

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 137

Issued by Authority of the Parliamentary Secretary to the Attorney-General

Family Law Act 1975 *Family Law (Superannuation) Amendment (ABS) Regulation 2013*

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.

Part VIIIB of the Family Law Act provides for the division of superannuation between married and de facto couples on relationship breakdown. The *Family Law (Superannuation) Regulations 2001* (the Principal Regulations) have been prescribed to give effect to the distribution of superannuation interests under Part VIIIB of the Family Law Act. The Principal Regulations contain much of the detail of the legislative scheme for the division of superannuation on relationship breakdown, including provisions relating to the adjustment of base amount interests held by non-member spouses during any period between the operative time (as defined by section 90MD of the Family Law Act) and the date at which a non-member spouse's entitlement is paid.

The *Family Law (Superannuation) Amendment (ABS) Regulation 2013* (the Regulation) amends the Principal Regulations to ensure that regulation 45D of the Principal Regulations is operative. This enables the Australian Government Actuary to make this year's *Family Law (Superannuation)(Interest Rate for Adjustment Period) Determination* (Determination), which is required to be made by 1 July 2013.

Under regulation 45D of the Principal Regulations, the Australian Government Actuary is sub-delegated power to determine an interest rate (subregulation 45D(3) of the Principal Regulations) and methods for calculating interest rates (under subregulations 45D(4) and (6) of the Principal Regulations) relating to the adjustment of base amount interests held by non-member spouses. This power is exercised by the making of a Determination every year. The current Determination commenced on 1 July 2013 and applies for the 2012/13 financial year.

The rate and methods are linked by regulation 45D of the Principal Regulations to the May publication each year by the Australian Bureau of Statistics (ABS) of figures relating to the percentage change in the original estimate of full time adult ordinary time earnings by persons in Australia for the year ending with the previous February quarter. This series was chosen on the basis that it would be the most recently published prior to the commencement of a financial year.

These figures were published by the ABS each quarter and the determination currently in force is based on the change over the year ending with the February 2012 quarter. However, the ABS has reduced the frequency of the Survey of Average Weekly Earnings (AWE) from quarterly to biannual and is no longer publishing the relevant statistics for the year ending

with the February quarter. Therefore, amendment of the Principal Regulations is required to link the rate and methods to the percentage change over the year to the November quarter (which is published in February) which will now be the most recently available at the commencement of a financial year.

The ABS has reported that there was a 5.0% increase in the original estimate of full-time adult ordinary time earnings for all persons in Australia for the year ending in the November 2012 quarter. This information is contained in the ABS Average Weekly Earnings Australia Publication 6302.0, published on 21 February 2013. However, this figure includes the increase in earnings over the three months to February 2012 which formed part of the index used in specifying the interest rates to apply for the 2012/13 financial year. Furthermore, the increase in the February quarter was greater than the average quarterly increase over the remaining three quarters.

To avoid double counting, a transitional arrangement operates for the 2013/14 financial year. Under the formula, the annualised increase in earnings for the nine months to November 2012 is 4.8%.

Consultation on the form of the Regulation occurred between the Attorney-General's Department and the Australian Government Actuary by way of email and telephone exchange.

The Regulation commences on 1 July 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 (ABS) Regulation 2013*.

Section 2 — Commencement

Section 2 provides that the regulation commences on 1 July 2013.

Section 3 — Authority

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

Section 4 – Schedule(s)

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

Schedule 1 – Amendments

Item [1] – Regulation 45D

Item 1 amends regulation 45D of the *Family Law (Superannuation) Regulations 2001* by omitting the word February (whenever occurring) and substituting the word November.

Item [2] – After Part 7

Item 2 inserts a new Part 8 – Transitional Arrangements into the *Family Law (Superannuation) Regulations 2001*.

Part 8 – Transitional arrangements

73 – Purpose of Part 8

Regulation 73 clarifies that Part 8 makes transitional arrangements in relation to amendments of the *Family Law (Superannuation) Regulations 2001*.

74 – Amendments made by Family Law (Superannuation) Amendment (ABS) Regulation 2013

Regulation 74 provides a formula to determine the interest rate for an adjustment period that begins or ends in the 2013/14 financial year. The formula determines the ‘amended percentage change’ to be used to calculate the interest for the adjustment period for subregulations 45D(3), (4) and (6).

amended percentage change is defined by reference to a formula that represents the annualised percentage change in the original estimate of full-time adult ordinary time earnings for all persons in Australia between the February and November 2012 quarters.

The following terms are used in the formula to determine the amended percentage change:

February OTE means the original estimate of full-time adult ordinary time earnings for all persons in Australia published by the Australian Bureau of Statistics for the February 2012 quarter.

November OTE means the original estimate of full-time adult ordinary time earnings for all persons in Australia published by the Australian Bureau of Statistics for the November 2012 quarter.

Statement of Compatibility with Human Rights

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

Family Law (Superannuation) Amendment (ABS) Regulation 2013

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 Family Law (Superannuation) Amendment (ABS) Regulation 2013 (the Regulation) makes technical amendments to regulation 45D of the *Family Law (Superannuation) Regulations 2001* (the Principal Regulations) to ensure that regulation 45D of the Principal Regulations is operative.

The amendments to the Principal Regulations are required as a result of the decision of the Australian Bureau of Statistics (ABS) to reduce the frequency of the Survey of Average Weekly Earnings from quarterly to biannual. On 16 August 2012 the ABS stated:

The frequency of the average weekly earnings series is changing from quarterly to biannual in 2012. The May 2012 publication [of the February quarter] is the last quarterly issue and the November 2012 publication the first produced on a biannual basis. From 2013 onwards, the AWE series will be published twice a year relating to the May and November quarters...For full details on the change in frequency, refer to the Information Paper: Changes to Average Weekly Earnings, Australia, April 2012...

Regulation 45D of the Principal Regulations uses ‘the percentage change in the original estimate of full-time adult ordinary time earnings for all persons in Australia, as published by the Australian Bureau of Statistics during the year ending with the February quarter...’.

The Regulation amends the Principal Regulations to link the rate and methods to the percentage change over the year to the November quarter, which will now be the most recently available at the commencement of a financial year.

None of these amendments make substantive changes to the law.

Human rights implications

The Regulation does not engage any of the applicable rights or freedoms.

Conclusion

The Regulation is compatible with human rights as it does not raise any human rights issues.