

Family Law (Superannuation) Amendment Regulations 2002 (No. 1)

2002 No. 176

EXPLANATORY STATEMENT

STATUTORY RULES 2002 No. 176

ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

FAMILY LAW ACT 1975

FAMILY LAW (SUPERANNUATION) AMENDMENT REGULATIONS 2002 (No. 1)

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 *Family Law Legislation Amendment (Superannuation) Act 2001* (the Amendment Act) inserted into the Act Part VIIIIB which relates to the division of superannuation interests between parties to a marriage on marriage breakdown or divorce.

The purpose of the Regulations is to amend the Family Law (Superannuation) Regulations 2001 (the Principal Regulations) to make minor technical and drafting changes to reflect the Government's family law and superannuation reforms relating to the valuation of superannuation interests, the entitlement of parties when interests are divided and the provision of information to parties before and after division occurs.

The Regulations:

- provide for additional types of payments in respect of a superannuation interest of a party to a marriage that can not be split for the purposes of the Part (Item 22);
- provide for the Minister to be able to approve a method for determining the value of a superannuation interest in the payment phase that is paying a pension for the life of the member spouse (Items 30 and 31);
- prescribe the entitlement of a non-member spouse, under a base amount payment split (one of the two kinds of splits that can be made under Part VIIIIB of the Act of most superannuation interests), when the superannuation interest pays benefits in the form of an allocated pension (Items 63 and 77);
- where the member spouse has re-married and split his or her superannuation interest two or more times, prescribe the entitlement under a base amount payment split of any second or subsequent non-member spouse when a payment becomes payable in respect of such an interest (Items 35, 77 and 139);
- prescribe the category of persons who can provide independent financial advice to a non-member spouse about the financial effect of any waiver of entitlements under a payment split, and certify that the advice has been provided (Item 81);
- prescribe additional information which a trustee of a superannuation plan must provide in response to an application under the Act for information about the interest, and one further circumstance in which particular information is not required to be provided (Items 84, 86, 89, 92, 94, 98, 104, 106, 110, 112 and 115 to 117);

- provide how information about a superannuation interest must be provided to an applicant, and for the evidentiary effect in proceedings of the form in which it is required to be given (Item 117);
- provide a new Schedule 1A that sets out a method for calculating the value of a non-member spouse's entitlement of a percentage only interest in the payment phase (Item 128); and
- provide for additional factors for the purpose of the method contained in the Principal Regulations for valuing a superannuation interest in the payment phase that is paying a lifetime pension, for use when a member spouse under 35 years of age is receiving an invalidity pension and where the pension is CPI indexed but with a 5% cap on annual increases (Item 136).

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 after the Act has received the Royal Assent and before the Act concerned comes into operation as if the Act had come into operation.

Details of the Regulations are as follows:

Relation 1 is formal.

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

Regulation 3 provides for the amendment of the Principal Regulations by Schedule 1.

Schedule 1

Item 1: Regulation 3, definition of 'accumulation fund'

This item omits a definition that is not used in the Principal Regulations.

Item 2: Regulation 3, definition of 'allocated pension'

This item inserts new paragraphs (a) and (b) into the definition to remove any doubt that the provisions in the Principal Regulations relating to allocated pensions apply to pensions that meet the standards for such pensions prescribed by the Superannuation Industry (Supervision) Regulations or by the Retirement Savings Account Regulations.

Item 3: Regulation 3 definition of 'defined benefit fund'

This item omits a definition that is not used in the Principal Regulations.

Item 4: Regulation 3 after definition of 'members retirement age' including the note

This item inserts a definition of the term 'net earnings', a term used in new subregulation 48(2).

Item 5: Regulation 3 definition of 'percentage-only interest'

This item, with item 13, makes a drafting change, so that the term 'percentage-only interest' is prescribed in new regulation 9A.

Item 6: Regulation 3 definition of 'relevant date' subparagraph (a)(ii)

This item amends the definition of 'relevant date' to correct subparagraph (a)(ii) so that the rule that applies about the relevant date for the purposes of superannuation agreement or a flag lifting agreement - that it is the date when the copy of the agreement is served on the trustee - applies to agreements that are undated, rather than unsigned.

Item 7: Regulation 3, after definition of 'trustee'

This item provides signposts to definitions of terms used in other provisions of the Principal Regulations which are 'unflaggable interest' and 'unsplittable interest'.

Item 8: Regulation 3, definition of 'unit trust'

This item omits a definition as a result of the replacement of new subregulations 48(2) and (3) of the Principal Regulations.

Item 9: After paragraph 5(1)(a)

This item amends the definition of 'defined benefit interest' by inserting paragraph 5(1)(ab), to ensure that benefits payable to some judges and, in some circumstances, to members of parliament are defined benefit interests for the purposes of the Principal Regulations.

Item 10: Subregulation 7(1)

This item makes a drafting change to the application provision in regulation 7 of the Principal Regulations.

Items 11 and 12: Subregulations 7(3) and 7(4)

These items amend the definition of 'releasing event', a concept that is intended to replicate, for the purposes of determining whether an interest in a superannuation fund that is not a regulated superannuation fund is in the growth phase, the concept of a 'condition of release' which is relevant in determining that issue in relation to an interest in a regulated superannuation fund. The item replaces subparagraph 7(3)(a)(iii) of the Principal Regulations which, mistakenly, provided for temporary incapacity instead of permanent incapacity as a releasing event (new paragraph 7(3)(c)), and inserts an additional paragraph 7(3)(d) to provide for a releasing event where the member spouse has turned 65 years. A consequential drafting change is made to subregulation 7(4).

