

Family Law (Superannuation) Regulations 2001 2001 No. 303

EXPLANATORY STATEMENT

STATUTORY RULES 2001 No. 303

ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

Family Law Act 1975

FAMILY LAW (SUPERANNUATION) REGULATIONS 2001

Section 125(1) of the *Family Law Act 1995* (the Act) provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the Regulations is to prescribe the necessary matters, and make other necessary provision to support the operation of the Part VIII B of the Act, inserted by *Family Law Legislation Amendment (Superannuation) Act 2001* (the Amendment Act).

Part VIII B, which will commence on a day to be fixed by Proclamation, will allow certain payments in respect of a superannuation interest of a party to a marriage to be allocated, by court order or agreement, between the parties to the marriage.

The Regulations prescribe:

- a superannuation interest as a percentage-only interest;
- the identity of persons who are not common law trustees as the trustees of the particular superannuation plans for the purposes of the Part VIII B of the Act;
- a superannuation interest that can not be split for the purposes of the Part;
- payments in respect of a superannuation interest of a party to a marriage that can not be split for the purposes of the Part;
- the method for determining the amount of the total withdrawal value of all superannuation interests of a member spouse;
- the method for determining the value of a superannuation interest;
- the method for calculating the entitlement of a non-member spouse when a payment in respect of a superannuation interest that is subject to particular kinds of payment splits becomes payable;
- that reasonable fees may be charged by trustees of superannuation plans in respect of payment splits and the operation of the Part in relation to superannuation interests, and that particular persons are liable to pay those fees;
- the information which a trustee of a superannuation plan must provide in response to an application under the Act for information about a superannuation interest, and the circumstances in which that information is not required to be provided;
- the information which a trustee of a superannuation plan must provide, after the operative time of a payment split, to the non-member spouse about the superannuation interest; and

- the form of declarations and notices to support the operation of the Part.

Subsection 4(1) of the *Acts Interpretation Act 1901* enables, where an Act amends another Act to confer a power to make regulations, the power to be exercised before the Act concerns comes into operation as if the Act had come into operation.

Details of the Regulations are as follows:

Regulation 1 is formal.

Regulation 2 provides for the commencement of the Regulations on the commencement of the Amendment Act.

Part 1 of the Regulations provides for the definition of terms used in the Regulations and related preliminary matters.

Regulations 3 and 4 provide for the definition of many of the terms used in the Regulations. Regulations 5 to 9 provide for the definition of particular terms used in the Regulations. If a term used in the Regulations is also used in Part VIIIIB of the Act, it has (unless any contrary intention appears) the meaning it has in Part VIIIIB.

Regulation 5 provides for the meaning of the term 'defined benefit interest' in the Regulations.

Regulation 6 provides for the meaning of the term 'growth phase', for the purpose of a superannuation interest in a regulated superannuation fund or an approved deposit fund or that is a retirement savings account, in the Regulations.

Regulation 7 provides for the meaning of the term 'growth phase', for the purpose of an interest in other superannuation funds to which Part VIIIIB of the Act will apply.

These interests will nearly all be in exempt public sector superannuation schemes, the vast majority of which are State schemes that are not regulated by the Commonwealth.

Regulation 8 provides for the meaning of the term 'payment phase' in the Regulations.

Regulation 9 provides for the meaning of the term 'partially vested accumulation interest' in the Regulations.

Regulation 10 provides for the identification of additional persons, who are not common law trustees, as trustees of superannuation plans to which Part VIIIIB of the Act will apply.

Regulation 11 prescribes a superannuation interest that has a value of less than \$5,000 as an interest that is an unsplitable interest for the purposes of Part VIIIIB of the Act.

Part 2 of the Regulations provides for the prescription of payments in respect of a superannuation interest of a member spouse that are payments that are not splittable payments for the purposes of Part VIIIIB of the Act.

There are 2 purposes achieved through the prescription of such payments as ones that are not splittable.

The first purpose is achieved by prescription of payments of a particular character. Prescription of these payments will have the effect that the member spouse (or his estate) will not be required to share any part of any payments of that character with the non-member spouse. These payments are prescribed in Regulations 12 and 13.

