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FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Daryl Williams AM QC MP)

TABLE OF CONTENTS

FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

GENERAL OUTLINE

The Family Law Legislation Amendment (Superannuation) Bill 2000 ('Superannuation Bill') will give effect to the Government's commitment to reform family law to enable superannuation interests to be divided on marriage breakdown.

Under the current law, the court can take into account any superannuation interest held by the parties, and can and does adjust other property having regard to the fact that one of the parties will have the superannuation interest available as a financial resource.. However, a superannuation interest is not able to be divided.

The Superannuation Bill will amend the *Family Law Act 1975* ('the Family Law Act') to provide for the division of superannuation interests on marriage breakdown. This can be achieved either by agreement or by court order.

The Superannuation Bill will provide that parties will be able to make a superannuation agreement, in the context of a broader financial agreement, that specifies how a superannuation interest will be divided on marriage breakdown. Parties will be able to agree on how payments made pursuant to a superannuation interest are to be split.

Schedule 2 of the Family Law Amendment Bill 1999, which is currently before the Parliament, will provide that parties will be able to make a financial agreement, either before or during marriage or after marriage breakdown, about how any or all of their property is to be divided on marriage breakdown. If the agreement complies with the formal requirements, set out in the Family Law Amendment Bill 1999, then it will be binding on the parties. If the agreement is binding, then the court will generally not be able to make an order about the property that is dealt with in the agreement.

The Superannuation Bill will provide for different methods of valuing a superannuation interest depending on whether the interest is a lump sum or a pension interest. The details of the information needed, and the calculations necessary, to value a superannuation interest and to split it will be contained in the Family Law Regulations. The application of the regulations will yield a single valuation that will be particularly important for the actuarial method, as it will require complex calculations in order to establish the present day value of a contingent superannuation interest. This will ensure that parties are aware of the value of a superannuation interest that they are dealing with in the agreement, and will also minimise the opportunity for dispute about the value of a superannuation interest.

In some circumstances, parties may wish to defer their agreement about how a superannuation interest is to be divided, for example because the party who holds the superannuation interest is nearing a condition of release (for example, retirement) at which time the actual value of the interest will be known. The Superannuation Bill will provide that parties will be able to make a "flagging" agreement, which will act to prevent the trustee of the superannuation fund from dealing with a superannuation interest until the

"flag" has been lifted. The flag will be able to be lifted either by further agreement or by court order should the parties be unable to subsequently agree.

Superannuation agreements will be binding in the same circumstances as the general financial agreements will be binding, pursuant to the provisions contained in the Family Law Amendment Bill 1999. When a superannuation agreement is binding, the trustee of the relevant fund will be required by the law to give effect to the agreement.

Because parties will have obtained prior advice, a court will only be able to set aside a superannuation agreement in certain circumstances, for example if it was obtained by fraud, it was otherwise void or where there was a significant change in circumstances that would make it unfair to give effect to the agreement.

If parties are unable to agree about how to divide a superannuation interest on marriage breakdown, the court will have the jurisdiction and the power to make an order about a superannuation interest that will bind the third party superannuation trustee.

Section 79 of the Family Law Act provides that in proceedings with respect to the property of the parties to a marriage, a court may make such order as it considers appropriate altering the interests of the parties in the property. The court must not make an order altering the interests of the parties in the property unless it is satisfied that it is just and equitable to make the order.

The Superannuation Bill will provide that a superannuation interest is to be treated as property for the purposes of a property order. Therefore, an order about a superannuation interest will be able to be made in proceedings pursuant to section 79 of the Family Law Act. Such an order would usually be made as part of a broader court order dealing with any of the property of the parties that has not been dealt with in a financial agreement.

As with superannuation agreements, the court will be able to make either an order about how payments made pursuant to the superannuation interest are to be split or an order to "flag" a superannuation interest.

The Superannuation Bill will also amend the *Bankruptcy Act 1966* ('Bankruptcy Act'), consequent on the amendments to the Family Law Act relating to superannuation. The Bankruptcy Act provides that certain superannuation interests of the bankrupt, and payments made pursuant to those interests, are property that is not divisible among the creditors of the bankrupt. The amendment to the Bankruptcy Act will extend a similar exemption to a bankrupt who acquires payments pursuant to a payment split of a superannuation interest.

The Superannuation Bill will also amend the *Superannuation Industry (Supervision) Act 1993* ('SIS Act') and the *Superannuation (Resolution of Complaints) Act 1993* ('Complaints Act'). It is intended that amendments to the *Superannuation Industry (Supervision) Regulations* ('SIS Regulations') will allow, in certain circumstances, the creation of a new interest for the non-member spouse who is to receive payments under an agreement or order to split a superannuation interest. The amendments to the SIS Act and the Complaints Act contained in the Superannuation Bill are designed to facilitate this and to ensure that the

non-member spouse is given, in appropriate circumstances, similar membership rights to those that the member spouse enjoys.

FINANCIAL IMPACT STATEMENT

There will be costs associated with the preparation of actuarial tables to be used in the valuation of defined benefit superannuation interests. There will also be costs associated with an education campaign to inform the family law community and the superannuation industry of the changes that are being made. These will be met from existing resources.

REGULATION IMPACT ON BUSINESS

There will be an impact on the superannuation industry. The trustee of a superannuation plan will be required to divide a superannuation interest in accordance with either an agreement or a court order.

This will necessitate changes to both the administrative and the information technology systems of the superannuation plan. The costs of implementing these changes will be born by the superannuation industry.

The superannuation plan will be able to charge a small administrative fee, set by regulation, for work associated with a payment split of a superannuation interest.

REGULATION IMPACT STATEMENT

Problem Identification

The present difficulty with the treatment of superannuation on marriage breakdown can largely be attributed to three factors:

- Australia's superannuation system has developed rapidly since 1980; there has been substantial growth in the coverage of superannuation in the community and in the value of superannuation savings; and the system is characterised by a variety of schemes and choices that can be made about the timing of retirement and the form in which benefits are taken; and

- despite this growth and variety, the provisions of the Family Law Act dealing with superannuation do not provide much guidance, with little by way of express reference to superannuation; and

- although the existence of a superannuation interest is increasingly recognised by parties negotiating a family law settlement, there is no mechanism for superannuation held in one spouse's name to be divided or transferred to the other, nor can the Family Court order a third party (such as a superannuation fund trustee) to provide benefits to a former spouse at some future time, even though this might be the fairest outcome for both spouses.

The impact of these difficulties has generally fallen on the non-superannuated spouse, most particularly on women out of the workforce because of homemaker and child-rearing responsibilities. The Australian Institute of Family Studies ('AIFS') in its 1986 *Settling Up* report found that superannuation played no part in the property division in the majority of property settlements, and where superannuation had not been taken into account, about 75 per cent of respondents had received no advice on its relevance.

More recently, the AIFS, in its 1999 working paper entitled *Superannuation and Divorce in Australia*, found that whilst superannuation has grown in importance as a family asset since the time of *Settling Up* superannuation is still, in more than half of all cases, not considered in the division of property. In fact the AIFS study suggested that the figures in the working paper were not significantly different to those found by *Settling Up*.

At the same time, superannuated spouses experience difficulties under the present arrangements. The lack of flexibility in dealing with superannuation means that current property must often be traded away in exchange for an asset that may not be able to be realised for many years. This leaves one party with the realised asset of the house, yet with no retirement income, and the other party with no realisable assets but often significant retirement income.

<u>The current approach to superannuation in family law</u>

Under the Family Law Act, the Family Court has a broad discretion to re-allocate property in a way that is just and equitable. In doing so, the Court must take into account the contributions each spouse has made to the marriage (that is, to the acquisition, conservation

and improvement of property, or to the welfare of the family), their respective needs and their ability to fulfil them.

Typically a superannuation interest does not fall within the definition of property for the purposes of the Family Law Act because it is not generally able to be accessed before the member satisfies a condition of release. The Family Court cannot give effect to a re-allocation of property between spouses by making an order to divide a superannuation interest.

Through the 1980s there was no clear or consistent approach to dealing with superannuation adopted by the Family Court, and a variety of approaches were developed. More recently, the Family Court has endeavoured to achieve greater consistency but is faced with earlier decisions as well as an unsatisfactory legislative situation. The approaches open to the Family Court can be summarised as follows:

- a superannuation interest is a factor to be taken into account as a matter relevant to the needs of the non-contributing spouse – if the Court is satisfied that the spouse is adequately provided for as to his or her future retirement, the superannuation interest may be ignored altogether;

- a superannuation interest may be taken into account in a general way when considering what orders to make in respect of other property of the parties;

- the value of a superannuation interest may be offset against the value of other assets; or

- proceedings may be adjourned, or an order made but its operation deferred, until superannuation entitlements are received.