Item 13: After regulation 9

This item, with item 5, makes a drafting change, so that the term 'percentage-only interest' is prescribed in new regulation 9A, inserted by this item.

Item 14: After regulation 10

This item amends the Principal Regulations to insert a new regulation 10A to prescribe a superannuation interest in the payment phase as an unflaggable interest.

Prescription of such an interest will prevent courts or parties being able to place a payment flag - which, in the case of a court ordered payment flag, is a process in the nature of an injunction requiring the trustee not to make any splittable payments in respect of the interest without the leave of the court - on a superannuation interest that is already paying benefits (for example, regular pension payments when the member spouse with the interest has already retired).

Items 15 and 16: Regulation 11

These items amend regulation 11 of the Principal Regulations and insert a new subregulation 11(2) to provide an exception for Judges' Pensions Act schemes superannuation interests in the Commonwealth and South Australia to the prescription of a superannuation interest of a member spouse as an unsplittable interest where the withdrawal benefit of the member spouse is less than \$5,000. Those interests provide pension benefits only on satisfaction of particular conditions (for example, in the case of a Commonwealth Judge over 60 years of age who has retired, by having served as a Judge for not less than 10 years). If a Judge resigns before satisfying a relevant condition, the minimum level of superannuation support required under the Commonwealth's Superannuation Guarantee arrangements is payable under other legislative arrangements (for example, in relation to Commonwealth Judges, by virtue of a Declaration made on 9 August 1993 by the Minister for Finance under sections 3F and 4A of the *Superannuation (Productivity) Benefit Act 1988*). The exception will enable a member spouse with a superannuation interest mentioned in new subregulation 11(2) to provide for a payment split in respect of the interest in a family law property settlement should his or her marriage break down any time before the relevant condition has been satisfied.

Item 17: Part 2, after the heading

This item provides for a heading of new Division 2.1 of Part 2 of the Principal Regulations, consequent on the inclusion of two Divisions in Part 2, new Division 2.1 dealing with payments in respect of a superannuation interest of a member spouse that are not splittable generally if they are payments of a particular character (regulations 12 and 13 of the Principal Regulations), and new Division 2.2 (Item 22) dealing with particular circumstances in which payments in respect of such an interest of any character are not splittable (new regulations 14 to 14N).

Item 18: Paragraph 12(1)(c)

This item replaces paragraph 12(1)(c) of the Principal Regulations with a new paragraph 12(1)(c) to confine the category of temporary incapacity payments that are not splittable payments for the purposes of Part VIIIIB of the Act to payments that are pension payments and to remove the requirement that the member spouse receiving the payment must have ceased to be gainfully employed.

Items 19: Paragraph 12(1)(d)

Item 19 replaces paragraph 12(1)(d) of the Principal Regulations with a new paragraph 12(1)(d). A series of temporary incapacity payments will remain splittable payments 2 years after payments of that kind have commenced to be paid in all circumstances. New paragraph 12(1)(d) will provide that a payment made to a member spouse in respect of an interest in a superannuation fund that is not a regulated superannuation fund on compassionate grounds as provided by the governing rules of the fund is a payment that is not a splittable payment for the purposes of Part VIIIIB of the Act. A payment made to a member spouse on compassionate grounds in respect of an interest in a regulated superannuation fund is, under paragraph 12(1)(a) of the Principal Regulations, already a payment that is not splittable.

Item 20: Subregulation 12(2), definitions of 'gainfully employed' and 'members retirement age'

Item 20 omits a definition of 'member's retirement age', a term used in paragraph 12(1)(d) of the Principal Regulations.

Item 21: Subparagraphs 13 (1)(b)(i) and (ii)

This item amends regulation 13 of the Principal Regulations by inserting an additional subparagraph (subparagraph 13(1)(b)(i)) to confine the category of adult child reversionary beneficiary payments that are not splittable payments for the purposes of Part VIIIIB of the Act to payments to such a person who was, immediately before the death of the member spouse,

dependent on the member spouse. Under subparagraph 13(1)(b)(ii) a payment to an adult child reversionary beneficiary is not a splittable payment if the payment is made to enable the child to complete his or her education or to provide maintenance and expenses in respect of special needs he or she has because of a physical or intellectual disability.

Item 22: Regulation 14

This item replaces regulation 14 of the Principal Regulations with new Division 2.2 dealing with particular circumstances in which payments in respect of a superannuation interest of a member spouse are not splittable.

This item, with item 17, proposes the inclusion of two Divisions in Part 2, new Division 2.1 (item 17) dealing with payments in respect of a superannuation interest of a member spouse that are not splittable generally if they are payments of a particular character (regulations 12 and 13 of the Principal Regulations), and new Division 2.2 dealing with particular circumstances in which payments in respect of such an interest of any character are not splittable (new regulations 14 to 14N).

Like the replaced regulation 14 of the Principal Regulations, those particular circumstances will be time-related, being a circumstance occurring after the happening of one of a number of particular events.

Also like the replaced regulation 14, the effect of new Division 2.2 is to bring to an end a payment split where the non-member spouse's entitlement under it has been satisfied in some other way.

