



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

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 14 September 2023

David Hurley
Governor-General

By His Excellency's Command

Mark Dreyfus KC
Attorney-General

Contents

1	Name.....	1
2	Commencement	1
3	Authority.....	1
4	Schedules.....	1
	Schedule 1—Amendments	2
	<i>Family Law (Superannuation) Regulations 2001</i>	<i>2</i>

1 Name

This instrument is the *Family Law (Superannuation) Amendment (2023 Measures No. 1) Regulations 2023*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	16 September 2023

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Family Law Act 1975*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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

Family Law (Superannuation) Regulations 2001

1 Regulation 3

Insert:

lifetime pension: 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.

Note: Regulation 11A also affects the meaning of ***lifetime pension***.

2 Subregulation 5(1)

Omit “Subject to subregulation (2), for”, substitute “For the purposes of”.

3 Paragraph 5(1)(a)

Before “a superannuation interest”, insert “subject to subregulation (2)”.

4 Paragraph 5(1)(b)

Before “a component of”, insert “subject to subregulation (2)”.

5 At the end of subregulation 5(1)

Add:

; or (c) a superannuation interest that:

- (i) a member spouse has in the scheme provided for by the *Australian Defence Force Cover Act 2015*; and
- (ii) is in the payment phase.

6 Subregulation 5(2)

Repeal the subregulation, substitute:

- (2) However, a superannuation interest, or a component of a superannuation interest, is not a ***defined benefit interest*** because of paragraph (1)(a) or (b) if:
- (a) the only benefits payable in respect of the interest or component that are defined by reference to the amounts or factors mentioned in subregulation (1A) are benefits payable on death or invalidity; and
 - (b) there are no other circumstances in which benefits payable in respect of the interest or component are, or could have been, defined by reference to the amounts or factors mentioned in subregulation (1A).

- Note 1: Subregulation (2) has the effect that paragraphs (1)(a) and (b) do not apply to a superannuation interest or component if defined benefit factors:
- (a) are only used to calculate death or invalidity benefits in respect of the interest or component; and
 - (b) 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.

- Note 2: However, subregulation (2) does not prevent a superannuation interest or component mentioned in paragraph (1)(c) being a defined benefit interest for the purposes of these Regulations (even if paragraph (1)(a) or (b) could also apply to the superannuation interest or component).

Example 1: Benefits in respect of a superannuation interest of a member spouse are payable on retirement based on the balance of the member's account. However, on death or invalidity the benefit is to be defined by reference to amounts or factors mentioned in subregulation (1A). The member retires on invalidity and the benefits that become payable to the member are then defined by reference to those amounts or factors. The superannuation interest is not a defined benefit interest because defined benefit factors only applied, and could only have applied, in the circumstance of the death or invalidity of the member spouse.

Example 2: Benefits in respect of a component of a superannuation interest of a member spouse are payable in a range of circumstances, including death, invalidity or retirement, and are to be defined by reference to amounts or factors mentioned in subregulation (1A). The component is a defined benefit interest because death or invalidity are not the only circumstances in which defined benefit factors are, or could be, applied to calculate the benefits in respect of the interest.

7 After subregulation 11(1)

Insert:

Note: This regulation prescribes the kinds of superannuation interests that are unsplitable interests. An unsplitable interest cannot be the subject of a payment split under a superannuation agreement, a flag lifting agreement or a splitting order: see Parts VIII B and VIII C of the Act.

8 At the end of regulation 11

Add:

- (3) To avoid doubt, an interest that is not covered by this regulation is not an unsplitable interest only because payments in respect of that interest are not splittable payments.

9 At the end of Part 1

Add:

11A Meaning of lifetime pension etc.

To avoid doubt, for the purposes of these Regulations, a benefit in respect of a superannuation interest, or a component of a superannuation interest, of a member spouse in an eligible superannuation plan that is paid as a pension is not prevented from being a lifetime pension of the member spouse, or a pension payable for the life of a member spouse, merely because:

- (a) the benefit is paid upon the retirement of the member spouse (including, but not limited to, retirement on the basis of invalidity); and
- (b) under the governing rules of the plan, the payments may be varied (including by being reduced to nil), suspended or cancelled.

10 Paragraph 12(1)(c)

Repeal the paragraph, substitute:

- (c) a pension payment to the member spouse that is paid on the basis of temporary incapacity (within the meaning of regulation 6.01 of the SIS Regulations), other than a payment that is:
 - (i) one of a series of payments of that kind that have been paid to the member spouse for a period of at least 2 years and is made more than 2 years after the first such payment of that series; or
 - (ii) a payment to which paragraph (ea) applies; or
 - (iii) a payment from a lifetime pension;

11 At the end of subregulation 12(1)

Add:

Note: This regulation prescribes the kinds of payments that are not splittable payments. Generally, any of these kinds of payments in respect of a member spouse's superannuation interest will not be a splittable payment (see subsection 90XE(2) or 90YG(2) of the Act).