Problems with the current approach

The current treatment is not satisfactory. The variety of approaches creates uncertainty, especially for those seeking to negotiate a settlement rather than relying on a court determination. Other key problems are:

- valuation: there are difficulties in determining the value of superannuation interests, especially in defined benefit schemes because the final benefit will depend upon events (eg. retirement age, vesting rules, resignation, death, or changes in personal circumstances including remarriage and/or parenthood) that will not be known at the time of the settlement of the parties financial affairs. While it is relatively simple to value an accrued interest in an accumulation plan, valuing an interest in a defined benefit plan is significantly more complicated;

- limited powers of the Family Court: the Family Court does not have clear power under the Family Law Act to make orders directed against third parties (for example, to a trustee of a superannuation fund, directing them to divide a superannuation interest);

- legislative restrictions: the superannuation legislation does not allow the division of all superannuation interests between spouses on marriage breakdown or at any other time;

- insignificant other assets: in some cases there is no capacity to offset the value of a superannuation interest because there are no other significant assets (for example, equity in the former family home);

- lack of access to information: information about a superannuation interest is often inaccessible to the non-contributing spouse and there is a real concern that people trade off superannuation interests for other assets without understanding the true value of accumulating income for retirement in a concessionally taxed environment;

- impracticality: adjourning property proceedings is impractical except in cases where an interest is shortly to be paid out; and

- weight: it has proved difficult for the Family Court to determine the weight to give to a party's superannuation interest when it is taken into account by the Family Court when considering what orders to make in respect of the property of the parties because of the problems of valuation.

Successive Governments have both investigated the problem and received a number of reports, from bodies such as the Australian Law Reform Commission, the Family Law Council and the Parliamentary Joint Select Committee on Certain Family Law Issues. In the 1996 election campaign, the Government promised to examine the treatment of superannuation following the dissolution of marriage. On 8 March 1998, the Prime Minister announced the Government's intention to actively work to introduce reforms to bring about greater fairness and certainty into the treatment of superannuation in the event of marriage breakdown.

Specification of desired objective

The main objective is to provide a coherent framework for addressing the shortcomings of current arrangements, while taking into account the range and complexity of superannuation plans. Concurrent objectives are to:

- encourage parties to take responsibility for their own affairs wherever possible;
- minimise compliance costs; and
- be consistent with the Government's broader retirement incomes policy goals.

There are naturally some tensions between these objectives and a result that achieves one objective may lead to an inability to fully meet another objective. For example, the parties might wish to access superannuation for current needs rather than keep it for retirement. While this would be consistent with the policy objective that parties should be able to agree on solutions, it would be inconsistent with the Government's retirement incomes policy objective that superannuation be used to maintain and improve living standards in retirement. The preferred option would, therefore, seek to offer a solution that provides reasonable balance between any conflicting aims.

Elements of the objectives against which options are to be assessed follow.

Consistent, transparent and fair value should be recognised: While noting the difference between superannuation and other assets, the fair value of a superannuation interest should, like any other asset of the marriage, be taken into account in the division of assets on breakdown of a marriage especially as superannuation is becoming an increasingly significant asset in many marriages. Considerations of fairness dictate that its full value should be recognised.

It is important that parties should be able to ascertain an accurate valuation of superannuation interests and have the ability to divide those interests with regard to their own particular circumstances. The benefit in a defined benefit scheme has two components: a vested benefit and an unvested value. The vested benefit must be at least the minimum resignation benefit. The unvested value notionally accrues to the employee but may not be realised until the member satisfies certain requirements, as determined by the rules of the fund. For example, the employee may not fully qualify for additional benefits unless he or she remains employed by the company for a certain number of years. This raises questions about transparency and consistency of the methods used to fully value superannuation benefits, which must be addressed by the various options.

Guidance for parties agreeing on solutions: Parties should retain responsibility for settling their own affairs but clear guidance should be provided to assist this and for the Family Court to make decisions in the absence of agreement**.**

In family law, the emphasis is now for parties to agree solutions and use mechanisms other than the Court for dispute resolution (for example, mediation). Solutions relating to superannuation interests on marriage breakdown should follow this direction, especially as the vast majority of family law cases settle without the need for a hearing before the Family Court. A major consideration in designing a new scheme for dealing with superannuation on marriage breakdown is, therefore, to facilitate an outcome about which parties can agree.

It is also necessary to address the lack of certainty arising out of the present divergent approach by the Family Court and to design proposals which provide guidance for both negotiated settlements and Court decisions.

Access to information: To enable informed decisions, parties should have access to full information about superannuation interests**.**

Parties settling their financial matters after marriage breakdown can only make informed decisions about how to deal with superannuation if they have access to information about their spouse's superannuation interests, information about how to value and apportion superannuation interests and understanding about the benefits of accumulating assets for retirement in a concessionally-taxed environment.

A clean break: The treatment of superannuation interests on marriage breakdown should, as far as practicable and equitable, avoid further proceedings between the parties.

Property decisions made by the Family Court under the Family Law Act are guided by the "clean break" principle by which the Court is required to make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further

proceedings between them. The aim of the principle is to avoid the need for unnecessary contact between the parties following marriage breakdown and to allow them to pursue independent lives as far as possible.

In the superannuation context, a clean break may be possible where the value of the superannuation is readily ascertainable and the accrued interest can be divided immediately, such as with fully vested accumulation schemes. Defined benefit schemes, on the other hand, are more complex and it may be preferable for the division of the benefit to be deferred in some cases.

Consistency with retirement incomes policy: The treatment of superannuation on marriage breakdown should be consistent with the broader goals of retirement incomes policy.

The Government's retirement incomes policy has a number of broad objectives, including:

- ensuring that superannuation savings, which have benefited from concessional tax treatment, are used to maintain and improve living standards in retirement rather than being diverted to other uses; and

- effectively targeting Government assistance, in the form of age pensions and other benefits to those who have limited resources with which to fund their retirement.

Financial certainty following marriage breakdown: The financial circumstances of parties following marriage breakdown should be as certain as possible. Parties need to settle their financial affairs quickly and expeditiously so that they can re-establish themselves. Any proposals in relation to superannuation should also be designed to increase financial certainty for the parties so they are able to make informed decisions about their future financial situation.

Ease of administration for superannuation funds: Proposals for the treatment of superannuation on marriage breakdown should have regard to ease of compliance with administrative arrangements and, as far as possible, limit cost due to litigation and settlement.

The treatment of superannuation on marriage breakdown should not unduly increase the complexity and cost of the superannuation system. In order to minimise disruption and costs, the arrangements for superannuation on marriage breakdown should generally be consistent with the benefit design of the scheme.

Identification of options

In devising the options for consideration, there are a number of choices to be made. The first issue is whether a superannuation interest should be divided at all and if so whether all types of superannuation should be included or whether some should be excluded. There has been an increasing number of calls for reform to this area of the law and, as superannuation becomes more widespread, the option of not dividing will lead to increasing inequity between separated couples. Because of the preservation rules and as superannuation will become a more significant asset holding of the couple, the inequity of not dividing superannuation will be accentuated.

There are also choices for introducing reforms to valuation which intersect with the options set out below. Options for changes to valuation could be simply to introduce rules for valuation of the vested benefit only by reference to the minimum resignation benefit. Alternatively, valuation could include not only the vested benefit but also the unvested value calculated according to actuarial evidence on a case by case basis. A third valuation option is to calculate the unvested value according to prescribed tables which would apply to all superannuation interests. Division of unvested superannuation interests could create an actuarial risk for the contributing member which may in turn influence their employment decisions and therefore labour market mobility.

There are three broad options for consideration:

- *Option* 1:
  maintain the status quo;

- *Option* 2:
  maintain the status quo but introduce reforms to valuation; and

- *Option* 3:
  introduce reforms to treat superannuation interests as a separate matrimonial asset and to allow superannuation interests to be divided on marriage breakdown as well as provide the Family Court with guidance on how to deal with superannuation interests. Superannuation interests including vested and unvested benefits would be valued at their actuarially determined expected value.

Option 1 – Maintain status quo

This would involve no change to the current arrangements.

Option 2 – Maintain the status quo but introduce reforms to valuation

This option would provide a greater degree of certainty because of improvements in the valuation of superannuation interests. However, under this option superannuation would remain outside the jurisdiction of the court, which would continue to rely on its present array of approaches to dealing with superannuation interests in the context of parties settling their financial affairs.

Option 3 – Introduce reforms to treat superannuation interests as a separate matrimonial asset and to allow superannuation interests to be divided on marriage breakdown as well as provide the Family Court with guidance on how to deal with superannuation interests. Superannuation interests including vested and unvested benefits would be valued at their actuarially determined expected value.

This option would include measures to enable spouses and the Family Court to readily determine the value of a superannuation interest, including by reference to actuarially determined valuation factors for a defined benefit interest. The Family Court would be given guidance on how to deal with superannuation interests for couples seeking court assistance in the settlement of the parties financial affairs. Parties would also be encouraged to agree their own solutions. Separating couples and the Family Court would be able to

direct the trustees of their superannuation plans to divide payments made pursuant to a member's superannuation interest.

Valuation: One of the most difficult problems that has been faced by separating parties when deciding whether to trade a superannuation interest for other property is gaining an appreciation of the current value of that interest. This will be just as important once parties have the ability to divide a superannuation interest. The division of a superannuation interest could be confined to the vested benefit only, which could be valued by reference to the minimum resignation benefit. However, this ignores benefits that accrue to members, but which may not become payable until certain conditions of release are satisfied, and will not lead to a fair outcome especially for the non-contributing spouse.

