

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 16

Issued by Authority of the Attorney-General

Family Law Act 1975
Family Law (Superannuation) Amendment Regulation 2013 (No. 1)

Subsection 125(1) of the *Family Law Act 1975* (the Family Law Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Family Law Act, prescribing all matters required or permitted by the Family Law Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Family Law Act.

The *Family Law (Superannuation) Regulations 2001* (the Principal Regulations) have been prescribed to give effect to the distribution of superannuation interests under Part VIII B of the Family Law Act. The Principal Regulations contain a default method for valuing superannuation interests. If a trustee believes that the design of a particular superannuation plan differs markedly from the assumed design underpinning the default method in the Principal Regulations, they may apply to the Attorney-General for approval of a method specific to their plan.

The purpose of the *Family Law (Superannuation) Amendment Regulation 2013 (No. 1)* (the Regulation) is to amend the Principal Regulations to ensure that the Judges' Pensions Act Scheme (the scheme constituted by the *Judges' Pensions Act 1968* for the provision of retirement and other benefits to and in respect of Judges, within the meaning of that Act) is no longer prescribed as a 'percentage-only interest' in the Principal Regulations.

Paragraph 9A(1)(a) of the Principal Regulations prescribes that a superannuation interest in the Judges' Pensions Act Scheme is a percentage-only interest for the purposes of section 90MD of the Family Law Act. The Regulation omits paragraph 9A(1)(a) from the Principal Regulations.

A percentage-only interest is not valued and split in the same way as other superannuation interests. In this case, this is because the Judges' Pensions Act Scheme does not vest progressively, but only vests once the member of the fund satisfies certain conditions. The current 'percentage-only' splitting arrangements mean that any property settlement/split involving the pension of a Judge occurs only when payments are made to a retired Judge. Payments to a former spouse do not commence until the Judge retires and cease upon the death of the Judge. There is no certainty as to the overall quantum of benefit that the former spouse is entitled to receive.

The Judges' Pensions Act Scheme will be amended by the *Judges and Governors-General Legislation Amendment (Family Law) Act 2012* (the Judges and Governors-General Act) to implement new superannuation splitting arrangements in relation to Federal Judges. The amendments to the Judges' Pensions Act Scheme introduce scheme-specific methods and factors for the splitting of a Judges' pension at the time of a property settlement/split, rather

than rely on the ‘percentage-only’ splitting arrangements whereby any split in a property settlement of the pension of a Judge occurs only when payments are made to a retired Judge.

The methodology for calculating interests in the Judges’ Pensions Act Scheme will be set out in the *Family Law (Superannuation)(Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003*. Therefore, interests in the Judges’ Pensions Act Scheme should no longer be prescribed as ‘percentage-only’ in the Principal Regulations.

Consultation on the form of the Regulation occurred between the Attorney-General’s Department and the Department of Finance and Deregulation (the Secretary of the Department of Finance and Deregulation is the trustee of the Judges’ Pensions Act Scheme) by way of email and telephone exchange.

The Regulation commences on 15 March 2013.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Details of the Regulation are as follows:

Section 1 — Name of regulation

Section 1 provides that the title of the regulation is the *Family Law (Superannuation) Amendment Regulation 2013 (No. 1)*.

Section 2 — Commencement

Section 2 provides that the regulation commences on 15 March 2013.

Section 3 — Authority

Section 3 provides that the regulation is made under the *Family Law Act 1975*.

Section 4 - Schedules

Section 4 provides that the *Family Law (Superannuation) Regulations 2001* are amended as set out in Schedule 1.

Schedule 1 – Amendments

Item [1] – Paragraph 9A(1)(a)

Item 1 repeals paragraph 9A(1)(a) of the *Family Law (Superannuation) Regulations 2001*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Family Law (Superannuation) Amendment Regulation 2013 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Regulation amends the *Family Law (Superannuation) Regulations 2001* (the Principal Regulations) to ensure that the Judges' Pensions Act Scheme is no longer prescribed as 'percentage-only'.

The Judges' Pensions Act Scheme is being amended by the *Judges and Governors-General Legislation Amendment (Family Law) Act 2012* (Judges and Governors-General Act) to introduce scheme-specific methods and factors for the splitting of a Judges' pension at the time of a property split, rather than rely on the 'percentage-only' splitting arrangements whereby any split in a property settlement of the pension of a Judge occurs only when payments are made to a retired Judge.

Human rights implications

The amendment to un-prescribe the Judges' Pensions Act Scheme is a technical change required to reflect the amendments made by the Judges and Governors-General Act and therefore does not directly impact on any human rights.

However, the effect of the Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* as it advances the protection of human rights.

The Regulation will assist in promoting the human rights recognised in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), particularly Article 16. Article 16 requires that States' parties take all appropriate measures to eliminate discrimination against women in all matters relating to marriage.

In 2008, Sex Discrimination Commissioner Elizabeth Broderick advised the then Attorney-General that, in her view, the *Judges Pension Act 1968* may be inconsistent with the objects of the *Sex Discrimination Act 1984* and may also violate Article 16 of CEDAW. She explained that, as a consequence of the current family law splitting arrangements for Federal Judges, three major disadvantages for divorcing spouses of Federal Judges are likely:

- Commencement of pension payments is timed with the Judge's retirement and is therefore uncertain
- For women non-members there may be a gap between their retirement and their entitlement to pension payments, given that men tend to work longer than women before retiring, and

- There is no entitlement to pension payments after the Judge dies. Given the differential life expectancies of women and men, this means that women affected are unlikely to receive pension payments for the duration of their retirement.

The amendments made by the Judges and Governors-General Act promotes the human rights of women by allowing former spouses of Judges and Governors-General, who have until relatively recently predominantly been women, to receive a separate interest benefit in the event of a family law split. This approach resolves the issues identified by the Sex Discrimination Commissioner.

Conclusion

The Regulation is compatible with human rights freedoms because it advances the protection of human rights.