

Family Law (Superannuation) Amendment (2023 Measures No. 1) Regulations 2023

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Family Law Act 1975* (Family Law Act) provides the legislative framework for resolving arrangements for children, finances and property following a relationship breakdown.

Subsection 125(1) of 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.

Parts VIII B and VIII C of the Family Law Act provide for the division of superannuation between married and de facto couples on a relationship breakdown. The *Family Law (Superannuation) Regulations 2001* (the FLS Regulations) have been prescribed to give effect to the distribution of superannuation interests under Parts VIII B and VIII C of the Family Law Act. Specifically, the FLS Regulations support the operation of Parts VIII B and VIII C by prescribing the methods for valuing superannuation interests, the way in which payment splits are to be put into effect, and the information that trustees must provide to parties to proceedings.

The *Family Law (Superannuation) Amendment (2023 Measures No. 1) Regulations 2023* (the Amendment Instrument) makes a number of amendments to provide greater clarity about the meaning and application of certain terms and provisions and to ensure the FLS Regulations operate as intended.

The purpose of the Amendment Instrument is to:

- Clarify that a pension that is nominally payable for life, but which may be subject to review to confirm the member spouse's continuing entitlement, is not precluded for this reason from being a 'lifetime pension' or 'pension payable for the life of the member spouse' for the purposes of the FLS Regulations.

- Clarify that a superannuation interest, or a component of a superannuation interest, is not a defined benefit interest for the purpose of the FLS Regulations if the only reason (rather than one of the reasons) it is payable is because of the member's death or invalidity. Whether or not an interest is considered to be a defined benefit interest determines what information the superannuation trustee is required to provide to the member or non-member spouse about the superannuation interest and how that interest is valued for the purpose of a family law superannuation split.
- Prescribe that a superannuation interest that a member spouse has in the scheme provided for by the *Australian Defence Force Cover Act 2015* and is in the payment phase is to be considered a defined benefit interest for the purpose of the FLS Regulations.
- Clarify the difference between 'unsplittable interests' and 'unsplittable payments' in the FLS Regulations to minimise confusion about the relationship and distinct operation of these two terms, including to clarify that if certain payments from a superannuation interest cannot be split for family law purposes, this does not mean the superannuation interest itself is unsplittable.
- Ensure that pension payments from lifetime pensions are considered splittable payments from the time they become payable, because pension payments from lifetime pensions are intended to be paid for the life of the member spouse.

CONSULTATION

The Attorney-General's Department consulted closely with the Department of Finance, the Treasury, the Department of Defence, the Department of Veterans' Affairs, the Australian Government Actuary and the Commonwealth Superannuation Corporation throughout the development of the Amendment Instrument.

The Office of Impact Analysis has advised that a Policy Impact Analysis is not required for the Amendment Instrument (OBPR22-01665).

This Amendment 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*. A Statement of Compatibility with Human Rights is set out in **Attachment A**.

The Amendment Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. Details of the Amendment Instrument are set out in **Attachment B**.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

FAMILY LAW (SUPERANNUATION) AMENDMENT (2023 MEASURES NO. 1) REGULATIONS 2023

1. This 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 Amendments

2. This Instrument makes a number of amendments to the Family Law (Superannuation) Regulations 2001 (FLS Regulations) to provide greater clarity of the meaning of certain terms and to ensure the FLS Regulations operate as intended. The amendments clarify the meaning of key terms such as lifetime pension, defined benefit interest, unsplittable payments and unsplittable interests. The amendments also prescribe that an interest that a member spouse has in the scheme provided for by the *Australian Defence Force Cover Act 2015* (the ADF Cover Scheme), and is in the payment phase, is to be considered a defined benefit interest for the purpose of the FLS Regulations. The amendments will also ensure that the FLS Regulations clearly provide that pension payments from lifetime pensions are considered splittable payments from the time they become payable.

Human rights implications

Schedule 1 engages the following rights:

- the equality of rights and responsibilities of spouses at the dissolution of a marriage or de facto relationship in Article 23(4) of the International Covenant on Civil and Political Rights (ICCPR);
- the obligation to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property in Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);

Article 23(4) of the ICCPR states that ‘States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.’