Valuing interests in accumulation plans: Valuing interests in accumulation plans does not generally present problems as the value can readily be ascertained at any point in time.

Where there are unvested contributions in a fund that is primarily an accumulation plan, member statements should indicate that fact so that additional information can be obtained from the superannuation fund when needed.

Valuing interests in defined benefit plans Unlike accumulation plans, valuing an interest in a defined benefit plan is problematic.

Interests in defined benefit plans are typically based upon years of service with an employer and salary levels prior to retirement, as well as contributions and investment earnings. As the final benefit is dependent on future events, the full value of the retirement benefit cannot be known with certainty at the time of marriage breakdown. It is not possible, therefore, to place a definite figure on the value of an interest in a defined benefit plan at any point in time except when the benefit becomes payable. Valuing such interests normally requires actuarial expertise to identify the vested amount and the value of the benefit that has not yet vested.

This option, therefore, proposes to prescribe, in the Family Law Regulations a set of factors, developed by the Australian Government Actuary, that take these considerations into account. Parties and their advisers will be required to use these factors. The factors will also be used by the Family Court in determining the value of a superannuation interest when the parties approach the Court for assistance.

People would use the factors, in conjunction with additional information provided by the trustees, and their personal details, to calculate the present-day value of an interest in a defined benefit plan. The Family Law Regulations will also prescribe the method of calculation to be used.

If a particular superannuation fund considers that the valuation factors are not appropriate for its members, whether because of its benefit structure or the composition of its membership, it will be open to that fund to develop its own set of valuation factors and submit these to the Australian Government Actuary for approval.

If parties are unable to agree about how to value an interest in a defined benefit scheme, it will generally not be open to them to argue before the Court that there are particular characteristics (for example in terms of health, expected longevity or employment

prospects) which make the relevant factors inappropriate to them. The Court will be required to use the Australian Government Actuary's valuation factors, or approved factors developed by particular funds, to assess the value of a superannuation interest.

As noted above, the value of a superannuation interest in a defined benefit plan will not be known with complete certainty until the benefit is received. The value that the parties will arrive at using the factors developed by the Australian Government Actuary will represent the present value of the various possible superannuation outcomes (that is, the receipt of a resignation, retrenchment, invalidity, death or retirement benefit), weighted according to the probability of each of those outcomes occurring. The actual benefit eventually received by the member may in fact be higher or lower than this value, depending upon the circumstances in which the member leaves his or her superannuation fund.

Information to be made available for parties will make it clear that, although they will now be able to gain a better appreciation of the value of an interest in a defined benefit scheme, the actual value may differ because of the inherent uncertainties in such schemes. The parties will still need to weigh up for themselves how they wish to deal with that information.

Assessment of impacts of each option

Impact group identification

The groups likely to be affected include separating couples and their advisers, and the Family Court, the Australian Taxation Office ('ATO'), the Australian Prudential Regulation Authority ('APRA') and superannuation plan trustees. The proposals are also likely to have implications for Government revenue and outlays. The division of superannuation would also bring about a series of indirect effects for children. On the one hand it may create a more certain financial environment for the parents, thus being of benefit to the children. On the other hand, housing needs of children should be considered and there will be occasions where it may not be appropriate to divide the superannuation. Economy wide effects are also possible, for example labour market mobility may be adversely affected, however, this cannot be assessed at this stage.

Option 1 – Maintain status quo

Separating couples

The current arrangements leave separating couples uncertain as to how to treat superannuation interests in the event of marriage breakdown. While superannuation interests are increasingly being taken into account when couples arrange their financial affairs on marriage breakdown, there is no consistent method for valuing superannuation interests, especially in defined benefit plans, or dealing with superannuation interests. Parties face an uncertain outcome.

As superannuation interests become a more significant household asset, with growth due to the superannuation guarantee legislation, the option of trading a superannuation interest for other property will become less satisfactory. The contributing spouse will increasingly be required to trade larger amounts of current assets, or borrow, to compensate the non-contributing spouse for loss of retirement income. This tends to leave one member of

the couple with their current needs unmet (that is, housing) and the other with future needs unmet (that is, retirement income).

This unsatisfactory situation, combined with the significant growth in superannuation coverage, will lead to increasing community dissatisfaction with the current arrangements.

The Family Court

In the absence of reform, the Family Court would continue to apply the variety of different approaches and at the same time be unable to order a division of superannuation interest where that would be the most appropriate measure to achieve an equitable outcome in property settlement proceedings (for example, where there is no capacity to offset the value of a contributing spouse's superannuation interest because the couple has no other property). This restriction reduces the likelihood of an equitable outcome for the parties.

The absence of any clear guidance could lead to an increasing number of cases coming to the Court for determination, thus placing greater strain on the Court and its resources. It is likely that this would increase as the number of parties holding superannuation increases, due to the superannuation guarantee.

The APRA

In the absence of reform, parties may request the APRA to use its discretionary powers to direct trustees to divide their superannuation interests. Responding to such requests on a one off basis imposes an administrative burden on the APRA. While the instances of this are not great, the increased membership of superannuation is likely to mean this could increase considerably.

The ATO

The ATO currently has a role in the taxation of superannuation. This option would have no effect on the ATO.

Superannuation plan trustees

Superannuation plan trustees currently have a role in the administration of superannuation plans and this option would not increase the administrative burden but would leave trustees in a situation where they may have to deal with complaints the solution to which is outside their control. The level of dissatisfaction about the inability to divide superannuation interests may lead to an increase in the number of complaints.

Government revenue and outlays

This option has no immediate implications for Government revenue. Age pension outlays may tend to be higher in the longer term than they would otherwise be if parties were permitted to divide superannuation, as many non-contributing spouses would have no retirement income other than the age pension.

Option 2 – Maintain the status quo but introduce reforms to valuation

Separating couples

One of the shortcomings of the current arrangements is the lack of a consistent method for valuing superannuation interests especially in defined benefit schemes. Even where parties propose to deal with their superannuation in a fair manner, they need to obtain expert assistance in valuation of the interest. Valuation of a superannuation interest is a complex exercise and providing an accessible and objective means to value a superannuation interest would be of great benefit to separated couples.

However, attending to the valuation issues only would not address other important objectives in relation to superannuation in the family law context. For example. the court would not be able to equitably divide a resource that is becoming increasingly significant. Nor would the retirement income goals be addressed. The only choices for separated couples would be to trade off the resource, albeit at a fair value, or to adjourn the matter until the superannuation interest fully vests.

This unsatisfactory situation, combined with the significant growth in superannuation coverage, would lead to increasing community dissatisfaction with the current arrangements.

The Family Court

While the valuation difficulties for the Court would be resolved, it would continue to apply the variety of different approaches and at the same time be unable to order a division of superannuation interests. This restriction would reduce the likelihood of an appropriate outcome for the parties. As with option 1, it could lead to an increasing number of cases coming to the Court for determination, thus placing greater strain on the Court and its resources.

The APRA

The impact on the APRA would be similar to option 1.

The ATO

As with option 1, this option would have no effect on the ATO.

Superannuation plan trustees

Superannuation plan trustees would be required to provide information about the existing levels of superannuation accounts and would also have to provide that information to the non-contributing spouse. This would increase the administrative burden for superannuation scheme trustees, but trustees would be able to charge for the service.

These charges are expected to be modest, approximating the current costs of setting up a new superannuation account and will be borne by the separating couple.

Government revenue and outlays

As with option 1, this option would have no immediate implications for Government revenue. Age pension outlays may tend to be higher in the longer term than they would otherwise be if parties were permitted to divide superannuation as many non-contributing spouses would have no retirement income other than the age pension.

Option 3 – Introduce reforms to assist the valuation of superannuation interests, to allow superannuation interests to be divided on marriage breakdown and to provide the Family Court with more guidance on how to deal with superannuation interests

Separating couples

The focus of this option would be on the parties taking responsibility for agreeing on their own arrangements for dealing with superannuation. If they are unable to agree, however, a court would be given the jurisdiction and power to divide a superannuation interest. A superannuation interest in the name of one spouse is usually built up during a marriage through the joint efforts of both spouses. Superannuation contributions made by one party generally mean that the household has foregone current use of money so as to save for future retirement. If the parties had not separated they would have had a reasonable expectation that they would equally share in the superannuation interest at retirement.

How the division of superannuation interests can be achieved, however, would depend on the type of plan under consideration. Accumulation plans would be able to be divided relatively easily as the amount in the fund can readily be identified at any given time.

Defined benefit plans are more complex and dividing only the vested benefit would not fully recognise the value of the superannuation leading to unfairness in many cases. Although the full value of the benefit may not be realised until a later point in time, part of that benefit would often have accrued earlier.

In the case of defined benefit plans, therefore, this option proposes that an interest might be divided in different ways depending on the requirements in the particular case and based on the principle of a fair division. This option would allow the present day value of the superannuation accrued to the time of marriage breakdown to be recognised.

