, within 14 days after it became payable, give written notice to the member spouse and the non-member spouse.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (6) Subsection (5) does not apply if the trustee has previously given a notice under that subsection, for an earlier splittable payment, in respect of the payment flag.
- (7) If either spouse dies while a payment flag is operating:
- (a) the payment flag nevertheless continues to operate; and
 - (b) the legal personal representative of the deceased spouse has all the rights the deceased spouse would have had in respect of the payment flag.

Note: The rights of the legal personal representative under paragraph (b) include the right to enter into a flag lifting agreement under section 90MN.

90MM Payment flag may be terminated by court

If a court makes an order under section 90K setting aside a financial agreement in respect of which a payment flag is operating, the court may also make an order terminating the operation of the flag.

Note: Under section 90MH, a superannuation agreement must be part of a financial agreement. Therefore, setting aside the financial agreement also has the effect of setting aside the superannuation agreement.

90MN Flag lifting agreement etc.

- (1) At any time when a payment flag is operating on a superannuation interest, the spouses may make an agreement (a ***flag lifting agreement***) that either:
 - (a) provides that the flag is to cease operating without any payment split; or
 - (b) specifies an amount, method or percentage in accordance with subsection 90MJ(1).
- (2) If the flag lifting agreement provides for a payment split, the spouses may at any time make an agreement (a ***termination agreement***) that terminates the flag lifting agreement.
- (3) A flag lifting agreement or termination agreement has no effect unless it complies with the following requirements:
 - (a) the agreement must be signed by both spouses;
 - (b) for each spouse, the agreement must contain a statement that the spouse has been provided with independent legal advice from a legal practitioner as to the legal effect of the agreement;
 - (c) a certificate must be attached to the agreement, signed by the person who provided the legal advice and stating that the advice was provided;
 - (d) after the agreement is signed by the spouses, each spouse must be provided with a copy of the agreement.
- (4) A court may make an order setting aside a flag lifting agreement or termination agreement if, and only if, the court is satisfied as to any of the grounds set out in subsection 90K(1) (other than paragraph 90K(1)(f)).

-
- (5) An order setting aside a flag lifting agreement also operates to set aside the related financial agreement.
 - (6) An order under section 90K setting aside a financial agreement also operates to set aside the related flag lifting agreement.

Subdivision D—Miscellaneous

90MO Limitation on section 79 order

- (1) A court cannot make an order under section 79 with respect to a superannuation interest if:
 - (a) the superannuation interest is covered by a superannuation agreement that is in force; or
 - (b) the non-member spouse has served a waiver notice on the trustee under section 90MZA in respect of the interest; or
 - (c) a payment flag is operating on the superannuation interest.

Note: Under section 90MM, the court can terminate the operation of a payment flag in certain circumstances.

- (2) Subsection (1) does not prevent the court taking superannuation interests into account when making an order with respect to other property of the spouses.

90MP Separation declaration

- (1) A *separation declaration* is a written declaration that complies with this section.
- (2) The declaration must be signed by at least one of the spouses.
- (3) If section 90MQ applies to the declaration, then the declaration must state that:
 - (a) the spouses are married; and
 - (b) the spouses separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the declaration time; and
 - (c) in the opinion of the spouse (or spouses) making the declaration, there is no reasonable likelihood of cohabitation being resumed.

- (4) If section 90MQ does not apply to the declaration, then the declaration must state that the spouses are married, but are separated, at the declaration time.
- (5) For the purposes of this section, the question whether spouses lived separately and apart for a continuous period of not less than 12 months before a particular date is to be determined in the same way as it is under section 48.
- (6) In this section:
separated has the same meaning as in section 48 (as affected by sections 49 and 50).

90MQ Superannuation interests in excess of ETP threshold

- (1) This section applies to a declaration if, at the declaration time, the total withdrawal value for all the superannuation interests of the member spouse is more than the ETP threshold.
- (2) This section does not apply in the circumstances (if any) prescribed by the regulations.
- (3) In this section:
ETP threshold means the upper limit that applies under section 159SG of the *Income Tax Assessment Act 1936* for the financial year in which the declaration time occurs.
total withdrawal value means the amount determined in accordance with the regulations.

90MR Enforcement by court order

- (1) A court may make such orders as it thinks necessary for the enforcement of a payment split or payment flag under this Division.
- (2) The question whether a superannuation agreement or flag lifting agreement is valid, enforceable or effective is to be determined by the court according to the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts.