Article 16 of CEDAW asserts the same rights should exist for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The purpose of this Instrument is to provide greater clarity of the meaning and application of certain terms and provisions and to ensure the FLS Regulations operate as intended.

Schedule 1 of the Instrument promotes the rights mentioned above by providing certainty to separating couples, courts and superannuation trustees about how certain superannuation interests are to be treated for the purpose of family law superannuation splitting. This will provide more certainty about the division of superannuation after a relationship breaks down. The amendments in Schedule 1 will ensure superannuation interests affected by the amendments can be accurately valued and divided in accordance with Parts VIII B and VIII C of the Family Law Act. This promotes the just and equitable division of property between spouses, and the timely resolution of property disputes about separating spouses’ respective rights of ownership of property of the relationship.

Conclusion

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

Details of the *Family Law (Superannuation) Amendment (2023 Measures No. 1) Regulations 2023*

Section 1 - Name of Regulations

Section 1 provides that the title of the instrument is the *Family Law (Superannuation) Amendment (2023 Measures No. 1) Regulations 2023*.

Section 2 - Commencement

Section 2 provides that the instrument commences on the day after the instrument is registered.

Section 3 - Authority

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

Section 4 - Schedules

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 - Amendments

Item [1] – Regulation 3

Item 1 inserts a definition of ‘lifetime pension’ to the list of definitions contained in regulation 3 of the *Family Law (Superannuation) Regulations 2001* (FLS Regulations). This definition provides that a benefit in respect of a superannuation interest, or a component of a superannuation interest, of a member spouse in an eligible superannuation plan is a lifetime pension of the member spouse if the benefit is payable as a pension for the life of the member spouse.

A ‘pension’ is defined in the FLS Regulations as a pension, within the meaning of section 10 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), payable from an eligible superannuation plan (other than an account within the meaning of the *Small Superannuation*

Accounts Act 1995). Section 10 of the SIS Act provides that a pension includes a benefit provided by a fund, if the benefit is taken, under the regulations (that being, the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations)), to be a pension for the purposes of this Act.

Item 1 also inserts a Note to the new definition to provide that new Regulation 11A (see Item 9) also affects the meaning of lifetime pension.

Items [2] – [6] – Amendments to Regulation 5

The list of definitions in regulation 3 of the FLS Regulations includes a definition of the term ‘accumulation interest’. For the purpose of the FLS Regulations, a superannuation interest, or a component of a superannuation interest, that is not a defined benefit interest or a small superannuation accounts interest, is an accumulation interest.

The list of definitions in regulation 3 also includes the term ‘defined benefit interest’ as having the meaning given by regulation 5 of the FLS Regulations. Regulation 5 provides that, subject to subregulation 5(2), a ‘defined benefit interest’ is a superannuation interest, or a component of a superannuation interest, which is calculated in accordance with defined benefit factors set out in subregulation 5(1A). Existing subregulation 5(2) provides that a superannuation interest, or a component of a superannuation interest, is not a defined benefit interest if the only benefits payable in respect of the interest, or the component, that are defined by reference to the amounts or factors mentioned in subregulation 5(1A) are benefits payable on death or invalidity.

Item 6 repeals existing subregulation 5(2) and substitutes a new subregulation 5(2) to clarify that a superannuation interest, or a component of a superannuation interest, is not a defined benefit interest if defined benefit factors are only used to calculate death or invalidity benefits in respect of the interest or component, and would not be used to calculate benefits in respect of the interest or component that would become payable in other circumstances, such as on age retirement or the termination of employment.

The intended operation of regulation 5 is to exclude some interests which are properly regarded as accumulation interests from being classified as defined benefit interests merely because they have a conditional benefit payable on death or invalidity which is determined by reference to defined benefit factors. That is, regulation 5 is only intended to exclude a scheme which would only fall within the defined benefit definition because of the structure

of its death/invalidity benefit but is otherwise an accumulation scheme. It is not intended to exclude a scheme which is properly regarded as a defined benefit scheme but which also has a defined benefit death or invalidity component.

Item 6 also adds Notes at the end of new subregulation 5(2) to provide further guidance about the operation of regulation 5.