The Family Court

This option would give the Family Court greater choice in dealing with superannuation interests in contested settlements, which would increase the likelihood of an appropriate outcome for the parties. Providing more guidance for the Family Court on how to deal with superannuation interest would increase certainty and reduce the criticism of Court decisions.

The APRA

Following amendment of the superannuation legislation, the APRA would no longer be required to exercise its discretion to split superannuation interests.

The ATO

Because separating parties would have access to a new low rate Eligible Termination Payment ('ETP') threshold and a new Reasonable Benefit Limit, some may seek to take advantage of these taxation concessions without a bona fide separation. It may be a sham contrived to avoid taxation and depending on the extent of such sham arrangements, the ATO may be involved in investigations to ensure such arrangements are not entered into to gain the tax advantages by dividing superannuation interests.

Superannuation plan trustees

The Government recognises that enabling superannuation interests to be divided on marriage breakdown will have costs. The costs to trustees include overhead costs of implementing the reforms and the administrative costs of dividing a particular interest in the event of a request or order to do so.

The administrative costs will be borne by the parties to the marriage and the Regulations will prescribe the fees that the superannuation funds will be able to charge.

These costs are expected to be modest, particularly in the case of accumulation funds which are fully vested. It is expected that the cost would not be significantly more than the cost of establishing an account for a new member or making an ETP from a member's account. It is expected, therefore, that the prescribed fees will be similarly modest.

However there are overhead costs involved in implementing new administrative systems and information technology. Superannuation funds will not be permitted to charge fees in relation to the development of new systems. These costs would be indirectly passed on to all the members of the scheme.

Government revenue and outlays

Allowing division of superannuation interests will have a cost to revenue. Generally, the first prescribed amount (currently $96,637) of a lump sum benefit is subject to tax at a lower rate than amounts in excess of this threshold. As many non-contributing spouses may not otherwise have superannuation, allowing a division of superannuation interests would result in more people having access to this low rate ETP threshold.

Where the final benefit is taken as an income stream, the couple together may face a lower tax liability as a result of dividing the superannuation interest than if the superannuation interest had not been divided, but this would depend on other assets in retirement.

Any arrangements that increase the retirement income of a non-contributing spouse may also reduce age pension outlays. Arrangements that reduce the retirement income of the contributing spouse may increase age pension outlays.

Changes to the administrative and information technology systems for income security payments will also be required.

Consultation

Consultations have been undertaken with representatives of the superannuation industry including with the Association of Superannuation Funds of Australia ('ASFA') and representatives from the State superannuation and pension schemes. The Family Court of Australia, the Family Law section of the Law Council of Australia and National Legal Aid have also been consulted.

Those consulted recognised the need for reform in this area and were generally supportive of the proposed reform.

Conclusion and recommended option

The preferred option is option 3, which involves measures to assist in the valuation of superannuation interests, the division of superannuation interests and guidance for the Family Court. This would result in a significant improvement on the current arrangements.

Any potential costs arising from this option are likely to be outweighed by benefits associated with greater choice and certainty for separating parties. The costs to Government are one off costs and the administration costs to superannuation plan trustees, in dividing superannuation interests, can largely be allocated on a user pay basis to ensure the costs are borne by those who receive the benefits of the proposed reforms.

Implementation and review

Implementation of the preferred option will occur through the Family Law Legislation Amendment (Superannuation) Bill 2000 with superannuation amendments to commence on the anniversary of the day on which the resultant Act receives the Royal Assent. The development of valuation factors by the Government Actuary and the preparation of amendments to the Family Law Regulations is expected to occur in the middle of 2000, after which further consultation with the superannuation industry would take place. It is proposed that the operation of the Superannuation Bill will be reviewed after an initial period of three years from commencement to determine what, if any, improvements to the arrangements are necessary or desirable.

CONSULTATION STATEMENT

The Family Court of Australia, the legal profession and the superannuation industry have been consulted on the draft Superannuation Bill.

NOTES ON CLAUSES

Clause 1 – Short title

1. Clause 1 of the Superannuation Bill will provide that the Act may be cited as the *Family Law Legislation Amendment (Superannuation) Act 2000*.

Clause 2 – Commencement

2. Clause 2 of the Superannuation Bill will provide for the commencement of the Act. Subclause 2(1) will provide that generally the Act will commence on the day it receives the Royal Assent.

3. Subclause 2(2) of the Superannuation Bill will provide that Schedule 1 to the Superannuation Bill will commence on the first anniversary of the day on which the Act receives the Royal Assent. Schedule 1 to the Superannuation Bill provides for the amendments to the Family Law Act dealing with the division of superannuation on marriage breakdown, and also provides for amendments to other legislation.

4. The reason for the delay in commencement of Schedule 1 is to allow the superannuation industry and relevant government agencies to make the necessary adjustments to their information technology and administrative systems to implement the division of a superannuation interest on marriage breakdown. It will also allow for a range of educational activities to be undertaken in relation to the Bill.

Clause 3 – Schedule(s)

5. Clause 3 of the Superannuation Bill will provide that each Act that is specified in a Schedule will be amended or repealed as set out in the applicable items in the Schedule. Clause 3 of the Superannuation Bill will also provide that any other item in a Schedule has effect according to its terms.

Clause 4 – Definitions

6. Clause 4 of the Superannuation Bill will provide for definitions, relevantly:

   startup time will be the time when the Act commences; and

   superannuation amendments will be the amendments made by Schedule 1 to the Act.

Clause 5 – Application of superannuation amendments

7. Clause 5 of the Superannuation Bill will provide for the application of the superannuation amendments, as provided for in Schedule 1. The policy intention is that the superannuation amendments will not apply if a property settlement, either by a court approved agreement, under section 87 of the Family Law Act, or a court order, under section 79 of the Family Law Act, has been finally concluded prior to the commencement of the superannuation amendments. Similarly, if the court order

or the court approval for the agreement is subsequently set aside after the commencement of the superannuation amendments, the superannuation amendments will not apply because the parties will have had their property dealt with under section 79 or section 87 of the Family Law Act.

8. Subclause 5(1) of the Superannuation Bill will provide that, subject to clause 5, the superannuation amendments will apply to all marriages, including those that were dissolved before the startup time. This will make it clear that the amendments will apply regardless of when the marriage may have taken place. There will be, of course, exceptions to this general rule, which are set out in the following paragraph.

9. Subclause 5(2) of the Superannuation Bill will provide for the exceptions to the general provision in subclause 5(1). Accordingly, subclause 5(2) will provide that the superannuation amendments will not apply to a marriage if:

   (i) a maintenance agreement, under section 87 of the Family Law Act, was approved before the startup time (paragraph 5(2)(a)); or

   (ii) an order for the settlement of property, under section 79 of the Family Law Act, was made before the startup time (paragraph 5(2)(b)) that is not expressed to be an interim order.

10. Schedule 2 to the Family Law Amendment Bill, which is currently before the Parliament, will insert Part VIIIA into the Family Law Act. Part VIIIA will provide that parties to a marriage may make a financial agreement about how their property is to be divided on marriage breakdown. Under Part VIIIA it will not be possible to make an agreement about the division of a superannuation interest. However, parties to a financial agreement under Part VIIIA will have taken any superannuation interests into account in making the agreement. Therefore, parties who have made a financial agreement under Part VIIIA will not be able to subsequently make a superannuation agreement. This will be achieved by subclause 5(3) of the Superannuation Bill

11. Subclause 5(3) of the Superannuation Bill will provide that new Part VIIIB of the Family Law Act, which will provide for the division of superannuation on marriage breakdown and will be inserted into the Family Law Act by the Superannuation Bill, will not apply in relation to a financial agreement that was made before the startup time.

SCHEDULE 1 – AMENDMENTS

12. Schedule 1 to the Superannuation Bill will amend the following Acts:

(i) *Bankruptcy Act 1966*;

(ii) *Family Law Act 1975*;

(iii) *Superannuation Industry (Supervision) Act 1993*; and

(iv) *Superannuation (Resolution of Complaints) Act 1993*.

Bankruptcy Act 1966

General explanation

13. Section 116 of the Bankruptcy Act provides for the property that is to be divisible among the creditors of the bankrupt. Section 116(1) of the Bankruptcy Act sets out the general rule, which is that all property that belonged to or was vested in a bankrupt is so divisible. However, section 116(2) of the Bankruptcy Act provides for the exceptions to this general rule.

14. Subparagraph 116(2)(d)(iii) of the Bankruptcy Act provides that the interest of a bankrupt in a regulated superannuation fund or an approved deposit fund, within the meanings of the SIS Act, is not divisible among the creditors of the bankrupt. Subparagraph 116(2)(d)(iv) of the Bankruptcy Act provides that a payment to a bankrupt, received on or after the date of the bankruptcy, from such a fund is not divisible among the creditors if the payment is not a pension within the meaning of the SIS Act. In effect, an income stream from a superannuation pension can be used to satisfy creditors.

