

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

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

Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (PSS Scheme—Preserved Benefit Members) Approval 2024

PURPOSE AND OPERATION OF THE INSTRUMENT

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.

Parts VIII B and VIII C of the Family Law Act provide for the division of superannuation interests between married and de facto couples on relationship breakdown. The *Family Law (Superannuation) Regulations 2001* (the FLS Regulations) give effect to the distribution of superannuation interests under Parts VIII B and VIII C of the Family Law Act.

The FLS Regulations provide ‘default’ methods and factors for valuing superannuation interests. Where the default methods and factors are not appropriate for valuing interests in a particular scheme, regulations 38 and 43A of the FLS Regulations authorise the Attorney-General to approve scheme-specific methods or factors to be used to determine the gross value of particular superannuation interests.

The *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (the Approval Instrument) sets out methods and factors approved by the Attorney-General for determining the value of interests for over thirty superannuation funds or schemes, including for the Public Sector Superannuation Scheme (PSS Scheme). Part 2 of Schedule 1 of the Approval Instrument contains the scheme-specific methods and factors to determine the family law value for PSS Scheme interests.

The purpose of the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (PSS Scheme—Preserved Benefit Members) Approval 2024* (the Amendment Approval) is to correct outdated references in the Approval Instrument to paragraph 8.2.1 (A) of the Public Sector Superannuation Scheme Rules set out in the Schedule to the Public Sector Superannuation Scheme Trust Deed (PSS Rules).

Division 2.2 of Part 2, Schedule 1 of the Approval Instrument prescribes four methods for valuing PSS Scheme interests in the growth phase, two of which include references relating to a person’s entitlement to receive a benefit under paragraph 8.2.1 (A) of the PSS Rules.

These two methods pertain to:

- an interest that a person has in the PSS Scheme if the person is a preserved benefit member and the person is eligible to receive a benefit under paragraph 8.2.1 (A) of the PSS Rules (that is, a former contributing member with preserved benefits who is eligible to convert the preserved benefit to a pension) (Item 2), and
- an interest that a person has in the PSS Scheme if the person is a preserved benefit member and the person is not eligible to receive a benefit under paragraph 8.2.1 (A) of the PSS Rules (that is, a former contributing member with preserved benefits who is *not* eligible to convert the benefit to a pension) (Item 3).

Paragraph 8.2.1 (A) was part of previous rule 8.2.1, which was repealed in 2018. Rule 8.2.1 set out the benefit options for a preserved benefit member whose preserved benefit became payable on the date they reached the age of 65 or the date chosen by the preserved benefit member under paragraph 8.1.1(b) of the PSS Rules. Paragraph 8.2.1 (A) provided these preserved benefit members with the option of taking their benefit as a full pension or a part pension/part lump sum, provided they met certain requirements, while paragraph 8.2.1 (B) provided them with the option to be paid a lump sum.

The 2018 amendments retained the same benefit options for both categories of preserved benefit members that existed under previous rule 8.2.1, this being a full pension, part pension/part lump sum, or a lump sum payment. However, the amendments introduced a default benefit for a preserved benefit member whose benefit has become payable on reaching the age of 65 and enabled them to choose, within a specified timeframe, to take their benefit as a full pension or part pension/part lump sum. The amendments also separated the benefit options for a preserved benefit member whose preserved benefit has or will become payable on the date they reach age 65 from those of a preserved benefit member whose preserved benefit has become payable on the date chosen by them under paragraph 8.1.1(b), by establishing them in different provisions.

As a result of the 2018 amendments, the pension option (full pension or part pension/part lump sum) previously contained in repealed paragraph 8.2.1 (A) is now contained in rule 8.2.1A for a person whose preserved benefit will or has become payable on the date they reach age 65, and paragraph 8.2.1B(a) for a person whose preserved benefit has become payable on the date chosen by them under paragraph 8.1.1(b).

The Amendment Approval amends references to “paragraph 8.2.1 (A)” in Division 2.2 of Part 2, Schedule 1 of the Approval Instrument to “Rule 8.2.1A or paragraph 8.2.1B(a)” to correctly reference the current provisions in the PSS Rules.

The Amendment Approval is a legislative instrument for the purposes of the *Legislation Act 2003*. The Amendment Approval is not subject to disallowance by operation of item 3 of Regulation 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The Amendment Approval and the Approval Instrument are not subject to sunseting. Item 6 of the table in section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, made under paragraph 54(2)(b) of the *Legislation Act 2003*, exempts legislative instruments (other than regulations) that relate to superannuation from the sunseting regime set out under Part 4 of Chapter 3 of that Act. Instruments pertaining to family law superannuation splitting of PSS Scheme interests are intended to have enduring operation and the existence of uncertainty in respect of an individual's scheme entitlements would not be appropriate.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

CONSULTATION

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Finance and the Commonwealth Superannuation Corporation (CSC) as the trustee for the PSS Scheme.

The Office of Impact Analysis was also consulted on this instrument and advised that an Impact Analysis is not required for these amendments: OIA24-06480.

Details of the Amendment Approval are set out at [Attachment A](#).

Details of the Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (PSS Scheme—Preserved Benefit Members) Approval 2024

Section 1 – Name

This section provides that the title of the instrument is the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (PSS Scheme—Preserved Benefit Members) Approval 2024*.

Section 2 – Commencement

This section provides that the instrument will commence on the later of the day after the instrument is registered on the Federal Register of Legislation, the day after the *Superannuation Amendment (PSS Trust Deed) Instrument 2024* is registered, or the day after the *Family Law (Superannuation) (Provision of Information — Public Sector Superannuation Scheme) Amendment Determination 2024* is registered.

The *Superannuation Amendment (PSS Trust Deed) Instrument 2024* makes similar amendments to update some existing references to superseded paragraph 8.2.1 (A) to reference the current provisions in the PSS Rules.

The *Family Law (Superannuation) (Provision of Information — Public Sector Superannuation Scheme) Amendment Determination 2024* makes related amendments to the information a trustee must provide about a PSS Scheme interest to ensure parties have the necessary information required to accurately value the superannuation interest using the methods contained in the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003*. This includes whether or not a person is entitled to a benefit under rule 8.2.1A or paragraph 8.2.1B(a).

The Amendment Approval does not commence at all unless both the *Superannuation Amendment (PSS Trust Deed) Instrument 2024* and the *Family Law (Superannuation) (Provision of Information — Public Sector Superannuation Scheme) Amendment Determination 2024* are registered, to ensure that the substantive instruments relating to calculation of PSS Scheme interest values remain consistent.

Section 3 – Authority

This section provides that the instrument is made under regulation 38 of the *Family Law (Superannuation) Regulations 2001*.

Section 4 – Schedules

This section 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. Any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003

Item 1 - Clause 2 of Part 2 of Schedule 1 (table item 2, column headed “Interest in the growth phase”, paragraph (b))

Item 1 omits “paragraph 8.2.1 (A)” and substitutes “rule 8.2.1A or paragraph 8.2.1B(a)”. This is an update to the cross-reference to provisions in the PSS Rules to reflect amendments made in 2018.

Item 2 - Clause 2 of Part 2 of Schedule 1 (table item 3, column headed “Interest in the growth phase”, paragraph (b))

Item 2 omits “paragraph 8.2.1 (A)” and substitutes “either rule 8.2.1A or paragraph 8.2.1B(a)”. This is an update to the cross-reference to provisions in the PSS Rules to reflect amendments made in 2018.