New Division 2.2 sets out those categories of payments that are not splittable payments in two Subdivisions in Division 2 of Part 2. New Subdivision 2.2.2 (new regulations 14E to 14H) deals with payments in respect of a superannuation interest that is not a percentage-only interest and new Subdivision 2.2.3 (new regulations 14M and 14N) deals with payments in respect of a superannuation interest that is a percentage-only interest.

The expansion of the categories of payments under new Division 2.2 that are not splittable has resulted from further consultations by Government with State and Territory superannuation officials and with the superannuation industry.

In relation to superannuation interests that are not percentage-only interests, the additional categories of payments in new Subdivision 2.2.2 that are not splittable are ones made after the trustee has:

- paid to the non-member spouse, under the payment split provisions of the Superannuation Industry (Supervision) Regulations (the SIS Regulations), an amount that is at least the amount to which he or she is entitled in respect of the interest at the time of the payment (new regulation 14F(2)(c));
- opened a new Retirement Savings Account ('RSA'), under the payment split provisions of the RSA Regulations, for the non-member spouse (new regulation 14F(3)(a));
- transferred or rolled out under those provisions an amount equal to the value that such an RSA would be required to have, or paid to the non-member spouse an amount that is at least the amount to which he or she is entitled in respect of the interest at the time of the payment (new regulation 14F(3)(b) and (c));
- except in the case of a defined benefit interest in a self managed superannuation fund, created a new interest in the plan, under its governing rules, for the non-member spouse having

a value of at least his or her entitlement in respect of the interest at the time the interest is created (new regulation 14G(3)(b)(i));

- transferred or rolled out, under the governing rules of the plan, an amount to another superannuation fund or to an RSA, to be held for the benefit of the non-member spouse, having a value of at least his or her entitlement in respect of the interest at the time of the transfer or rollout (new regulation 14G(3)(b)(ii) and (4)(b));
- in the case of an interest in a regulated superannuation fund, an approved deposit fund or an RSA, paid to the non-member spouse (who has retired, reached 65 years of age, been permanently incapacitated or died) an amount that is at least the amount to which he or she is entitled in respect of the interest at the time of the payment (new regulation 14N(5)); or
- in the case of an interest in a superannuation fund that is not a regulated superannuation fund, paid to the non-member spouse an amount that is at least the amount to which he or she is entitled in respect of the interest at the time of the payment (new regulation 14G(6)).

Categories of payments in proposed new Subdivision 2.2.3 that are not splittable in respect of superannuation interests that are percentage-only interests are ones made after the trustee has:

- created a new interest in the plan, under its governing rules, for the non-member spouse having a value of at least his or her entitlement in respect of the interest at the time the interest is created (new regulation 14N(3)(a)(i));
- transferred or rolled out, under the governing rules of the plan, an amount to another superannuation fund or to an RSA, to be held for the benefit of the non-member spouse, having a value of at least his or her entitlement in respect of the interest at the time of the transfer or rollout (new regulation 14N(3)(b)(ii));
- in the case of an interest in a regulated superannuation fund, an approved deposit fund or an RSA, paid to the non-member spouse (who has retired, reached 65 years of age, been permanently incapacitated or died) an amount that is at least the amount to which he or she is entitled in respect of the interest at the time of the payment (new regulation 14N(4)); or
- in the case of an interest in a superannuation fund that is not a regulated superannuation fund, paid to the non-member spouse an amount that is at least the amount to which he or she is entitled in respect of the interest at the time of the payment (new regulation 14G(5)).

In the case of any new interest created, transfer or roll out or payment to a non-member spouse in respect of a defined benefit interest, the governing rules of the plan must not provide for the reduction of the benefit payable to any other member of the plan other than the member spouse (new subregulations 14G(7) and 14N(6)).

In relation to the replacement of regulation 14(3) and (4) by new regulation 14H, replacement paragraphs 14H(2)(d) and (3)(d) provide that only the non-member spouse need sign the notice. It is the non-member spouse who is giving up entitlements under new regulation 14H (in return for payment of an amount in satisfaction of that entitlement), and so it is not necessary for the member spouse to sign the notice. The member spouse is not required to sign a waiver notice (Form 5 of Schedule 1 of the Principal Regulations) under section 90MZA of the Act, an analogous procedural document where the entitlement under a payment split is being met by a lump sum paid by the trustee of the plan in which the member spouse's interest is held out of benefits otherwise payable to the member spouse.

Subregulation 14N also provides that the value of the non-member spouse's entitlement is determined in accordance with new Schedule 1A added by Item 128.

New Division 2.2 also incorporates some drafting changes to regulation 14 of the Principal Regulations.

Item 23: Paragraph 29(a)

This item makes a drafting correction to regulation 29 of the Principal Regulations.

Items 24 to 27: Amendments to regulation 31

Items 24 to 27 amend regulation 31 of the Principal Regulations to:

- confine the application of the methods in regulation 31 that will apply for determining the gross value in the growth phase of an accumulation interest to where relevant documents (in most cases, member information statements) are before the court in evidence in the relevant proceeding (Items 24 and 27);
- remove any doubt that the methods in regulation 31, which provide for determining the value of an accumulation interest by reference to past member information statements (including interpolating as required on a daily basis between the value stated in such statements), require reference to the value of the interest stated in those statements, rather than to the value of anything else stated in them (Items 24 and 27);
- enable the court to determine the value of an accumulation interest by reference to a document issued by the trustee of a plan, that is similar to a member information statement, stating the value of the interest at a particular date (including a past date) (Item 24); and
- make drafting corrections to subregulations 31(3) and (4) (Items 25, 26 and 27).