15. Subparagraph 116(2)(d)(v) of the Bankruptcy Act provides that an amount of money a bankrupt holds in a Retirement Savings Account ('RSA') is not divisible among the creditors of the bankrupt. Subparagraph 116(2)(d)(vi) of the Bankruptcy Act provides that a payment to a bankrupt, received on or after the date of the bankruptcy, from an RSA is not divisible among the creditors if the payment is not a pension within the meaning of the *Retirement Savings Accounts Act 1997* ('RSA Act').

16. Subsection 116(5) of the Bankruptcy Act provides for the manner in which subsection 116(1) is to extend to property covered by paragraph 116(2)(d).

17. The effect of these provisions is to make certain superannuation interests of the bankrupt, and payments made pursuant to those interests, property that is not divisible among the creditors of the bankrupt. The amendment to the Bankruptcy Act will extend a similar exemption to a bankrupt who acquires payments pursuant to a payment split under new Part VIIIB of the Family Law Act. This will cover the

situation where the non-member spouse becomes bankrupt. A description of the amendment follows.

Item 1 – After subparagraph 116(2)(d)(iv)

18. Item 1 of Schedule 1 to the Superannuation Bill will insert new subparagraph 116(2)(d)(iva) into the Bankruptcy Act, which will provide that a payment to the bankrupt under a payment split is not divisible among the creditors where the eligible superannuation plan involved is covered by subparagraph (iii) and the splittable payment is not a pension. The effect of this will be to replicate the existing exemptions to prevent these payments from being divisible among the creditors of the bankrupt.

Item 2 – At the end of paragraph 116(2)(d)

19. Item 2 of Schedule 1 to the Superannuation Bill will insert new subparagraph 116(2)(d)(vii) into the Bankruptcy Act and is a mirror provision for a retirement savings account ('RSA'). It will provide that a payment to the bankrupt under a payment split is not divisible among the creditors where the eligible superannuation plan is an RSA and the splittable payment involved is not a pension or annuity. The effect of this will be to exempt these payments from being divisible among the creditors.

Family Law Act 1975

Item 3: At the end of subsection 90K(1)

20. Section 90K, which will be inserted in the Family Law Act by the Family Law Amendment Bill 1999, will provide for the circumstances in which a court may set aside a financial agreement or an agreement terminating a financial agreement ('termination agreement').

21. Under a superannuation agreement, parties will be able to make a flagging agreement. The purpose of a flagging agreement will be to defer a final agreement about the division of the subject superannuation interest until a later date. The assumption is that parties who agree to a flagging agreement will be able, at a later date, to make a further agreement about splitting the subject superannuation interest. Part VIIIB of the Family Law Act will provide for the parties to make a flag lifting agreement, which will both terminate the flag on the superannuation interest and, if parties so choose, provide for the division of the superannuation interest.

22. However, there may be circumstances in which parties who had previously made a flagging agreement are unable later to agree on the necessary flag lifting agreement. In such circumstances, it is necessary to provide a means for the potential impasse to be broken, and to allow the court to make an order about the superannuation interest should the parties not be able to make a flag lifting agreement.

23. This will be achieved by Item 3 of Schedule 1 to the Superannuation Bill, which will insert new paragraph 90K(1)(e) in the Family Law Act. New paragraph 90K(1)(e) will provide that a court may set aside a financial agreement, when a

payment flag is operating under new Part VIIIB on a superannuation interest, if the court is satisfied that there is no likelihood that the operation of the flag on the superannuation interest will be terminated by a flag lifting agreement. It will be expressed in the terms of "no reasonable likelihood" to give the court the flexibility to deal with a broad range of fact situations, which might include later disagreement as well as death or incapacity.

24. Another area where the court's powers to set aside agreements will be expanded relates to "unsplittable payments". Under new Part VIIIB, it will be possible to prescribe certain superannuation interests to be "unsplittable", and therefore not able to be split either by agreement or court order. If an agreement has been made that purports to provide for a split of an "unsplittable" interest, it would not be able to be enforced. Therefore, in such circumstances, it is necessary for the agreement to be able to be set aside.

25. Item 3 of Schedule 1 to the Superannuation Bill will also insert new paragraph 90K(1)(f) to achieve this. New paragraph 90K(1)(f) will provide that a court may set aside a financial agreement if the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of new Part VIIIB.

Item 4: After Part VIIIA

26. Item 4 of Schedule 1 to the Superannuation Bill will insert, into the Family Law Act, new Part VIIIB – Superannuation interests.

Division 1 – Preliminary

Subdivision A – Scope of this Part

Section 90MA – Object of this Part

27. This section is self explanatory.

Section 90MB – This Part overrides other laws, trust deeds etc

28. The changes in the Superannuation Bill will override other laws, trust deeds etc that prevent, either expressly or by implication, the division of superannuation. This section will provide that superannuation interests will be able to be divided on marriage breakdown, despite any contrary intentions otherwise provided for in either legislation or a trust deed or other instrument.

29. Subsection 90MB(1) of new Part VIIIB will provide that new Part VIIIB has effect despite anything to the contrary in any other law of the Commonwealth (paragraph 90MB(1)(a)), any law of a State or Territory (paragraph 90MB(1)(b)) or anything in a trust deed or other instrument (paragraph 90MB(1)(c)).

30. Subsection 90MB(2) of new Part VIIIB will provide that, without limiting subsection 90MB(1), nothing done in compliance with new Part VIIIB by the trustee of an eligible superannuation plan is to be treated as resulting in a contravention of a law or instrument referred to in subsection 90MB(1).

31. The intention of subsection 90MB(2) is to provide protection for a trustee who acts in accordance with the provisions of new Part VIIIB. If any action taken by the trustee, in accordance with the requirements of new Part VIIIB, would mean that the trustee would otherwise be in breach of the governing rules of the superannuation fund, such a breach will not be treated as resulting in a contravention.

Section 90MC – Extended meaning of "matrimonial cause"

32. Existing section 4 of the Family Law Act defines "matrimonial cause" to be, relevantly in paragraph (ca), "proceedings between the parties to a marriage with respect to the property of the parties to the marriage...". Existing Part V of the Family Law Act provides for the jurisdiction in matrimonial causes. Existing section 39 of the Family Law Act provides that, subject to Part V, matrimonial causes may be instituted under the Family Law Act in the Family Court or in the Supreme Court of a State or a Territory.

33. Section 90MC of new Part VIIIB will provide that a superannuation interest is to be treated as property for the purposes of this definition. This means that proceedings dealing with a superannuation interest will be able to be instituted in those courts that have jurisdiction to deal with matrimonial causes, as provided for in Part V of the Family Law Act. However, creating the jurisdiction in this way means that superannuation interests, where they are to be divided, will have to be divided in accordance with new Part VIIIB. They will not be able to be treated as property generally for the purposes of Part VIII.

Subdivision B – Interpretation

Section 90MD – Definitions

34. Section 90MD of new Part VIIIB will provide for the definitions used in new Part VIIIB. Relevantly, the following terms will be defined:

(i) *eligible superannuation plan* will mean any of a number of listed types of funds, including:

(a) superannuation funds within the meaning of the SIS Act. This covers schemes regulated by the SIS Act. It also covers schemes known as "constitutionally protected" schemes (because of the tax exempt status), which are primarily state public sector schemes, judges' pension schemes and parliamentary superannuation schemes. It also covers non-SIS regulated superannuation schemes; and

(b) an approved deposit fund, within the meaning of the SIS Act;

(c) an RSA; and

(d) an account within the meaning of the *Small Superannuation Accounts Act 1995*.

The policy intention is to ensure that the broad range of superannuation funds is covered by the Act;

(ii) *unflaggable interest* will mean a superannuation interest prescribed by the regulations; and

(iii) *unsplittable interest* will mean a superannuation interest prescribed by the regulations.

35. Some superannuation interests will not be able to be flagged or split, pursuant to either an agreement or a court order. The regulations will prescribe such interests. It is envisaged that certain superannuation interests, perhaps because of the minimal value of the interests, should be prescribed to be either unsplittable or unflaggable, or both.

Section 90ME – Splittable payments

36. Subsection 90ME(1) of new Part VIIIB will provide that the following types of payments, in respect of a superannuation interest of a spouse, are splittable payments:

(i) a payment to the spouse (paragraph 90ME(1)(a));

(ii) a payment to another person for the benefit of the spouse (paragraph 90ME(1)(b)). This will cover the situation where the member spouse "rolls over" his or her superannuation interest into a new eligible superannuation plan. This will be particularly important once the proposals regarding "portability" of superannuation commence, and the movement of a superannuation interest between eligible superannuation plans becomes possible, more simple and more common;

(iii) a payment to the legal personal representative of the spouse, after the death of the spouse (paragraph 90ME(1)(c));

(iv) a payment to a reversionary beneficiary, after the death of the spouse (paragraph 90ME(1)(d)); and

(v) a payment to the legal personal representative of a reversionary beneficiary, after the death of the reversionary beneficiary (paragraph 90ME(1)(e)).