The second purpose is achieved by prescription of payments of any character that occur after the happening of a particular event. Prescription of these payments will have the effect of bringing to an end a payment split where the non-member spouse has received the effect of a payment split in some other way (for example, by the creation of a new interest in his or her name in the member spouse's superannuation fund) at an earlier time than the member spouse's receipt of superannuation benefits. These payments are prescribed by Regulation 14.

Regulations 12 and 13 prescribe a number of different types of payments in respect of a superannuation interest of a member spouse as payments that are not splittable payments for the purposes of Part VIII B of the Act.

Such payments to a member spouse that are made:

- on compassionate grounds;
- because he or she is in severe financial hardship;
- because he or she is incapacitated, if the payments do not reduce his or her retirement benefit or, if they do so, in the first two years of their making if they are made because the member spouse is temporarily incapacitated;
- to a reversionary beneficiary who is a child of the member spouse who is under 18, such a child over that age who is completing his or her education or has special needs because of a disability or to a reversionary beneficiary for the benefit of such a child;

are payments that are not splittable payments.

Payments made to a member spouse under two Commonwealth public sector superannuation schemes - the *Superannuation Act 1976* and the *Superannuation Act 1990* (more commonly known as the CSS scheme, and the PSS scheme, respectively) - are not splittable if made during any time when the member spouse's health is being assessed for the purpose of determining eligibility for a totally and permanently incapacitated benefit, or if made to top-up salary which has been reduced because of ill health.

Payments made to a member spouse from an account in the Superannuation Holding Accounts Reserve established under the *Small Superannuation Accounts Act 1995* (the Small Super Accounts Act) are also not splittable if the Commissioner of Taxation, who administers that Act, has created a separate account for the non-member spouse in the Reserve and transferred an amount to that account. Amendments made to section 15 of the Small Super Accounts Act by the *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2001* give the Commissioner the power, when served with a payment split in respect of an account in the Reserve, to open a separate account for the non-member spouse in the Reserve with a balance of an amount to be worked out in accordance with regulations to be made under the Small Super Accounts Act.

Regulation 14 prescribes payments in respect of a superannuation interest of a member spouse as payments that are not splittable in respect of a particular payment split if they occur after the happening of one of a number of particular events.

The purpose of the prescription of these payments is to bring to an end a payment split of an interest in favour of a particular separated or divorced non-member spouse where he or she has received the effect of the payment split in some other way at an earlier time than the member spouse's receipt of superannuation benefits:

Such payments that are made after the trustee has:

- created a new interest in the plan, under the payment split provisions of the Superannuation Industry (Supervision) Regulations, for the non-member spouse;
- transferred or rolled out under those provisions an amount equal to the value that such an interest would be required to have;
- created a new interest in the plan, under its governing rules, for the non-member spouse having at least the value that an interest created for him or her under the payment split provisions of the Superannuation Industry (Supervision) Regulations would be required to have;
- transferred or rolled out under those governing rules an amount having at least that value to another superannuation fund or to a retirement savings account (an RSA) to be held for the benefit of the non-member spouse;

are payments that are not splittable payments in respect of the particular payment split in relation to which the new interest was created or the amount was transferred or rolled out.

Payments that are made after the member spouse has paid to the non-member spouse an amount in satisfaction of his or her entitlement under a particular payment, and served a notice reciting that he or she has done so, are not splittable in respect of that payment split.

If the interest that is subject to the payment split is an interest in an exempt public sector superannuation scheme or, if the interest is one in a regulated superannuation fund, an approved deposit fund or an RSA and the non-member spouse has not retired, reached 65 years of age, been permanently incapacitated or died, the payment does not need to be preserved in the superannuation system. In other situations, if the non-member spouse has not retired etc., that payment must have been made by the member spouse to a regulated superannuation fund or to a retirement savings account to be held for the benefit of the non-member spouse, who will be able to access it when benefits are ordinarily payable to members of the fund to which it is paid.

Part 3 of the Regulations provides in relation to matters relevant to payment splits or payment flagging by agreement.

Regulation 15 is an application provision.

Regulation 16 provides that the entitlement of a non-member spouse, in respect of each splittable payment that becomes payable in respect of a superannuation interest that is subject to a 'base amount' payment split under a superannuation agreement that is still in the growth phase at the date it is served on the trustee, is the amount calculated in accordance with Division 6.2 of the Regulations.