Item 28: After paragraph 32 (a)

This item makes a drafting correction to regulation 32 of the Principal Regulations.

Item 29: Subregulation 38 (3), note

This item makes drafting corrections to the note following subregulation 38 of the Principal Regulations.

Items 30 and 31: Subregulation 42(2) and After regulation 43

Items 30 and 31 will amend subregulation 42(2) of the Principal Regulations and insert new regulation 43A to provide a power for the Minister to approve in writing methods or factors for use in determining the gross value of an interest in the payment phase that is paying benefits as a pension for the life of the member spouse.

It is expected that the power will be exercised to approve factors for valuing such an interest where the pension has a guarantee period (for example, that payments will continue for a particular period if the member spouse dies before that time). Such an interest will have a different value depending on the length of the guarantee period and the age of the member spouse at the time that the interest is being valued. If the factors taking into account guarantee periods were incorporated in Schedule 5, they would have substantially increased the length and the complexity of the Schedule.

Items 32 and 33: Amendments to regulation 44

Items 32 and 33 omit the definition of the terms 'relevant condition of release', 'gainful employment' and 'accrual period' in, and make a consequential change to the Heading for,

regulation 44 of the Principal Regulations. The definitions of the first two terms are no longer necessary as a result of the amendments to provisions in Division 6.2 of Part 6 of the Principal Regulations. A concept of 'adjustment period', in similar terms to the concept of an 'accrual period', is used in new subregulation 47(2) and regulation 48 (Items 36 and 37), and is defined in new subregulation 47(3).

Items 34 and 35: Regulation 46

Items 34 and 35 amend regulation 46 of the Principal Regulations to insert additional subregulation 46(2) to limit Division 6.2 of Part 6 to a payment split that is the first or only payment split in respect of a superannuation interest of a member spouse and to provide for the application of the Division, with the modifications set out in Schedule 7, to a second or later payment split (for example, where the second marriage of a member spouse breaks down and a second order or agreement under Part VIIIB of the Act is made with the second spouse in respect of the member's superannuation interest).

Item 36: Subregulations 47(2) and (3)

This item amends regulation 47 of the Principal Regulations to replace subregulations 47(2) and (3) with new subregulations 47(2), (3) and (4).

The main substantive change is to replace the concept of an 'accrual period' in regulation 47 with the concept of an 'adjustment period'. Under new subregulation 47(2), the trustee is required, in the case of a base amount payment split (one of the two kinds of splits that can be made under Part VIIIB of the Act of most superannuation interests), to adjust the relevant base amount by the amount of interest that applies to the superannuation interest for the adjustment period. The change of concept reflects that interest cannot be said to have accrued when, for example, the trustee of the plan in which an accumulation interest is held, where the plan has had a negative return on its investments, has allocated negative net earnings to the member spouse.

The other substantive change is to provide for the adjustment of the relevant base amount if a splittable payment becomes payable part way through an adjustment period.

Item 37: Regulation 48

This item amends regulation 48 of the Principal Regulations to:

- as explained above in relation to the amendments proposed by Items 32 and 33 and Item 36, replace the concept of an 'accrual period' with the concept of an 'adjustment period';
- replace the notion of a crediting rate, as the interest rate for adjusting a base amount in respect of a payment split of an accumulation interest, with one of an allotment of net earnings (for regulated superannuation funds, approved deposit funds and Retirement Savings Accounts) and another of an allocation of investment earnings (for superannuation funds other than regulated superannuation funds);
- align the interest rate for adjusting a base amount in respect of a payment split of an interest in a self managed superannuation fund, and of any accumulation interest where there has been no allotment or allocation of earnings, with the interest rate that applies in the case of a base amount payment split of a defined benefit interest (the percentage change in average weekly ordinary time earnings ('AWOTE') published periodically by the Australian Bureau of Statistics ('ABS'), plus 2.5 percentage points); and

- provide for the application of the ABS's AWOTE index in situations where the 12 month or quarterly publication by the ABS of the index, and the period for which the index applies, does not coincide precisely with the adjustment period.

Item 38: Subregulation 49(l)

This item amends regulation 49 of the Principal Regulations to make drafting changes and corrections to subregulation 49(l).

The corrections will:

- extend the application of regulation 49 so that it sets out the entitlement of a nonmember spouse in respect of a base amount payment split in respect of any splittable payment that is a lump sum (and not just splittable payments where the member spouse has satisfied a relevant condition of release); and
- provide that regulation 49 applies, relevantly, when the member spouse is entitled to receive a lump sum, rather when he or she has received it.

Regulation 49 provides for the entitlement of the non-member spouse when the lump sum is equal to or more than the adjusted base amount applicable to the non-member spouse at the time that the lump sum becomes payable.

Item 39: Subregulation 50(1)

This item amends regulation 50 of the Principal Regulations to make drafting changes and corrections to subregulation 50(1).

The corrections will:

- extend the application of regulation 50 so that it sets out the entitlement of a nonmember spouse in respect of a base amount payment split in respect of any splittable payment that is a lump sum (and not just splittable payments where the member spouse has satisfied a relevant condition of release); and
- provide that regulation 50 applies, relevantly, when the member spouse is entitled to receive a lump sum, rather when he or she has received it.