37. Subsection 90ME(2) of new Part VIIIB will provide that a payment is not a splittable payment if it is so prescribed by the regulations. Some payments should not be splittable, for example because the superannuation interest is too small for a payment split to be appropriate, or because the splittable payment is being made as a result of a special circumstance of the member spouse, such as temporary disability or illness.

Section 90MF – Reversionary interest

38. A reversionary interest is an interest that 'reverts' to a nominated beneficiary. Section 90MF of new Part VIIIB will provide that a "reversionary interest", for the purposes of new Part VIIIB of the Family Law Act, is any interest where the entitlement to benefits in respect of an interest is conditional on the death of another person who is still living.

Section 90MG – Meaning of in force

39. It is intended that a superannuation agreement will form part of a more general financial agreement and that, therefore, a superannuation agreement will be in force in the same circumstances under which a financial agreement would be in force.

40. Section 90G, which will be inserted into the Family Law Act by the Family Law Amendment Bill, will provide for the circumstances in which a financial agreement is binding. A financial agreement will be binding on the parties if:

    (i) the agreement is signed by both parties (paragraph 90G(1)(a)); and

    (ii) the agreement contains statements to the effect that each party has been provided with independent advice (paragraph 90G(1)(b)); and

    (iii) the practitioners who provided the advice certify that the advice was provided (paragraph 90G(1)(c)); and

    (iv) the agreement has not been terminated and has not been set aside by a court (paragraph 90G(1)(d)); and

    (v) after the agreement is signed, the original agreement is given to one of the parties and a copy is given to the other (paragraph 90G(1)(e)).

41. Subsection 90MG(1) of new Part VIIIB will provide that a financial agreement will be in force at any time when it is binding on the parties, in accordance with section 90G.

42. Subsection 90MG(2) of new Part VIIIB will provide that a superannuation agreement will be in force at any time when the relevant financial agreement is in force.

43. Subsection 90MG(3) of new Part VIIIB will provide that a flag lifting agreement will in force if it meets the requirements set out in section 90MN of new Part VIIIB and has not been either set aside by a court or terminated.

Division 2 – Payment splitting or flagging by agreement

Subdivision A – Superannuation agreements

Section 90MH – Superannuation agreement to be included in financial agreement

44. The policy intention is that a superannuation agreement should be made in the context of a broader financial agreement, dealing with the division of property on marriage breakdown. The amendments have been drafted so that a superannuation agreement will simply form part of a broader financial agreement. A financial agreement may be made either before or during marriage or after marriage breakdown.

45. Subsection 90MH(1) of new Part VIIIB will provide that a financial agreement, under Part VIIIA of the Family Law Act, may include an agreement that deals with superannuation interests of either or both of the parties to the agreement as if those interests were property.

46. It is possible that a superannuation interest may not exist at the time that the superannuation agreement is made and the agreement may be made in contemplation of the acquisition of such an interest. This might occur, for example, in the context of an agreement made prior to marriage. Subsection 90MH(1) will also provide that it does not matter whether or not the superannuation interests are in existence at the time the agreement is made.

47. Subsection 90MH(2) of new Part VIIIB will provide that the part of the financial agreement that deals with superannuation interests is a "superannuation agreement" for the purposes of new Part VIIIB.

48. Subsection 90MH(3) of new Part VIIIB will provide that a superannuation agreement will have effect only in accordance with new Part VIIIB and, in particular, will not be able to be enforced under Part VIIIA. The purpose of this provision is to maintain the integrity of the self contained nature of the superannuation provisions. This will mean that where superannuation is to be split it will have to be split in accordance with the provisions of Part VIIIB.

49. It is intended that a superannuation interest will only be able to be divided on marriage breakdown. People who are either not married, or if married the marriage has not broken down, will not be able to effect a division of any superannuation interests that they hold.

50. Subsection 90MH(4) of new Part VIIIB will provide that a superannuation agreement that is included in a financial agreement made in contemplation of marriage, under section 90B, to be inserted in the Family Law Act by the Family Law Amendment Bill 1999, will have no effect unless the parties actually marry. This is because the Commonwealth may make laws with respect to marriage and while it is permissible to cover circumstances where people have an intention to marry, they must actually marry for the agreement to be effective.

51. The provisions in the Family Law Amendment Bill 1999 that deal with financial agreements will provide that parties will be able to make a financial agreement about property that either or both of them have acquired prior to the dissolution of the marriage. Therefore in order that a superannuation interest will be able to be dealt with in an agreement made pursuant to section 90B, section 90C or section 90D, it is necessary to clarify when a superannuation interest is acquired.

52. Subsection 90MH(5) of new Part VIIIB will provide that a superannuation interest of a party to a financial agreement is treated as being acquired at the time when that party first becomes a member of the eligible superannuation plan in respect of that interest

Subdivision B – Payment splitting

Section 90MI – Operative time for payment split

53. An agreement to split a splittable payment, pursuant either to a superannuation agreement or a flag lifting agreement, will have effect by force of the legislation. Therefore, it is necessary to provide for the time at which the payment split becomes operative, in order that the trustee knows when the legal obligations to implement the payment split will apply. It will clearly be necessary that the trustee be notified of the agreement.

54. In addition, a payment split will only become operative after the marriage between the parties to the agreement has broken down. Therefore, it is necessary that the parties demonstrate this breakdown.

55. Section 90MI of new Part VIIIB will provide that the "operative time" for a payment split will be the beginning of the fourth (4th) working day after the day on which a copy of the agreement is served on the trustee. This is to ensure that there is sufficient time for the trustee to receive the agreement and make the necessary administrative arrangements, such as forwarding it to the area of the organisation responsible for implementing the payment split or to the fund administrator, in accordance with the agreement.

56. A payment split, pursuant to an agreement, will only operate in the context of a marriage breakdown. In circumstances where the marriage has not broken down, then an agreed payment split is not to operate. A decree absolute dissolving the marriage is one means of showing marriage breakdown. However, under the Family Law Act, it is possible for a marriage to have broken down without a decree absolute with respect to the marriage having been granted. In these circumstances it is, therefore, necessary, for the parties to provide the trustee with a declaration that the marriage has broken down.

57. To achieve this, paragraph 90MI(a) of new Part VIIIB will provide that the agreement, to be served on the trustee, is to be accompanied by either:

    (i) a copy of the decree absolute dissolving the marriage (subparagraph 90MI(a)(i)); or

(ii) a "breakdown declaration" for which the declaration time is not more than 28 days before the service on the trustee (subparagraph 90MI(a)(ii)).

58. It may be necessary, in order to ensure that the superannuation agreement becomes operative in appropriate circumstances, and doesn't become operative in inappropriate circumstances, that a further declaration by one or both of the parties is required.

59. For this reason, subsection 90MI(b) of new Part VIIIB will provide that, in addition to the requirements of subsection 90MI(a), the regulations may provide for a further declaration. If such a further declaration is required, then the operative time will not be reached until such further declaration has also been made.

Section 90MJ – Payment split under superannuation agreement or flag lifting agreement

60. A superannuation agreement, or a flag lifting agreement, may provide for a payment split. Section 90MJ of new Part VIIIB will provide for the operation of this payment split.

61. Paragraph 90MJ(1)(a) of new Part VIIIB will provide that section 90MJ will apply to a superannuation interest if the interest is identified in a superannuation agreement or a flag lifting agreement. This means that the agreement will have to specify any superannuation interest that is to be covered by the agreement. If parties make a superannuation agreement or a flag lifting agreement before any superannuation interest is actually held, it will be possible to provide for the interests either by specific or by generic description. That is, parties will be able to make an agreement about "a superannuation in XYZ fund" or, alternatively, parties will be able to make an agreement about "any superannuation interest" that either party holds.

62. Paragraph 90MJ(1)(b) of new Part VIIIB will provide that section 90MJ will apply to the superannuation interest if the superannuation agreement or flag lifting agreement contains one of three splitting methods. The first method is the actuarial method and it will enable parties to obtain an actuarial value of the superannuation interest. In effect, this will enable the parties to arrive at a present day value of the superannuation interest that is contingent upon particular events and will be available for defined benefit interests. Once the value is obtained and the parties agree on what proportions the interest is to be split, the parties will be able to achieve this by identifying a percentage in the agreements.

63. The second method is the fixed percentage method. The value of some superannuation interests, such as accumulation interests, is readily ascertainable and the actuarial method is not necessary for these interests. In these circumstances, the fixed percentage method will be available for parties to split a superannuation interest. This method will also be able to be used when one of the parties is received a pension and the pension is to be split.

64. The third method is the transfer amount method. It will enable parties to identify an amount (rather than a percentage) to transfer. This method may be used where a

lump sum is to be split and that sum is known. This method may also be used where the value of a superannuation interest is being considered together with other property and part of the superannuation interest is to be transferred to achieve a just and equitable result. For example, if the property of the parties consists of a house valued at $200,000 and a superannuation interest valued at $300,000, the parties may wish to agree that one party takes the house and a transfer of $50,000 of the superannuation interest and the other party takes the remaining $250,000 of the superannuation interest.

65. The three methods will provide a comprehensive array of ways in which parties will be able to split a superannuation interest. It is necessary to provide this level of detail so that the trustee is able to split the superannuation interest with certainty.