Regulation 17 provides for the entitlement of a non-member spouse, in respect of each splittable payment that becomes payable in respect of a superannuation interest that is subject to a 'base amount' payment split under a superannuation agreement that is in the payment phase at the date it is served on the trustee. Where the base amount is a total amount that relates to the whole of the superannuation interest, the non-member spouse is entitled to be paid the amount calculated in accordance with Division 6.3 of the Regulations. Where the base amount relates to ongoing pension payments, the non-member spouse is entitled, in respect of each splittable payment, to be paid the base amount.

Regulation 18 is an application provision.

Regulation 19 provides for the entitlement of a non-member spouse in respect of each splittable payment that becomes payable in respect of a percentage-only interest that is subject to a percentage split under a superannuation agreement that applies for the purpose of

subparagraph 90MJ(1)(b)(i) of the Act. The entitlement is, broadly speaking, a percentage of each splittable payment that reduces, in accordance with the formula in the provision, over time, as the period of the member spouse's post-separation membership of the plan in which the interest is held increases.

Regulation 20 prescribes the amount that is the total withdrawal value for all the superannuation interests of a member spouse. The amount is relevant for which of two forms of a separation declaration is required to accompany a superannuation agreement when it is served on the trustee of a plan.

Part 4 of the Regulations provides in relation to matters relevant to payment splits or payment flagging by court order.

Regulation 21 is an application provision. It disapplies Part 4 to an interest that is a percentage-only interest.

Regulation 22 provides for the methods of valuation of a superannuation interest, to be applied by the court before making an order splitting such an interest, that is to apply in the growth phase and in the payment phase. The court must determine the value of such an interest, if it is in the growth phase, in accordance with Division 5.1 of the Regulations. If the interest is in the payment phase, the court must determine the value of the interest in accordance with Division 5.2 of the Regulations.

The methods of valuation apply for all superannuation interests except percentage-only interests, an interest in a self managed superannuation fund or an interest in a regulated superannuation fund in which the trustee has given the required statutory notice when it is proposed to reconstruct or terminate the fund. Valuation of these interests will be determined by the court on the basis of evidence led by the parties in the proceedings.

The method of valuation of an account in the Superannuation Holding Accounts Reserve is set out in Regulation 24 of the Regulations.

Regulation 23 provides for the entitlement of the non-member spouse in respect of each splittable payment that becomes payable in respect of a superannuation interest other than a percentage-only interest. The non-member spouse entitled, if the interest is in the growth phase at the date of the order, to the amount calculated in accordance with Division 6.2 of the Regulations. If the interest is in the payment phase at that date, the non-member spouse is entitled to the amount calculated in accordance with Division 6.3 of the Regulations.

Regulation 24 provides for the valuation of an account in the Superannuation Holding Accounts Reserve that is to be applied by the court before making an order splitting such an account. The value is, broadly, the account balance at the relevant date.

Regulation 25 is an application provision.

Regulation 26 provides for the entitlement of a non-member spouse in respect of each splittable payment that becomes payable in respect of a percentage-only interest that is subject to a payment split under a court order. The entitlement is, broadly speaking, a percentage of each splittable payment that reduces, in accordance with the formula in the provision, over time, as the period of the member spouse's post-separation membership of the plan in which the interest is held increases.

Part 5 of the Regulations provides for the methods of valuation of superannuation interests to be applied by a court before making an order splitting such such an interest. Different methods apply depending on whether the interest is in the growth phase or in the payment phase.

Regulation 27 is an application provision.

Regulation 28 provides for a power for the Minister to approve in writing an age other than the retirement age specified in the governing rules of the plan or the age of 65 years as the retirement age, for the purpose of determining the value of a defined benefit interest in the growth phase in accordance with the method of valuation set out in Schedule 2, for all members of a plan or of an identifiable class of members of the plan. The approval is subject to disallowance by either House of Parliament.

Regulation 29 provides for a power for the Minister to approve in writing methods or factors for use in determining the gross value of a defined benefit interest or a partially vested accumulation interest in the growth phase. The approval is subject to disallowance by either House of Parliament.

