

# **Family Law (Superannuation) Amendment (Unsplittable Interests) 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 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.

Sections 90XT and 90YY of the Family Law Act provide that a court may make an order splitting superannuation payments in relation to a superannuation interest, other than an unsplitable interest. This means that a superannuation interest that is an unsplitable interest cannot be the subject of a superannuation splitting order or agreement. Sections 90XD and 90YD define ‘unsplitable interest’ as a superannuation interest prescribed in the FLS Regulations for the purpose of those sections. Regulation 11 of the FLS Regulations provides that certain superannuation interests of little or no value are ‘unsplitable interests’, meaning the interest itself cannot be split by 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.

The *Family Law (Superannuation) Amendment (Unsplittable Interests) Regulations 2023* (the Amendment Instrument) exempt superannuation interests in the scheme constituted by the *Parliamentary Contributory Superannuation Act 1948* (PCS Act) from the operation of regulation 11 of the FLS Regulations. That is, superannuation interests in the Parliamentary Contributory Superannuation Scheme (PCSS) will always be considered splittable interests for the purpose of a superannuation splitting order or agreement, even if the order or agreement is contemplated at a time when a pension or annuity payable to a member under that scheme has been temporarily reduced.

Lifetime PCSS pensions or annuities may be payable under the PCS Act to former federal parliamentarians who entered Parliament prior to 9 October 2004, to their eligible dependants upon their death, or to a former spouse as part of a family law superannuation splitting order or agreement. However, the PCS Act provides that a pension or annuity payable to a member can be temporarily reduced for the period of time when a member is receiving a salary or an allowance for being a member of a state parliament or territory legislative assembly (section 21 of the PCS Act), by the rate of that salary, or, when a member is in receipt of income from holding certain Commonwealth or state ‘offices of profit’ (section 21B of the PCS Act). The amendment in the Amendment Instrument ensures that a superannuation interest in the PCSS will not be considered an unsplitable interest if, at the time an order or agreement is contemplated, the pension or annuity is temporarily reduced under section 21 or 21B of the PCS Act.

This amendment will remove potential uncertainty regarding the interpretation of regulation 11 as it applies to temporarily reduced PCSS pensions or annuities, and will ensure the FLS Regulations operate consistently with the broader policy objectives of the superannuation splitting framework that superannuation agreements and orders are made on just and equitable terms.

## **CONSULTATION**

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Finance to ensure the amendments achieve their intended purpose. The Department of Finance is the administrator of the Parliamentary Contributory Superannuation Scheme and supports this amendment.

The 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**.

## **REGULATION IMPACT STATEMENT**

The Office of Impact Analysis was consulted about this instrument and has advised that an Impact Analysis is not required: OIA23-05155

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

### **FAMILY LAW (SUPERANNUATION) AMENDMENT (UNSPLITTABLE INTERESTS) REGULATIONS 2023**

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

#### **Family Law (Superannuation) Amendment (Unsplittable Interests) Regulations 2023**

This disallowable 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 disallowable instrument**

This Instrument amends regulation 11 of the *Family Law (Superannuation) Regulations 2001* (FLS Regulations) to prescribe that regulation 11, which contains the definition of ‘unsplittable interest’ for the purpose of sections 90XD and 90YD of the Family Law Act, does not apply to superannuation interests in the scheme constituted by the *Parliamentary Contributory Superannuation Act 1948* (PCS Act). This ensures that superannuation interests in the Parliamentary Contributory Superannuation Scheme (PCSS) are always considered splittable interests for the purpose of family law superannuation splitting under Parts VIII B or VIII C of the *Family Law Act 1975* (Family Law Act). This means that if the order or agreement is contemplated at a time when a pension or annuity payable to a member under the PCSS scheme has been temporarily reduced, the superannuation interest will be considered a splittable interest.

#### **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 ‘State 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 valuable consideration.

Lifetime pensions or annuities may be payable under the PCS Act to former parliamentarians who entered Parliament prior to 9 October 2004, to their eligible dependents upon their death, or to a former spouse as a result of a family law superannuation splitting order or agreement. However, the amount of the pension or annuity payable under the PCS Act will be temporarily reduced for the period of time in which the member may be in receipt of a salary or allowance for being a member of a state parliament or territory legislative assembly (section 21 of the PCS Act) by the rate of that salary, or, for the period of time in which the member may be in receipt of income for holding certain state or Commonwealth ‘offices of profit’ (section 21B of the PCS Act).