Regulation 50 provides for the entitlement of the non-member spouse when the lump sum is less than the adjusted base amount applicable to the non-member spouse at the time that the lump sum becomes payable.

Items 40 to 43: Amendments to subregulations 51(1) and (2)

These items make a drafting correction, and also some drafting changes to subregulation 51(1) and (2) of the Principal Regulations consequential on the extension of the application of regulation 50 by Item 39.

Item 44: Subregulation 51(3), definitions of 'Comm' and 'Py+m'

This item makes drafting changes and corrections to the definitions of the concepts of 'Comm' and 'Py+m' consequential on the extension of the application of regulation 50 by Item 39 and the insertion of new regulation 43A by Item 31. The definition of 'Py+m' is also corrected to apply the pension valuation factor under Schedule 5 when the pension payable to the member spouse in respect of his or her superannuation interest is a fixed term pension.

Item 45: Paragraph 51(4)(a)

This item makes a drafting change to paragraph 51(4)(a) of the Principal Regulations consequential on the extension of the application of regulation 50 by Item 39.

Items 46 to 52: Amendments to subregulations 51(4), (5), (6) and (7)

These items amend subregulations 51(4), (5), (6) and (7) of the Principal Regulations so that, when the non-member spouse requests the member spouse under subregulation 51(1), to commute pension payments to pay a proportion of the adjusted base amount applicable to the non-member spouse, the non-member spouse will receive the same proportion of any additional amount that the member spouse commutes of his or her pension payments in response to that request as the non-member spouse will receive of all future splittable payments in respect of the interest.

Item 53: Subregulation 52(1)

This item amends regulation 52 of the Principal Regulations to make drafting changes consequential on other amendments to the Principal Regulations.

New paragraph 52(1)(a) will confine the application of regulation 52 so that it does not apply to an interest in respect of which benefits are payable as an allocated pension. New regulation 54A of the Principal Regulations (Item 63) will set out the entitlement of a non-member spouse under a base amount payment split made or ordered in the growth phase in respect of such an interest.

A drafting change to new paragraph 52(1)(b) is consequential on the extension of the application of regulation 50 by Item 39.

Item 54: Subregulation 52(2), definitions of 'Comm' and 'Py+m'

The amendment made by this item is explained at Item 44 above.

Item 55: Subregulation 53(1)

This item amends regulation 53 of the Principal Regulations to make drafting changes consequential on other amendments to the Principal Regulations.

New paragraph 53(1)(a) will confine the application of regulation 53 so that it does not apply in respect an interest in respect of which benefits are payable as an allocated pension. New regulation 54A of the Principal Regulations (Item 63) will set out the entitlement of a nonmember spouse under a base amount payment split made or ordered in the growth phase in respect of such an interest.

A drafting change to new paragraph 53(1)(b) is consequential on the extension of the application of regulation 50 by Item 39.

Items 56 to 61: Amendments to subregulations 53(2), (3) and (4)

These items amend subregulations 53(2), (3) and (4) of the Principal Regulations so that, when the non-member spouse requests the member spouse under subregulation 53(1) to commute pension payments to pay a proportion of the adjusted base amount applicable to the non-member spouse, the non-member spouse will receive the same proportion of any additional amount that the member spouse commutes of his or her pension payments in response to that request as the non-member spouse will receive of all other splittable payments in respect of the interest.

Item 62: Subregulation 54(1)

This item amends regulation 54 of the Principal Regulations to make drafting changes consequential on other amendments to the Principal Regulations.

New paragraph 54(1)(a) will confine the application of regulation 54 so that it does not apply to an interest in respect of which benefits are payable as an allocated pension. New regulation 54A of the Principal Regulations (Item 63) will set out the entitlement of a non-member spouse under a base amount payment split made or ordered in the growth phase in respect of such an interest.

A drafting change to new paragraph 54(1)(b) is consequential on the extension of the application of regulation 50 by Item 39.

Item 63: After regulation 54

This item amends the Principal Regulations to insert new regulation 54A to provide for the entitlement of a non-member spouse in respect of a base amount payment split of a superannuation interest in respect of which benefits are payable as an allocated pension that is made or ordered in the growth phase.

At the time a splittable payment becomes payable in respect of the interest, the non-member spouse is entitled to be paid the adjusted base amount applicable to him or her at that time out of the lump sum from which the allocated pension is payable.

If the lump sum out of which the allocated pension is payable is less than the adjusted base amount applicable to the non-member spouse, the non-member spouse is entitled to be paid the lump sum and, in addition, the proportion of every future splittable payment in respect of the superannuation interest that the remaining adjusted base amount bears to the value of the interest after the nonmember spouse has been paid the lump sum from which the allocated pension is payable.

Item 64: Division 6.3, heading

This item inserts a Heading into Division 6.3 of the Principal Regulations as a consequence of the introduction of new Subdivisions 6.3.1, 6.3.2 and 6.3.3 into Division 6.3, by Item 65.

Item 65: Before regulation 56

This item inserts:

- a Heading for proposed new Subdivision 6.3.2 into the Principal Regulations; and
- additional regulation 55A into the Principal Regulations, providing for the application of new Subdivision 6.3.2.

Item 66: Subregulation 56(1)

This item amends subregulation 56(1) of the Principal Regulations to confine the application of regulation 56 so that it does not apply if the first splittable payment in respect of the interest after the operative time of the payment split is a payment in respect of an allocated pension. New regulation 58A of the Principal Regulations (Item 77) will set out the entitlement of a nonmember spouse under a base amount payment split made or ordered in the payment phase in respect of such an interest.