Regulation 30 provides for the method for determining the value of a superannuation interest in the growth phase. The method is to determine the gross value of the interest, in accordance with whichever of the particular provision in one of Regulations 31 to 38 applies to the interest, and to deduct from that amount the value of any earlier payment split, and any surcharge debt that is readily ascertainable at the time the interest is being valued.

Regulation 31 provides, with Schedule 2, for the method for determining the gross Value in the growth phase of an interest if the whole of the interest is a defined benefit interest.

Regulation 32 provides for the method of determining the gross value in the growth phase of an interest if the whole of the interest is an accumulation interest (other than a partially vested accumulation interest). Where the method is a date in the past, the method will enable the court to determine the gross value by reference to past member information statements, interpolating (if necessary) on a daily basis between the value stated in such statements taking into account any partial payment of benefits and any transfer or roll in of benefits (other than regular contributions) to or by the member.

Regulation 33 provides, with Schedule 3, for the method for determining the gross value in the growth phase of an interest if the whole of the interest is a partially vested accumulation interest.

Regulation 34 provides for the method for determining in the growth phase the gross value of an interest made up of a component that is a defined benefit interest and a component that is an accumulation interest (other than a partially vested accumulation interest).

Regulation 35 provides for the method for determining in the growth phase the gross value of an interest made up of a component that is a defined benefit interest and a component that is a partially vested accumulation interest.

Regulation 36 provides for the method for determining in the growth phase the gross value of an interest that is the greater of a defined benefit interest and an accumulation interest (other than a partially vested accumulation interest).

Regulation 37 provides for the method for determining in the growth phase the gross value of an interest that is the lesser of a defined benefit interest and an accumulation interest (other than a partially vested accumulation interest).

Regulation 38 provides for the method for determining in the growth phase the gross value of an interest the benefit in respect of which is, under the governing rules of the plan, the amount of a defined benefit less any other amount (for example, the amount of any benefit required under an industrial award to be paid to the member spouse by his or her employer).

Regulation 39 is an application provision.

Regulation 40 provides for the method for determining the value of a superannuation interest in the payment phase. The method is to determine the gross value of the interest, in accordance with whichever of the particular provision in one of Regulations 41 to 43 applies to the interest, and to deduct from that amount the value of any earlier payment split.

Regulation 41 provides for the method for determining in the payment phase the gross value of an interest where the whole or remaining part of the benefit is payable only as one or more lump sums.

Regulation 42 provides, with Schedules 4 and 5, for the methods for determining in the payment phase the gross value of an interest if the benefits in respect of the interest are being paid as a pension.

Regulation 43 Provides, with Schedule 6, for the methods for determining in the payment phase the gross value of an interest if part of the benefits in respect of the interest is being paid as a pension and the remaining part of the benefits is payable as a lump sum (other than a lump sum that is a commutation of a pension).

Part 6 of the Regulations provides for the entitlement of a non-member spouse in respect of each splittable payment that becomes payable in respect of a superannuation interest that is subject to a 'base amount' payment split. Division 6.2 provides for this entitlement where the interest was in the growth phase at the date of service of the agreement or order on the trustee and Division 6.3 provides for this entitlement where the interest was in the payment phase at that time.

Regulations 44 and 45 define a number of terms used in Part 6.

The content of Division 6.2 falls into 2 parts - the growth of the relevant base amount specified in the agreement or allocated by the court (Regulations 47 and 48), and how that base amount is paid to the non-member spouse once the superannuation benefits commence to be paid to the member spouse (Regulations 49 to 54).

Regulation 46 provides a general description of the content of Division 6.2 of Part 6.

Regulation 47 requires the trustee, after each accrual period in relation to the superannuation interest, to adjust the relevant base amount by the amount of interest (if any) that has accrued, at the rate that applies under Regulation 48, to the base amount during the accrual period.

Regulation 48 provides for the rate at which interest accrues to the base amount under Regulation 47. That rate is:

- if the superannuation interest is a unit trust, the percentage change in the unit price in the accrual period;
- if the whole of the interest is an accumulation interest (other than an accumulation interest in a unit trust), the plan's crediting rate;
- if any component of the interest is a defined benefit interest (except where the amount of total benefits payable in respect of that defined benefit interest is calculated by application of a growth factor to a specified amount), the percentage change in average weekly ordinary times earnings (AWOTE), as published by the Australian Bureau of Statistics, for the preceding 12 months, plus 2.5 percentage points;

- if any component of the interest is a defined benefit interest and the amount of total benefits payable in respect of that defined benefit interest is calculated by application of a growth factor to a specified amount, that growth factor.