66. Paragraph 90MJ(1)(c) of new Part VIIIB will provide that section 90MJ applies to a superannuation interest if the agreement is in force at the operative time. Section 90MG will provide for the meaning of "in force" and section 90MI will provide for the operative time for a payment split..

67. Paragraph 90MJ(1)(d) of new Part VIIIB will provide that section 90MJ applies to an interest that is not an unsplittable interest. An unsplittable interest will mean a superannuation interest prescribed by the regulations, pursuant to section 90MD.

68. Subsection 90MJ(2) of new Part VIIIB will provide that subsections 90MJ(3), (4) and (5) will begin to apply to the superannuation interest at the operative time. Section 90MI will provide for the operative time for a payment split.

69. Subsection 90MJ(3) of new Part VIIIB will provide for the entitlement of the non-member spouse to a portion of the entitlement of the member spouse. It will provide that whenever a splittable payment becomes payable, in respect of the superannuation interest, the non-member spouse will be entitled to be paid the amount (if any) that is calculated under subsection 90MJ(4) and there will be a corresponding reduction in the entitlement of the member spouse - that is, the person to whom the splittable payment would have been made but for the payment split.

70. It is important to note that the trustee will not be required to pay to the non-member spouse any greater amount than the member spouse would be entitled to. That is, it will not be possible for the agreement to provide that the non-member spouse will be entitled to greater than 100% of the member spouse's entitlement. However, it would be possible for the agreement to provide that the non-member spouse will be entitled to 100% of the member spouse's entitlement.

71. Subsection 90MJ(4) of new Part VIIIB will provide for the method of calculation of the amount of the payment split. As outlined above, for paragraph 90MJ(1)(b), there will be three different methods of calculating the amount of the payment split – the actuarial method, the fixed percentage method and the transfer amount method. Each of the three methods will be appropriate to particular kinds of superannuation interests at specific times.

72. The actuarial method will be appropriate to calculate the value of a defined benefit interest when it is in the accumulation phase. The transfer amount method will be appropriate for both an accumulation interest in the accumulation phase and a lump sum in the payment phase. The fixed percentage method will be appropriate for an accumulation interest in the accumulation phase and both a lump sum and an income stream in the payment phase.

73. As mentioned above, the actuarial method will involve an actuarial calculation of the present day value of both the vested and non-vested components of the superannuation interest. For the transfer amount method it will also be necessary to calculate the value of the superannuation interest. The Family Law Regulations will provide for the formulae to be used in making these calculations.

74. It is intended that once the operative time has been reached, and the payment splits have commenced, the parties will not be able subsequently to agree to "re-merge" the superannuation interest. Accordingly, subsection 90MJ(5) of new Part VIIIB will provide that section 90MJ will continue to apply to the superannuation interest even if the agreement later ceases to be in force. It will be possible, however, for a court to cancel a payment split, pursuant to section 90MV of the Bill.

Subdivision C – Payment flagging

Section 90MK – Operative time for payment flag

75. The practical effect of a payment flag is to "injunct" the trustee in order that no payments, pursuant to the superannuation interest, are made. The payment flag will operate as soon as is possible.

76. Section 90MK of the Bill will provide that the operative time for a payment flag under a superannuation agreement will be, in effect, the time when the agreement about the payment flag is served on the trustee.

77. Any agreement about the payment flag will be made in the context of marriage breakdown. Therefore, in order for an agreement about the payment flag to be operative, parties will need to declare, if they have not formally dissolved their marriage, that their marriage has broken down.

78. Subsection 90MK(a) of the Bill, therefore, will provide that the operative time for a payment flag under a superannuation agreement is the time when a copy of the agreement is served on the trustee together with either:

    (i) a copy of the decree absolute, dissolving the marriage (paragraph 90MK(a)(i)); or

    (ii) a "breakdown declaration" for which the declaration time is not more than 28 days before the service on the trustee (paragraph 90MK(a)(ii)).

79. It may be necessary, in order to ensure that the agreement about the payment flag becomes operative in appropriate circumstances, and doesn't become operative in

inappropriate circumstances, that a further declaration by one or both of the parties is required.

80. For this reason, subsection 90MK(b) of the Bill will provide that, in addition to the requirements of subsection 90MK(a), the regulations may provide for a further declaration. If such a further declaration is required, then the operative time will not be reached until such further declaration has also been made.

Section 90ML – Payment flag

81. A superannuation agreement may provide for a payment flag. It is envisaged that parties may choose to make an agreement to flag a superannuation interest in circumstances where a condition of release (such as retirement) is likely to occur reasonably soon, at which time the actual value of the superannuation interest will become known. Section 90ML of the Bill will provide for the operation of this payment flag.

82. Subsection 90ML(1) of the Bill will provide that section 90ML will apply to a superannuation interest if:

(i) the interest is identified in a superannuation agreement (paragraph 90ML(1)(a)); and

(ii) the agreement provides that the interest is to be subject to a payment flag (paragraph 90ML(1)(b));

(iii) the agreement is in force at the operative time (paragraph 90ML(1)(c)). Section 90MI will provide for the definition of the operative time of a payment flag.; and

(iv) the interest, with which the agreement deals, is not an unflaggable interest (paragraph 90ML(1)(d)). Section 90MD will provide for the definition of unflaggable interest.

83. Subsection 90ML(2) of the Bill will provide that a payment flag starts to operate on the superannuation interest at the operative time for a payment flag, as provided for in section 90MJ of the Bill. Subsection 90ML(2) of the Bill will also provide that a payment flag continues to operate until either:

(i) a court terminates the operation of the payment flag, by an order made pursuant to section 90MM (paragraph 90ML(2)(a)); or

(ii) a flag lifting agreement is served on the trustee, pursuant to section 90MI, in respect of the superannuation interest (paragraph 90ML(2)(b)).

84. Section 90MN of the Bill will provide for the making of a flag lifting agreement. It will not be possible to make a binding flag lifting agreement other than in accordance with section 90MN. For this reason, subsection 90ML(3) of the Bill will provide that if a payment flag ceases to operate because a flag lifting agreement has been served on the trustee (pursuant to paragraph 90ML(2)(b)), this cessation

will not be affected by a later termination of the flag lifting agreement. That is, the termination of a flag lifting agreement, pursuant to subsection 90MN(2), will not automatically resurrect the payment flag. If parties terminate a flag lifting agreement and also want to resurrect the payment flag, it will be necessary for them to make a new agreement pursuant to section 90ML.

85. As outlined above, the practical effect of a payment flag operating on a superannuation interest is to prevent the trustee making any splittable payment in respect of the interest. It is an offence, for which the penalty will be 50 penalty units, for the trustee to make any splittable payment in respect of the interest.

86. The note to subsection 90ML(4) explains that, pursuant to section 4B(3) of the *Crimes Act 1914*, if a corporate body commits the offence the penalty will be 250 penalty units.

87. When a splittable payment becomes payable and if a payment flag is operating, the trustee will not be able to make any payment in respect of the interest. Parties need to know that a splittable payment would have become payable but for the payment flag, in order that they can decide what they want to do with the superannuation interest.

88. Subsection 90ML(5) of the Bill will provide that if a splittable payment becomes payable in respect of a superannuation interest while a payment flag is operating, the trustee must, within 14 days after it became payable, give written notice to the member spouse and the non-member spouse. It will be an offence, for which the penalty will be 50 penalty units, not to comply with this requirement.

89. The note to subsection 90ML(5) explains that, pursuant to section 4B(3) of the *Crimes Act 1914*, if a corporate body commits the offence the penalty will be 250 penalty units.

90. The trustee will only be required to give notice to the parties on the first occasion that a splittable becomes payable. Subsection 90ML(6) of the Bill will provide that subsection (5) does not apply if the trustee has previously given notice, for an earlier splittable payment, in respect of the payment flag.

91. While a payment flag is operating and either of the spouses dies, it is necessary to provide for such an event. Subsection 90ML(7) of the Bill will provide that in such circumstances:

    (i) the payment flag will continue to operate (paragraph 90ML(7)(a)); and

    (ii) the legal personal representative of the deceased spouse will have all the rights the deceased spouse would have had in respect of the payment flag (paragraph 90ML(7)(b)). The rights of the legal personal representative will include the right to enter into a flag lifting agreement under section 90MN, so that the flag can be lifted and payments made in accordance with the agreement.

Section 90MM – Payment flag may be terminated by a court

92. Under section 90K, which is to be inserted in the Family Law Act by the Family Law Amendment Superannuation Bill 1999, a court will be able to make an order setting aside a financial agreement in certain circumstances.

93. Section 90MM of new Part VIIIB will provide that if a court makes an order, under section 90K, setting aside a financial agreement in respect of which a payment flag is operating, the court may also make an order terminating the operation of the payment flag.

Section 90MN – Flag lifting agreement

94. As outlined above, the effect of a payment flag agreement is to prevent, or "injunct" against, the trustee making any payments in respect of the superannuation interest that has been flagged. If, at a later date, the parties wish to make an agreement to deal with the superannuation interest, it will be necessary for the flag to be lifted before the interest can be dealt with.