Item 67: Subregulation 57(1)

This item amends subregulation 57(1) of the Principal Regulations to confine the application of regulation 57 so that it does not apply if the first splittable payment in respect of the interest after the operative time of the payment split is a payment in respect of an allocated pension. New regulation 58A of the Principal Regulations (Item 77) will set out the entitlement of a nonmember spouse under a base amount payment split made or ordered in the payment phase in respect of such an interest.

Item 68: Subregulation 58(1)

This item makes a drafting correction to subregulation 58(1) of the Principal Regulations.

Item 69: Subregulation 58(3), definitions of 'Comm' and 'Py+m'

The amendment made by this item is explained at Item 44 above.

Items 70 to 76: Amendments to subregulations 58(4), (5), (6) and (7)

These items amend subregulations 58(4), (5), (6) and (7) of the Principal Regulations so that, when the non-member spouse requests the member spouse under subregulation 58(1) to commute pension payments to pay a proportion of the base amount allocated to the non-member spouse, the non-member spouse will receive the same proportion of any additional amount that the member spouse commutes of his or her pension payments in response to that request as the non-member spouse will receive of all future splittable payments in respect of the interest.

Item 77: After regulation 58

This item amends the Principal Regulations to insert new regulation 58A and Subdivision 6.3.3.

New regulation 58A will provide for the entitlement of a non-member spouse in respect of a base amount payment split of a superannuation interest that is made or ordered in the payment phase where the first splittable payment in respect of the interest after the operative time of the payment split is a payment in respect of an allocated pension.

At the time a splittable payment becomes payable in respect of the interest, the non-member spouse is entitled to be paid the base amount allocated to him or her out of the lump sum from which the allocated pension is payable.

If the lump sum out of which the allocated pension is payable is less than the base amount allocated to the non-member spouse, the non-member spouse is entitled to be paid the lump sum and, in addition, the proportion of every future splittable payment in respect of the superannuation interest that the remaining base amount bears to the value of the interest after the non-member spouse has been paid the lump sum from which the allocated pension is payable.

New Subdivision 6.3.3 will provide for the entitlement of a second or subsequent non-member spouse under a second or later base amount payment split of a superannuation interest of a member spouse that is made or ordered in the payment phase. Such a payment split may occur where a second marriage of the member spouse breaks down and a second order or agreement under Part VIIIIB of the Act is made with the second spouse in respect of the member's superannuation interest.

Items 78, 79 and 80: Amendments to subregulation 59(1)

These items amend subregulation 59(1) of the Principal Regulations to provide that the trustee may charge reasonable fees in respect of things done in relation to a superannuation interest

covered by a superannuation agreement, flag lifting agreement of splitting order (for example, the creation of a new interest for the non-member spouse in the plan).

Item 81: Regulation 60

This item amends regulation 60 of the Principal Regulations to insert additional subregulation 60(2) to prescribe the persons who are able to provide independent financial advice to a nonmember spouse who proposes to waive his or her entitlement under a payment split.

Item 82 and 83: Amendments to subregulation 63(1)

These items amend subregulation 63 (1) of the Principal Regulations consequential on proposed new regulation 68A (Item 117).

Items 84 to 86: Amendments to subregulation 63(2)

These items amend subregulation 63 (2) of the Principal Regulations to make a drafting change consequential on new subregulation 63(6) (Item 89) and to provide for additional information that the trustee of a plan must provide to an applicant for information under section 90MZB of the Act about an accumulation interest. That additional information is whether the interest is an unsplittable interest, whether the interest is subject to a payment split and the details of any fee that may be charged by the trustee. If the interest is subject to a payment split, particular information must be provided about the payment split (Item 89).

Item 87: Subregulation 63(3)

This item makes drafting corrections to subregulation 63(3) of the Principal Regulations.

Item 88: Paragraphs 63(4)(d),(e) and (f)

This item amends subregulation 63(4) of the Principal Regulations to replace paragraphs 63(4)(d), (e) and (f).

Neither of new paragraphs 63(4)(d) or (e) require the trustee to provide information to an applicant for information under section 90MZB of the Act about preserved benefits, which is what remains after benefits which are restricted non-preserved and unrestricted non-preserved.

New paragraphs 63(4)(d) and (f) specify particular circumstances:

- in which information about the relevant preservation and taxation components of the interest must be provided by the trustee; or
- that will determine what precise preservation and taxation component information is provided by the trustee to an applicant for information under section 90MZB of the Act.

Item 89: After subregulation 63 (4)

This item amends regulation 63 of the Principal Regulations to insert additional subregulations 63(5) and (6). New subregulation 63(5) sets out the particular information which a trustee is required to provide an applicant for information under section 90MZB of the Act when the interest is subject to a payment split. New subregulation 63(6) provides that the trustee is only required to provide particular information relating to the value of an interest if a record of that information is in its possession, power or control. Some information relating to a superannuation interest, particularly historical information that parties to a marriage may require about the interest, may no longer be kept by trustees.

Items 90 and 91: Amendments to subregulation 64(1)

These items amend subregulation 64(1) of the Principal Regulations consequential on new regulation 68A (Item 117).