However, if different rates apply to different components of the interest, the rate at which interest accrues to the base amount is the weighted average crediting rate that applies to the interest in the accrual period.

Regulation 49 provides for the non-member spouse to be entitled to be paid an amount equal to the amount of the adjusted base amount from any lump sum (other than one chosen to be taken in that form) received by the member spouse on satisfying any one of a number of conditions. Once the non-member spouse receives that amount, he or she is not entitled to be paid any amount from any other splittable payment in respect of the interest.

Regulation 50 provides, where the amount of such a lump sum is less than the amount of the adjusted base amount, for non-member spouse to be entitled to be paid the amount of the lump sum and, unless he or she has elected under Regulation 51 to be paid some remaining portion of the adjusted base amount from a further lump sum that the member spouse might be able to take, the proportion of every other splittable payment in respect of the interest that the remaining adjusted base amount bears to the value of the superannuation interest after the non-member spouse was paid that initial lump sum.

Regulations 51 to 54 provide for the non-member spouse to be able to elect to be paid any portion of the adjusted base amount, or of the remaining adjusted base amount, in lump sum form from a lump sum payment that the member spouse may be able to take.

Generally, this lump sum payment will be one that the member spouse may be able to choose to take when he or she commutes the whole or part of any pension benefits that are payable in respect of the interest.

An election is only able to be made by the non-member spouse where the amount that he or she requests to be paid in lump sum form will not cause the member spouse to lose the right to take the remaining part of the benefits in respect of the interest as a pension.

.An amount which the non-member spouse elects to be paid from any lump sum able to be chosen by the member spouse reduces the adjusted base amount only to the extent of the commutation rate that applies to the member spouse if he or she were to choose to receive his or her superannuation benefits in the form of a lump sum. Generally, commutation rates imposed by superannuation funds favour the taking of benefits by way of pension over doing so in lump sum form.

Where the non-member spouse elects to take only a portion of the adjusted base amount (or the remaining adjusted base amount) in lump sum form, he or she is entitled to be paid the proportion of every other splittable payment in respect of the interest that the remaining adjusted base amount bears to the value of the superannuation interest after the non-member spouse was paid that initial lump sum.

Regulation 55 provides a general description of the content of Division 6.3 of Part 6, which provides for the entitlement of a non-member spouse in respect of an interest that is subject to a 'base amount' split where the interest is in the payment phase.

Regulation 56 provides for the non-member spouse to be entitled to be paid an amount equal to the amount of the base amount from the next payment that the member spouse receives after the operative time of the payment split. Once the non-member spouse receives that amount, he or she is not entitled to be paid any amount from any other splittable payment in respect of the interest.

Regulation 57 provides, where the amount of that next payment is less than the amount of the base amount, for non-member spouse to be entitled to be paid the amount of that payment and, unless he or she has elected under Regulation 58 to be paid some remaining portion of the base amount from any lump sum that the member spouse might be able to take, the proportion of every other splittable payment in respect of the interest that the remaining base amount bears to the value of the superannuation interest after the non-member spouse was paid that first payment.

Regulation 58 provides for the non-member spouse to be able to elect to be paid any portion of the remaining base amount in lump sum form from a lump sum payment that the member spouse may be able to take.

Like the situation that applies, under Regulations 51 to 54, when an interest is in the growth phase, an election is only able to be made by the non-member spouse where the amount he or she requests to be paid in lump sum form will not cause the member spouse to lose the right to take the remaining part of the benefits in respect of the interest as a pension.

Again, like the situation that applies when an interest is in the growth phase, an amount which the non-member spouse elects to be paid from any lump sum able to be chosen by the member spouse reduces the base amount only to the extent of the commutation rate that applies to the member spouse if he or she were to choose to receive his or her superannuation benefits in lump sum form.

Where the non-member spouse elects to take only a portion of the remaining base amount in lump sum form, he or she is entitled to be paid the proportion of every other splittable payment in respect of the interest that the remaining base amount bears to the value of the superannuation interest after the non-member spouse was paid the first splittable payment following the operative time of the payment split.