Item 5 inserts new paragraph 5(1)(c) to prescribe a third category of interest as a defined benefit interest for the purpose of the FLS Regulations. This is to capture a superannuation interest that a member spouse has in the scheme provided for by the *Australian Defence Force Cover Act 2015* (the ADF Cover Scheme), and is in the payment phase.

The ADF Cover Scheme provides automatic death and invalidity cover for eligible ADF personnel. An ADF Cover Scheme pension forms part of an ADF member's superannuation entitlements and is activated only when a member is no longer able to serve due to invalidity. This means that, until it becomes payable, an ADF Cover Scheme interest has no value and cannot be valued for the purpose of family law superannuation splitting.

The ADF Cover Scheme is not an accumulation scheme, as the benefit is not 'accumulated' over time. The benefit does not exist unless or until a member claims invalidity, and at that point, their benefit is calculated in accordance with a formula (defined benefit factors) and paid out as a lifetime pension. However, the ADF Cover Scheme also does not currently meet the definition of 'defined benefit interest' in regulation 5, as benefits in respect of a superannuation interest in the ADF Cover Scheme are calculated by reference to the defined benefit factors in subregulation 5(1A) of the FLS Regulations and are only payable on death or invalidity.

Benefits payable in respect of the ADF Cover Scheme are payable as lifetime pensions. This arrangement is intended to be consistent with invalidity pensions which are payable in respect of the employer component (defined benefit component) from the Military Superannuation and Benefits Scheme and Defence Forces Retirement and Death Benefits superannuation schemes, for the life of the beneficiary.

New paragraph 5(1)(c) ensures that a superannuation interest in the ADF Cover Scheme will be treated as a defined benefit interest, consistent with the other military invalidity pensions which are payable for the life of the beneficiary. This will mean that when the trustee is required to provide information about a superannuation interest in the ADF Cover Scheme,

that information would be provided in accordance with regulation 64 of the FLS Regulations (defined benefit interests) and not regulation 63 (accumulation interests). This will ensure that the information provided by the trustee about the interest will be relevant and accurate for the purpose of valuing the superannuation interest for family law superannuation splitting.

Items 2 to 4 make a number of amendments to regulation 5 to account for new paragraphs 5(1)(c) and 5(2)(b).

Items [7] and [8] – Regulation 11

Regulation 11 of the FLS Regulations contains the meaning of ‘unsplittable interest’ for the purpose of sections 90XD and 90YD of the Family Law Act. While most superannuation interests can be split following separation either by agreement or court order, regulation 11 provides that certain superannuation interests of little or no value are ‘unsplittable interests’; that is, the interest itself cannot be split by an agreement or court order. This recognises that splitting superannuation of little or no value is not cost effective for the parties and may be administratively burdensome for superannuation trustees to implement.

In contrast, regulation 12 of the FLS Regulations prescribes payments to a member spouse that are not ‘splittable payments’. Payments that are not ‘splittable payments’ are the types of payments to a member spouse from their superannuation to which an order or agreement under Part VIIIB or Part VIIC of the Family Law Act will not apply.

Item 7 inserts a note after subregulation 11(1) to explain to the reader that an unsplittable interest cannot be the subject of a payment split under a superannuation agreement, a flag lifting agreement or a splitting order, in accordance with Parts VIIIB and VIIC of the Family Law Act.

Item 8 adds new subregulation 11(3) to clarify, for the avoidance of doubt, that just because payments in respect of a superannuation interest are not splittable payments, does not mean that the interest itself is unsplittable. A superannuation interest is only an unsplittable interest if it meets the requirements in regulation 11.

These amendments are intended to clarify the difference between unsplitable interests (regulation 11) and payments that are not splittable payments (regulation 12) to minimise confusion about the difference between these two terms.

Item [9] – At the end of Part 1

Item 9 inserts new regulation 11A. New regulation 11A will support the new definition of ‘lifetime pension’ in Item 3 by clarifying that, for the purpose of the FLS Regulations, certain benefits that are paid as a pension are not prevented from being a lifetime pension or pension payable for the life of a member spouse merely because they are paid upon retirement (including retirement on the basis of invalidity) and, under the governing rules of the plan, the payments may be varied (including reduced to nil), suspended or cancelled.