Items 92 to 94: Amendments to subregulation 64(2)

These items amend subregulation 64(2) of the Principal Regulations to make a drafting change consequential on new subregulation 64(6) (Item 98) and to provide for additional information that the trustee of a plan must provide to an applicant for information under section 90MZB of the Act about a defined benefit interest. That additional information is whether the interest is an unsplitable interest, whether the interest is subject to a payment split and the details of any fee that may be charged by the trustee. If the interest is subject to a payment split, particular information must be provided about the payment split (Item 98).

Item 95: Subregulation 64(3)

This item makes drafting corrections to subregulation 64(3) of the Principal Regulations.

Items 96 and 97: Amendments to subregulation 64(4)

These items amend subregulation 64(4) of the Principal Regulations to make a drafting correction to paragraph 64(4)(b) and to replace paragraphs 64(4)(k), (1) and (m).

Neither of new paragraphs 64(4)(k) or (1) require the trustee to provide information to an applicant for information under section 90MZB of the Act about preserved benefits, which is what remains after benefits which are restricted non-preserved and unrestricted non-preserved.

New paragraphs 64(4)(k) and (m) specify particular circumstances:

- in which information about the relevant preservation and taxation components of the interest must be provided by the trustee; or
- that will determine what precise preservation and taxation component information is provided by the trustee to an applicant for information under section 90MZB of the Act.

Item 98: After subregulation 64(4)

This item amends regulation 64 of the Principal Regulations to insert additional subregulations 64(5) and (6). New subregulation 64(5) sets out the particular information which a trustee is required to provide an applicant for information under section 90MZB of the Act when the interest is subject to a payment split. New subregulation 64(6) provides that the trustee is only required to provide particular information relating to the value of an interest if a record of that information is in its possession, power or control. Some information relating to a superannuation interest, particularly historical information that parties to a marriage may require about the interest, may no longer be kept by trustees.

Items 99 to 101: Amendments to subregulations 65 (3), (4) and (5)

These items amend regulation 65 of the Principal Regulations to make drafting changes to subregulations 65(3), (4) and (5).

Item 102: After subregulation 65(6)

This item amends regulation 65 of the Principal Regulations which provides for the meaning of 'accrued benefit multiple', a term used in Schedule 2 in relation to the method for determining

the value of a defined benefit interest of a member spouse in the growth phase. The item inserts additional subregulation 65(6A) to pick up, for the purpose of the default accrued benefit multiple that applies if, one is not defined under the governing rules of a superannuation plan, any backdated or deemed accrual of benefits by the member spouse before the date he or she acquired the defined benefit interest.

Item 103: Subregulation 66(1)

This item amends subregulation 66(1) of the Principal Regulations consequential on new regulation 68A (Item 117).

Items 104 to 106: Subregulation 66(2)

These items amend subregulation 66(2) of the Principal Regulations to make a drafting change consequential on new subregulation 66(6) (Item 110) and to provide for additional information that the trustee of a plan must provide to an applicant for information under section 90MZB of the Act about an accumulation interest. That additional information is whether the interest is an unspittable interest, whether the interest is subject to a payment split and the details of any fee that may be charged by the trustee. If the interest is subject to a payment split, particular information must be provided about the payment split (Item 110).

Item 107: Subregulation 66(3)

This item makes drafting corrections to subregulation 66(3) of the Principal Regulations.

Items 108 and 109: Amendments to subregulation 66(4)

These items amend subregulation 66(4) of the Principal Regulations to make a drafting correction to paragraph 66(4)(a) and to replace paragraphs 64(4)(d) and (e).

New paragraph 66(4)(d) does not require the trustee to provide information to an applicant for information under section 90MZB of the Act about preserved benefits, which is what remains after benefits which are restricted non-preserved and unrestricted non-preserved.

New paragraphs 66(4)(d) and (e) specify particular circumstances:

- in which information about the relevant preservation and taxation components of the interest must be provided by the trustee; or
- that will determine what precise preservation and taxation component information is provided by the trustee to an applicant for information under section 90MZB of the Act.

Item 110: After subregulation 66(4)

This item amends regulation 66 of the Principal Regulations to insert additional subregulations 66(5) and (6). New subregulation 66(5) sets out the particular information which a trustee is required to provide an applicant for information under section 90MZB of the Act when the interest is subject to a payment split. New subregulation 66(6) provides that the trustee is only required to provide particular information relating to the value of an interest if a record of that information is in its possession, power or control. Some information relating to a superannuation interest, particularly historical information that parties to a marriage may require about the interest, may no longer be kept by trustees.

Item 111: Subregulation 67(1)

This item amends subregulation 67(l) of the Principal Regulations consequential on new regulation 68A (Item 117).

Items 112 to 115: Amendments to subregulation 67(2)

These items amend subregulation 67(2) of the Principal Regulations to make a drafting change consequential on new subregulation 67(5) (Item 116) and to provide for additional information that the trustee of a plan must provide to an applicant for information under section 90MZB of the Act about an interest in a self managed superannuation fund. That additional information is whether the interest is an unsplittable interest, whether the interest is subject to a payment split, (if requested) a copy of the governing rules of the plan and the details of any fee that may be charged by the trustee. If the interest is subject to a payment split, particular information must be provided about the payment split (Item 116).