-
- (3) Without limiting subsection (2), in proceedings relating to a superannuation agreement or flag lifting agreement, the court has the same powers, may grant the same remedies and must have the same regard to the rights of third parties as the High Court has, may grant and is required to have in proceedings in connection with contracts or purported contracts, being proceedings in which the High Court has original jurisdiction.

Division 3—Payment splitting or flagging by court order

90MS Order under section 79 may include orders in relation to superannuation interests

- (1) In proceedings under section 79 with respect to the property of spouses, the court may, in accordance with this Division, also make orders in relation to superannuation interests of the spouses.

Note 1: Although the orders are made *in accordance with* this Division, they will be made *under* section 79. Therefore they will be generally subject to all the same provisions as other section 79 orders.

Note 2: Sections 71A and 90MO limit the scope of section 79.

- (2) A court cannot make an order under section 79 in relation to a superannuation interest except in accordance with this Part.

90MT Splitting order

- (1) A court, in accordance with section 90MS, may make the following orders in relation to a superannuation interest (other than an unsplitable interest):
- (a) if the interest is not a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
 - (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations; and
 - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
 - (b) an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:

- (i) the non-member spouse is entitled to be paid a specified percentage of the splittable payment; and
 - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
 - (c) if the interest is a percentage-only interest—an order to the effect that, whenever a splittable payment becomes payable in respect of the interest:
 - (i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations by reference to the percentage specified in the order;
 - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order;
 - (d) such other orders as the court thinks necessary for the enforcement of an order under paragraph (a), (b) or (c).
- (2) Before making an order referred to in subsection (1), the court must determine the value of the interest as follows:
- (a) if the regulations provide a method for determining the value of the interest, the court must determine the value in accordance with the regulations;
 - (b) otherwise, the court must determine the value by such method as it considers appropriate.
- (3) Regulations for the purposes of paragraph (2)(a) may provide for the value to be determined wholly or partly by reference to methods or factors that are approved in writing by the Minister for the purposes of the regulations.
- (4) Before making an order referred to in paragraph (1)(a), the court must allocate a base amount to the non-member spouse, not exceeding the value determined under subsection (2).

Note: The base amount is used to calculate the entitlement of the non-member spouse under the regulations.

90MU Flagging order

- (1) A court, in accordance with section 90MS, may make an order in relation to a superannuation interest (other than an unflaggable interest):
-

- (a) directing the trustee not to make any splittable payment in respect of the interest without the leave of the court; and
 - (b) requiring the trustee to notify the court, within a period specified in the order, of the next occasion when a splittable payment becomes payable in respect of the interest.
- (2) In deciding whether to make an order in accordance with this section, the court may take into account such matters as it considers relevant and, in particular, may take into account the likelihood that a splittable payment will soon become payable in respect of the superannuation interest.

Division 4—General provisions about payment splitting

90MV Court may cancel payment split

- (1) A court may, under section 79, make an order terminating the operation of a payment split if:
- (a) the superannuation agreement in respect of the payment split has ceased to be in force; and
 - (b) the non-member spouse has not served a waiver notice on the trustee under section 90MZA in respect of the payment split.
- (2) The termination has effect for splittable payments that become payable after the date specified in the order.

90MW Deductions from splittable payment before calculating payment split

Any deduction that the trustee is entitled to make from a splittable payment is to be deducted from the splittable payment before calculating any payment split and before applying section 90MX.

90MX Multiple payment splits applying to the same splittable payment

- (1) This section applies if 2 or more payment splits apply to the same splittable payment.
- (2) The payments splits are to be calculated in order of their operative times, starting with the earliest time.

- (3) For the purpose of calculating each of those payment splits (other than the one with the earliest operative time), the amount of the splittable payment is taken to be reduced by the amount to which another person is entitled under the payment split with the next earlier operative time.

Example: W has a superannuation interest that is subject to 3 payment splits in respect of W's marriages to X, Y and Z (in that order). The operative times of the payment splits are in the same order as the marriages. Assume each payment split provides for a 50% share to the non-member spouse. W becomes entitled to a splittable payment of \$100. The final payment entitlements are as follows: X gets \$50. Y gets \$25. Z gets \$12.50. W gets the remaining \$12.50.