Part 7 makes general provision about payment splitting.

Regulation 59 provides for the trustee of a plan to be able to charge reasonable fees in respect of a payment split, a payment flag, flag lifting under a flag lifting agreement that does not provide for a payment split, an order terminating the operation of a payment flag and an application for information about a superannuation interest.

With two exceptions, the fee is payable by the spouse and the member spouse in equal parts.

The first exception is that the non-member spouse must pay a fee in respect of a payment split under which he or she is entitled to be paid the whole amount of each splittable payment that becomes payable.

The second exception is that a fee payable in respect of an application for information about a superannuation interest is payable by the person who makes the application.

Regulation 60 provides that a waiver notice must be in accordance with Form 5 in Schedule 1.

Regulation 61 provides for the definition of terms used in Division 7.2, which makes provision in relation to applications to a trustee of a plan under section 90MZB of the Act for information about a superannuation interest.

Regulation 62 provides, with Form 6 in Schedule 1, for the form of the declaration which must accompany an application under section 90WB.

Regulation 63 provides for the content of the information that a trustee of a plan must provide to an applicant for information about a superannuation interest, other than a percentage-only

interest or an interest in a self managed superannuation fund, that is an accumulation interest or a component of which is such an interest. The information will enable the applicant to value such an interest using the method set out in Part 5 of the Regulations.

Regulations 64 and 65 provide for the content of the information that a trustee of a plan must provide to an applicant for information about a superannuation interest, other than a percentage-only interest or an interest in a self managed superannuation fund, that is a defined benefit interest or a component of which is such an interest.

Regulation 66 provides for the content of the information that a trustee of a plan must provide to an applicant for information about a percentage-only interest, other than an interest in a self managed superannuation fund.

Regulation 67 provides for the content of the information that a trustee of a plan must provide to an applicant for information about an interest in a self managed superannuation fund.

Regulation 68 provides for the content of the information that a trustee of a plan must provide to an applicant for information about an account in the Superannuation Accounts Holding Reserve.

Regulation 69 provides that a secondary government trustee of a plan, other than a secondary trustee of the scheme constituted by the *Parliamentary Contributory Superannuation Act 1948*, is not required to provide any information to an applicant for information about a superannuation interest.

Regulation 70 provides for a notice that it is required that the trustee of a plan other than a regulated superannuation fund, an approved deposit fund, a retirement savings account or an account in the Superannuation Accounts Holding Reserve should give to the non-member spouse as soon as practicable after the operative time for the payment split.

Regulation 71 Provides for information that the trustee of an interest in the growth phase in an exempt public sector superannuation scheme, a superannuation fund that is not a regulated superannuation fund or the scheme constituted by the Superannuation Act 1922 that is not a percentage-only interest is required to give the non-member spouse for each financial year. An offence, with a penalty of one penalty unit (currently \$110 for a natural person, \$550 for a body corporate), is created if the trustee does not give the information to the nonmember spouse within 6 months after the end of the relevant financial year.

Regulation 72 provides for particulars about which a non-member spouse in relation to a superannuation interest that is subject to a payment split must notify the trustee of the plan in which the interest is held.

Schedule 1 provides for the prescribed form of notices, requests and a declaration required by provisions of the Regulations.

Schedule 2 provides for the method for determining the gross value of a superannuation interest that is a defined benefit interest, or is made up of components one of which is such an interest, in the growth phase.

Schedule 3 provides for the method for determining the gross value of a superannuation interest that is a partially vested accumulation interest, or is made up of components one of which is such an interest, in the growth phase.

Schedule 4 provides for the method for determining the gross value of a superannuation interest, in the payment phase, if the benefits payable in respect of the interest are payable as a pension for the life of the member spouse.

Schedule 5 provides for the method for determining the gross value of a superannuation interest, in the payment phase, if the benefits payable in respect of the interest are payable as a pension for a fixed term.

Schedule 6 provides for the method for determining the gross value of a superannuation interest, in the payment phase, if part of the benefits in respect of the interest is being paid as a pension and the remaining part is payable as a lump sum that is not a commutation of a pension at a later time.