Item 116: Subregulation 67(31)

This item amends regulation 67 of the Principal Regulations to make drafting corrections to subregulations 67(3) and to insert additional subregulations 67(4) and (5). New subregulation 67(4) sets out the particular information which a trustee is required to provide an applicant for information under section 90MZB of the Act when the interest is subject to a payment split. New subregulation 67(5) provides that the trustee is only required to provide particular information relating to the value of an interest if a record of that information is in its possession, power or control. Some information relating to a superannuation interest, particularly historical information that parties to a marriage may require about the interest, may no longer be kept by trustees.

Item 117: After regulation 68A

This item amends the Principal Regulations to insert new regulations 68A and 68B.

New regulation 68A enables the non-member spouse under a base amount payment split of a superannuation interest made or ordered in the growth phase to obtain, shortly before the interest enters the payment phase, information from the trustee under the procedure in section 90MZB of the Act about the commutation factor for converting any pension entitlements of the member spouse to a lump sum.

New regulation 68B provides for:

- information about a superannuation interest provided by a trustee to an applicant under section 90MZB of the Act to be provided to the applicant in documentary form, and within a reasonable time of the receipt of the application under that provision; and
- the document to be evidence of the information stated in it and that the document was provided to the applicant.

The document provided to the applicant will then be able to be adduced by him or her in property settlement proceedings under the Act as evidence, where statements in it are relevant to the determination of the value of the superannuation interest (subsection 59(3) of the *Evidence Act* 1995 provides an exception to the hearsay rule for evidence of a representation contained in a document given under regulations made under an Act to the extent that the regulations provide that the document has evidentiary effect).

Items 118 and 119: Subregulation 70(2)

These items make drafting changes to subregulation 70(2) of the Principal Regulations.

Items 120 to 122: Amendments to subregulation 71(1) and (2)

These items make drafting changes to subregulations 71(1) and (2) of the Principal Regulations.

Item 123: Schedule 1 Form 1

This item amends Form 1 of Schedule 1 of the Principal Regulations in consequence of the replacement of regulation 14(3) and (4) by new regulation 14H (Item 22).

Items 124 and 125: Schedule 1 Form 2

These items amend Form 1 of Schedule 1 of the Principal Regulations in consequence of one of the drafting corrections made to subregulation 50(1) of the Principal Regulations (Item 39).

Item 126: Schedule 1 Form 3

This item amends Form 3 of Schedule 1 of the Principal Regulations in consequence of the drafting changes made to subregulations 52(1) and 53(1) of the Principal Regulations (Items 53 and 55).

Item 127: Schedule 1 Form 4

This item makes a drafting correction to Form 4 of Schedule 1 of the Principal Regulations.

Item 128: New Schedule 1A

This item adds a new schedule to the regulations that sets out the method for calculating the value of a non-member spouse's entitlement of a percentage-only interest in the payment phase. The schedule provides separate methods for determining the value of an interest where the benefit payable to the member spouse is a pension and where that benefit is payable as a pension and there is also another benefit payable, such as a lump sum. The value of the entitlement is to include the value of any reversionary benefit that might be payable to a surviving spouse of the member when the interest of the non-member is created or the amount is transferred rolled over or paid to the non-member.

The reversion valuation factor that is used in the calculation of the reversionary benefit, if any is payable, is to be determined in accordance with the table set out in the schedule.

Items 129 and 130: Amendments to Schedule 2, clauses 2 and 27

These items make drafting changes to clauses 2 and 27 of Schedule 2 of the Principal Regulations.

Item 131: Schedule 3, subclause 2(1)

This item makes a drafting correction to re-position a set of brackets in the formula in subclause 2(1) of Schedule 3 of the Principal Regulations.

Items 132 to 135: Amendments to Schedule 3, clause 3

These items amend subclauses 3(2), (3) and (4) of the Principal Regulations as a consequence of the amendments to regulation 31 of the Principal Regulations (Items 24 to 27).

Item 136: Schedule 4, clauses 3 to 9

This item replaces the factors in Schedule 4 of the Principal Regulations that are used to value a superannuation interest in the payment phase that is paying benefits as a pension for the life of

the member spouse. The new factors include the factors in the Principal Regulations for ages 35 and older, but also include factors for ages 18 to 34.

It is necessary to include the factors where, for example, it is necessary to value a superannuation interest in respect of which a member spouse under age 35 is receiving a lifetime invalidity pension. The factors will also be relevant for the purposes of determining, under Divisions 6.2 and 6.3 of Part 6 of the Principal Regulations, the entitlement of a non-member spouse under a base amount payment split where a member spouse under the age of 35 is entitled to receive or is receiving a lifetime pension. In addition some pensions are paid on the basis of CPI indexation with a cap of 5% increase per annum. A new clause 5 has been added to the schedule to provide for factors to value such a pension.

Item 137: Schedule 5, subclause 2(2), definition of 'Py+1'

This item makes a drafting correction to the definition of Py+1 in subclause 2(2) of Schedule 5 of the Principal Regulations.

Item 138: Schedule 5, clause 3, table

This item amends the schedule by adding in a line of numbers to indicate the value of the interest if there is no time remaining. In these circumstances the amount is nil. The item adds a line of zeros to the schedule.

Item 139: After Schedule 6

New Schedule 7 of the Principal Regulations sets out the modifications of Division 6.2 of Part 6 that will apply when determining the entitlement of a second or subsequent non-member spouse under a second or later base amount payment split of a superannuation payment of a member spouse made or ordered in the growth phase. Such a payment split may occur where a second marriage of the member spouse breaks down and a second order or agreement under Part VIIIB of the Act is made with the second spouse in respect of the member's superannuation interest.