90MY Fees payable to trustee

- (1) The regulations may:
- (a) allow trustees to charge reasonable fees:
 - (i) in respect of a payment split; or
 - (ii) otherwise in respect of the operation of this Part in relation to a superannuation interest; and
 - (b) prescribe the person or persons liable to pay those fees.
- (2) If any such fee remains unpaid after the time it is due for payment, then the trustee may recover any unpaid amount by deduction from amounts that would otherwise become payable by the trustee, in respect of the superannuation interest, to the person who is liable to pay the fee.

90MZ Superannuation preservation requirements

- (1) If the eligible superannuation plan for a payment split is a regulated superannuation fund or approved deposit fund, then the entitlement of the non-member spouse is subject to any regulations made under the SIS Act that provide for payment of that entitlement to a regulated superannuation fund or RSA for the benefit of the non-member spouse.
- (2) If the eligible superannuation plan for a payment split is an RSA, then the entitlement of the non-member spouse is subject to any regulations made under the *Retirement Savings Accounts Act 1997* that provide for payment of that entitlement to a regulated

superannuation fund or RSA for the benefit of the non-member spouse.

- (3) If the eligible superannuation plan for a payment split is a constitutionally protected fund within the meaning of section 267 of the *Income Tax Assessment Act 1936* or an exempt public sector superannuation scheme within the meaning of the SIS Act, then the entitlement of the non-member spouse is subject to any law or other instrument that provides for payment of that entitlement to a regulated superannuation fund or RSA for the benefit of the non-member spouse.

90MZA Waiver of rights under payment split

- (1) If the non-member spouse serves a waiver notice on the trustee in respect of a payment split, then the following provisions apply for each splittable payment that becomes payable after the date specified in the waiver notice:
- (a) the non-member spouse is not entitled to be paid any amount under the payment split in respect of the splittable payment;
 - (b) the entitlement of the person to whom the splittable payment would have been made but for the payment split continues to be reduced in the same way as it would have been reduced if the entitlement of the non-member spouse had not been terminated.

Example: X has a superannuation interest that is subject to a 50:50 payment split in favour of Y. Y serves a waiver notice on the trustee, in exchange for a lump sum payment made by the trustee to another fund for the benefit of Y. The effect is that X's payments will continue to be reduced by half, but Y will receive no further payments under the payment split.

- (2) To be effective for the purposes of this section, a waiver notice must be in the prescribed form and must be accompanied by:
- (a) a statement to the effect that the non-member spouse has been provided with independent financial advice from a prescribed financial adviser as to the financial effect of the waiver notice; and
 - (b) a certificate signed by the person who provided the financial advice, stating that the advice was provided.

90MZB Trustee to provide information

- (1) An eligible person may make an application to the trustee of an eligible superannuation plan for information about a superannuation interest of a member of the plan.
- (2) The application must be accompanied by:
 - (a) a declaration, in the prescribed form, stating that the applicant requires the information for either or both of the following purposes:
 - (i) to assist the applicant to properly negotiate a superannuation agreement;
 - (ii) to assist the applicant in connection with the operation of this Part in relation to the applicant; and
 - (b) the fee (if any) payable under regulations made for the purposes of section 90MY.
- (3) If the trustee receives an application that complies with this section, the trustee must, in accordance with the regulations, provide information about the superannuation interest to the applicant.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (4) Regulations for the purposes of subsection (3) may specify circumstances in which the trustee is not required to provide information.

Example: The regulations might provide that a secondary government trustee is not required to provide information where there is another trustee of the eligible superannuation plan who is better able to provide the information.

- (5) The trustee must not, in response to an application under this section by a spouse of the member, provide the spouse with any address of the member. For this purpose, **address** includes a postal address.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

-
- (6) If the trustee receives an application under this section from a person other than the member, the trustee must not inform the member that the application has been received.

Penalty: 50 penalty units.

Note: The penalty for a body corporate is 250 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

- (7) The regulations may require the trustee of an eligible superannuation plan, after the operative time for a payment split, to provide information to the non-member spouse about the superannuation interest concerned. Such regulations may prescribe penalties for contravention, not exceeding 10 penalty units.
- (8) In this section:

eligible person, in relation to a superannuation interest of a member of an eligible superannuation plan, means:

- (a) the member; or
- (b) a spouse of the member; or
- (c) a person who intends to enter into a superannuation agreement with the member.

90MZC Death of non-member spouse

If the non-member spouse dies after the operative date for a payment split:

- (a) the payment split nevertheless continues to operate; and
- (b) the payment split then operates in favour of the legal personal representative of the deceased spouse and is binding on that legal personal representative; and
- (c) the legal personal representative has all the rights the deceased spouse would have had in respect of the payment split, including the right to serve a waiver notice under section 90MZA.