The amendments in this Instrument remove potential uncertainty regarding the interpretation of regulation 11 as it applies to temporarily reduced PCSS pensions or annuities, by ensuring that a superannuation interest in the PCSS will not be considered an unsplitable interest even if a superannuation splitting order or agreement is contemplated at a time when the amount payable to a member has been temporarily reduced to zero or a small amount. This recognises that the member spouse will be entitled to the full pension or annuity once they are no longer in receipt of a salary or allowance as a member of a state parliament or territory legislative assembly, or when they are no longer receipt of income for holding certain state or Commonwealth ‘offices of profit’, and this should be reflected accordingly in the property settlement.

This promotes the just and equitable division of property between former spouses, and the timely resolution of property disputes about separating spouses’ respective rights of ownership of property of the relationship.

## **Conclusion**

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

**Details of the *Family Law (Superannuation) Amendment (Unsplittable Interests) Regulations 2023***

Section 1 – Name of Regulations

Section 1 provides that the title of the instrument is the *Family Law (Superannuation) Amendment (Unsplittable Interests) 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* (Family Law Act).

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] – At the end of subregulation 11(2)**

Item 1 inserts paragraph 11(2)(c) to provide that regulation 11 does not apply to a superannuation interest in the scheme constituted by the *Parliamentary Contributory Superannuation Act 1948* (PCS Act). This scheme is the Parliamentary Contributory Superannuation Scheme (PCSS).

Regulation 11 of the *Family Law (Superannuation) Regulations 2001* (FLS Regulations) contains the meaning of ‘unsplittable interest’ for the purpose of the definitions in sections 90XD and 90YD of the Family Law Act. Regulation 11 provides that certain superannuation interests of little or no value are ‘unsplittable interests’, meaning the interest itself cannot be split by 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 trustees to implement. Subregulation 11(1B) provides that a superannuation interest is an unsplittable interest if the benefits in respect of the superannuation interest are being paid to the member spouse as a lifetime pension or fixed-term pension that the member is no longer entitled to commute, and the amount of the annual benefit payable to the member is less than \$2,000. Subregulation 11(2) exempts certain superannuation interests from regulation 11.

Lifetime pensions or annuities may be payable under the PCS Act to former parliamentarians who entered Parliament prior to 9 October 2004, to their eligible dependents upon their death, or to a former spouse as a result of a family law superannuation splitting order or agreement.

New paragraph 11(2)(c) ensures that a superannuation interest in the scheme constituted by the PCS Act will not be considered an unsplitable interest even if, at the time an order or agreement is contemplated, the pension or annuity is temporarily reduced under section 21 (when a member is in receipt of a salary or allowance for being a member of a state parliament or territory legislative assembly) or 21B (when a member is in receipt of income for holding certain state or Commonwealth ‘offices of profit’) of the PCS Act. A member’s PCSS pension or annuity payments will recommence once the member is no longer in receipt of a state or territory parliamentary salary or allowance, or income related to holding an office of profit.

The policy intention is to ensure that parties are able to seek an order or make an agreement in respect of a superannuation interest in the PCSS, in circumstances where the pension or annuity payments would be temporarily reduced at the time the order or agreement is contemplated, noting the benefits payable in respect of the interest will recommence once the temporary reduction under section 21 or 21B of the PCS Act ceases.

#### **Item [2] – Part 8 (heading)**

Item 2 repeals the heading to Part 8 and substitutes “Part 8 – Application, saving and transitional provisions”. This is a technical amendment consequential to the amendment made by Item 4 below, to improve the readability of the Regulations.

#### **Item [3] – Regulation 73**

Item 3 amends Regulation 73 to omit “transitional”, and substitute “application, saving and transitional”. This is a technical amendment consequential to the amendment made by Item 4 below, to improve the readability of the FLS Regulations.

#### **Item [4] – At the end of Part 8**

Item 4 inserts new regulation 75, which is an application provision. New regulation 75 provides that new paragraph 11(2)(c), at Item 1 above, applies in relation to a PCSS superannuation interest identified in an agreement or court order made under Part VIIIB or VIIC of the Family Law Act, that provides for a payment split in respect of that interest and is made on or after the commencement of this Instrument. This clarifies that new paragraph 11(2)(c) operates prospectively only, in relation to orders and agreements that deal with PCSS interests.