In *Commissioner of Taxation v Douglas [2020] FCAFC 220* (4 December 2020) (‘Douglas’), the Full Court held, in respect of specific invalidity benefits paid under pensions that commenced on or after 20 September 2007, that the benefits did not meet standards under the SIS Regulations. Specifically, the Court held that the Military Superannuation and Benefits Scheme (MSBS) rules and Defence Forces Retirement and Death Benefits Scheme (DFRDBS) rules relating to invalidity benefits did not meet the minimum standards contained in subregulations 1.06(9A) and 1.06(2) of the SIS Regulations to be considered ‘superannuation income stream benefits’. This was because the rules of these schemes did not ensure that benefits were made annually throughout the life of the beneficiary.

The FLS Regulations define the term ‘pension’ in accordance with the broader definition of ‘pension’ in section 10 of the SIS Act. The FLS Regulations treat the invalidity pensions under the MSBS and DFRDBS as lifetime pensions and pensions payable for the life of a member, for the purposes of these regulations, and relevant agreements and orders under the Family Law Act have been made on that basis.

The purpose of new regulation 11A is to make clear that the mere fact that pension payments can be varied (including reduced to nil), suspended or cancelled does not prevent that pension from being considered to be a lifetime pension or pension payable for the life of a member spouse for the purpose of family law superannuation splitting. This includes invalidity pensions under MSBS, DFRDBS and the ADF Cover Scheme, and other pensions paid on retirement (including, but not limited to, retirement on the basis of invalidity) where the payments can be varied, suspended or cancelled, for example pensions under the

Commonwealth Superannuation Scheme, Public Sector Superannuation Scheme and the Parliamentary Contributory Superannuation Scheme. This is not an exhaustive list.

Item [10] – Paragraph 12(1)(c)

Existing regulation 12 provides for the types of payments in respect of a superannuation interest to a member spouse that are not ‘splittable payments’.

Existing paragraph 12(1)(c) provides that a pension payment (other than a pension payment to which paragraph 12(1)(ea) applies) to the member spouse that is made as a result of the member spouse’s ill health (whether physical or mental, but not including ill health that would constitute a permanent incapacity within the meaning given by regulation 1.03C of the SIS Regulations), is not a splittable payment unless the payment is one of a series of payments of that kind that have been made to the member spouse for at least two years.

The policy intent behind paragraph 12(1)(c) is that temporary payments for illness or incapacity that are paid from a pension (within the meaning of section 10 of the SIS Act) should not be regarded as superannuation available to be split with a former spouse unless those payments have been made for at least two years. However, the policy intent is that long-term pension payments should be splittable immediately.

Item 10 replaces paragraph 12(1)(c) to more clearly articulate this policy intent by rephrasing paragraph 12(1)(c) in terms of pension payments that are paid on the basis of temporary incapacity (within the meaning of regulation 6.01 of the SIS Regulations). New paragraph 12(1)(c) also makes clear that pension payments from lifetime pensions are splittable payments. This is consistent with the policy intent, as payments from lifetime pensions are intended to be payable for the life of the member spouse. New paragraph 12(1)(c) draws on the new definitions of lifetime pension inserted by Items 1 and 9 of this instrument.

Item [11] – At the end of subregulation 12(1)

Item 11 inserts a note at the end of subregulation 12(1) to clarify the purpose of regulation 12, which is to prescribe the types of payments to a member spouse from their superannuation to which an order or agreement under Part VIII B or Part VIII C of the Family Law Act will not apply (that is, the types of payments that cannot be subject to superannuation splitting).

An agreement or order made under Part VIIIB or Part VIIC of the Family Law Act can only split superannuation payments as and when they become payable to the member spouse (usually because a condition of release has been met), and can only apply to ‘splittable payments’. If a ‘splittable payment’ is made to the member spouse, the payment will be split on the terms of the order or agreement. This is provided in section 90XT of the Family Law Act.

Not all payments to a member spouse in respect of their superannuation interest are ‘splittable payments’. A payment is not a ‘splittable payment’ if it meets any of the requirements prescribed in the FLS Regulations for the purposes of subsections 90XE(2) or 90YG(2) of the Family Law Act. Regulation 12 sets out the types of payments to a member spouse that are not ‘splittable payments’.