Division 5—Miscellaneous

90MZD Orders binding on trustee

- (1) An order under this Part in relation to a superannuation interest may be expressed to bind the person who is the trustee of the eligible superannuation plan at the time when the order takes effect. However:
 - (a) in the case of a trustee who is not a secondary government trustee—the court cannot make such an order unless the trustee has been accorded procedural fairness in relation to the making of the order; and
 - (b) in the case of a secondary government trustee:
 - (i) the court cannot make such an order unless another trustee of the eligible superannuation plan has been accorded procedural fairness in relation to the making of the order; and
 - (ii) the court may, if it thinks fit, require that the secondary government trustee also be accorded procedural fairness.
- (2) If an order is binding on the person who is the trustee of an eligible superannuation plan at the time when the order takes effect, then the order is also binding (by force of this subsection) on any person who subsequently becomes the trustee of that eligible superannuation plan.

90MZE Protection for trustee

The trustee of an eligible superannuation plan is not liable for loss or damage suffered by any person because of things done (or not done) by the trustee in good faith in reliance on:

- (a) any document served on the trustee for the purposes of this Part; or
- (b) an order made by a court in accordance with this Part.

90MZF Service of documents on trustee

- (1) If a document is required or permitted to be served for the purposes of this Part on the trustee of an eligible superannuation plan, the

document may be served in any of the ways in which a document may be served under the Rules of Court.

- (2) Subsection (1) is in addition to any other method of service permitted by law.

90MZG False declarations

- (1) A person is guilty of an offence if:
- (a) the person makes a statement in a declaration, knowing that the statement is false or misleading; and
 - (b) the declaration is served on the trustee of an eligible superannuation plan for the purposes of this Part.
- (2) An offence against subsection (1) is punishable by imprisonment for a period of up to 12 months.
- (3) Subsection (1) does not apply if the statement is not false or misleading in a material particular.

90MZH Terminating employment because of payment flag etc.

A person must not terminate the employment of an employee on either of the following grounds:

- (a) a payment flag is operating in respect of a superannuation interest of the employee;
- (b) a superannuation agreement or splitting order is in force in respect of a superannuation interest of the employee.

Penalty: 100 penalty units.

Note: The penalty for a body corporate is 500 penalty units. See subsection 4B(3) of the *Crimes Act 1914*.

Superannuation Industry (Supervision) Act 1993

5 Subsection 10(1)

Insert:

member has a meaning affected by section 15B.

6 After section 15A

Insert:

15B Modified meaning of *member*

- (1) The regulations may provide that a person is to be treated, or is not to be treated, as being a *member* of a superannuation fund for the purposes of this Act or specified provisions of this Act.
- (2) This Act applies with such modifications (if any) as are prescribed in relation to a person who is a member of a superannuation fund because of regulations made for the purposes of this section.
- (3) In this section:
modifications includes additions, omissions and substitutions.

Superannuation (Resolution of Complaints) Act 1993

7 Subsection 3(2)

Insert:

beneficiary has a meaning affected by section 4B.

7A Subsection 3(2)

Insert:

holder, in relation to an RSA, has a meaning affected by section 4B.

8 Subsection 3(2)

Insert:

member has a meaning affected by section 4B.

8A Subsection 3(2)

Insert:

person who has an interest, in relation to a death benefit, has a meaning affected by section 4B.

9 After section 4A

Insert:

4B Modified meanings of *beneficiary, member etc.*

- (1) The regulations may provide that, for the purposes of this Act or specified provisions of this Act:
 - (a) a person is to be treated as being a qualifying person; or
 - (b) a person is not to be treated as being a qualifying person.
- (2) Without limiting subsection (1), regulations for the purposes of that subsection may be made in relation to a person who is entitled to become, or has applied to become, a member of a superannuation fund or a beneficiary of an approved deposit fund.
- (3) This Act applies with such modifications (if any) as are prescribed in relation to a person who is a qualifying person because of regulations made for the purposes of this section.

- (4) In this section:

modifications includes additions, omissions and substitutions.

qualifying person means:

- (a) a member of a superannuation fund; or
- (b) a beneficiary of an approved deposit fund; or
- (c) a person who has an interest in a death benefit; or
- (d) the holder of an RSA.

[*Minister's second reading speech made in—
House of Representatives on 13 April 2000
Senate on 18 June 2001*]

(53/00)