95. Section 90MN of new Part VIIIB will provide for the manner in which the parties will be able to agree to lift a payment flag. In agreeing to lift a payment flag, the parties may merely want to lift the flag and not subsequently split the interest. Alternatively, the parties may want also to provide for a payment split of the superannuation interest.

96. Subsection 90MN(1) of new Part VIIIB will provide that at any time when a payment flag is operating on a superannuation interest, the spouses may make a flag lifting agreement that either:

(i) provides that the flag is to cease operating without any payment split (paragraph 90MN(1)(a)); or

(ii) provides for a payment split pursuant to paragraph 90MJ(1)(b) (paragraph 90MN(1)(b)).

97. Subsequent to making a flag lifting agreement that provides for a payment split, parties may wish to terminate the payment split. Subsection 90MN(2) of new Part VIIIB will provide for this circumstance. Note that it will only be possible to terminate the payment split prior to the operative time.

98. If the flag lifting agreement merely provides that the flag is to cease operating, the parties cannot later terminate that agreement. This is because there would be no point in doing this, as terminating a flag lifting agreement does not have the effect of resurrecting the flag. As outlined above, the only way that a payment flag can be put into place is by a specific payment flag agreement.

99. Subsection 90MN(3) of new Part VIIIB will set out the formal requirements for a flag lifting agreement and a termination agreement to make such agreements binding on the parties.

100. A flag lifting agreement or a termination agreement will have no effect unless:

(i) the agreement is signed by both parties (paragraph 90MN(3)(a)); and

(ii) for each spouse, the agreement contains a statement that the spouse has been provided with independent legal advice from a legal practitioner as to the legal effect of the agreement (paragraph 90MN(3)(b)); and

(iii) a certificate is attached to the agreement, signed by the person who provided the legal advice and stating that the advice was provided (paragraph 90MN(3)(c)); and

(iv) after the agreement is signed by the spouses, each spouse is given a copy of the agreement (paragraph 90MN(3)(d)).

101. Subsection 90MN(4) of the Bill will provide that a court may make an order setting aside a flag lifting agreement or a termination agreement on the same grounds as a court is able to set aside a financial agreement under section 90K, which will be inserted into the Family Law Act by the Family Law Amendment Bill 1999.

102. The only exception to this will be that the ground, provided for in paragraph 90K(1)(e), that there is no likelihood that the operation of the flag will be terminated by a flag lifting agreement or a termination agreement is clearly not applicable. The ground in paragraph 90K(1)(e) is predicated on there being a flag in operation and in these circumstances the flag has already been lifted, either by a flag lifting agreement or a termination agreement.

103. An order setting aside a flag lifting agreement does not of itself affect the related financial agreement, since the flag lifting agreement is not a financial agreement pursuant to Part VIIIA. Subsection 90MN(5) therefore will provide that an order setting aside a flag lifting agreement also operates to set aside the related financial agreement, under which the superannuation agreement that put on the flag was made. Subsection 90MN(6) of new Part VIIIB will provide, in the reverse, that an order under section 90K setting aside a financial agreement also operates to set aside the related flag lifting agreement.

Subdivision D – Miscellaneous

Section 90MO – Limitation on section 79 orders

104. The policy intention is that parties should able to make a superannuation agreement and where such an agreement is binding and in force, a court will not have jurisdiction over the superannuation interest dealt with in the agreement. Similarly, if the parties have conclusively dealt with the superannuation interest in some other manner, a court will not be able to deal with the superannuation interest.

105. To implement this policy, subsection 90MO(1) of new Part VIIIB will provide that a court cannot make an order under section 79 of the Family Law Act with respect to a superannuation interest if:

(i) the superannuation interest is covered by a superannuation agreement that is in force (paragraph 90MO(1)(a)); or

(ii) the non-member spouse has served a waiver notice on the trustee, under section 90MZA in respect of the interest (paragraph 90MO(1)(b)). Under section 90MZA, a non-member spouse will be able to waive his or her entitlements to future payments made pursuant to a payment split. It is envisaged that the non-member spouse would agree to a waiver in consideration for payment of an amount of money from the trustee; or

(iii) a payment flag is operating on the superannuation interest (paragraph 90MO(1)(c)). A payment flag will effectively prevent any dealings with the superannuation interest on which it operates. If a court wishes to make an order about a superannuation interest on which a payment flag is operating it will have to make an order lifting the payment flag, as provided in paragraph 90K(1)(e).

106. The fact that a superannuation agreement is in force will not preclude a court from taking the superannuation interest into account when making an order about other property. Subsection 90MO(2) of new Part VIIIB will provide for this.

Section 90MP – Breakdown declaration

107. The policy intention is that while a superannuation agreement may be made either before or during the marriage or after the breakdown of the marriage, it will only operate to split payments after the marriage has broken down. Therefore it is necessary for the parties to show that the marriage has in fact broken down.

108. A copy of the decree absolute, dissolving the marriage, will demonstrate conclusively that the marriage has broken down. However it will not be necessary for parties to formally dissolve the marriage in order for a superannuation agreement to become operative. People can, and do, deal with their property on marriage breakdown without formally dissolving the marriage. Some parties choose not to formally dissolve the marriage. In such circumstances, parties will be required to declare that the marriage has in fact broken down.

109. Where parties have superannuation interests totalling more than the ETP threshold, pursuant to section 195SG of the *Income Tax Assessment Act 1936*, a more formal declaration about their marital status will be required. This is because of the concessional tax arrangements below the ETP threshold.

110. Section 90MP of new Part VIIIB will provide for the *breakdown declaration* that must be served on the trustee with the superannuation agreement. The breakdown declaration will be:

(i) a written declaration that complies with section 90MP (subsection 90MP(1)); and

(ii) signed by at least one of the spouses (subsection 90MP(2)).

111. Subsection 90MP(3) of new Part VIIIB will provide for the additional requirements of the declaration in the circumstances where the ETP threshold, outlined in section 90MQ of new Part VIIIB, applies. These requirements, which are based on the grounds for dissolving the marriage contained in section 48 of the Family Law Act, will be that the declaration must state that:

(i) the spouses are married (paragraph 90MP(3)(a)); and

(ii) the spouses separated and thereafter lived separately and apart for a continuous period of at least 12 months immediately before the declaration time (paragraph 90MP(3)(b) – see existing subsection 48(2) of the Family Law Act); and

(iii) in the opinion of the spouse (or spouses) making the breakdown declaration, there is no reasonable likelihood of cohabitation being resumed (paragraph 90MP(3)(c) – see existing subsection 48(3) of the Family Law Act).

112. Subsection 90MP(4) of new Part VIIIB will provide for the additional requirements of the breakdown declaration in circumstances where the ETP threshold does not apply. In such circumstances, the breakdown declaration will have to state merely that the spouses are married, but are separated, at the declaration time.

113. Subsection 90MP(5) of new Part VIIIB will provide that section 48 of the Family Law Act applies in determining whether the spouses have lived separately and apart for a continuous period of not less than 12 months.

114. Section 49 of the Family Law Act provides for the meaning of separation. Importantly, subsection 49(2) provides for the possibility of separation under one roof – that is, that the parties to a marriage may be held to have separated and lived separately and apart notwithstanding that they have continued to reside in the same residence or that one party has rendered some household services to the other.

115. Section 50 of the Family Law Act provides for the effect of a period of resumption of cohabitation on the separation. In effect, a period of 3 months resumption of cohabitation does not start the 12 month clock running again. Instead, for the purposes of calculating the 12 month separation period, the 3 month period of cohabitation is not counted.

116. The policy intention is that these concepts be used in the context of the breakdown declaration. Accordingly, subsection 90MP(6) of new Part VIIIB will provide that,

for the purposes of section 90MP, *separated* has the same meaning as in section 48 of the Family Law Act, as affected by sections 49 and 50.

Section 90MQ – Superannuation interests in excess of ETP threshold

117. As outlined above, parties will be required to make a more comprehensive declaration as to their marital status and the context in which the superannuation agreement will become operative when the superannuation interests are more than the ETP threshold.

118. Section 90MQ of new Part VIIIB will provide when the fuller breakdown declaration will be required.

119. Subsection 90MQ(1) of new Part VIIIB will provide that section 90MQ applies to a declaration if, at the declaration time, the total withdrawal value for all the superannuation interests of the member spouse is more than the ETP threshold.

120. There may be particular circumstances in which it would be inappropriate for the parties to have to make the fuller declaration as to their marital status. Subsection 90MQ(2) of the Superannuation Bill will provide that section 90MQ will not apply in the circumstances, if any, prescribed by the regulations.

121. Subsection 90MQ(3) of new Part VIIIB will provide for the definitions of terms that are used in this section, and is self-explanatory.

Section 90MR – Enforcement by court order

122. Under Division 2 of new Part VIIIB, the trustee will be required to take certain actions in order to implement a superannuation agreement to either split payments or to flag a superannuation interest. In order that such an agreement can be enforced, should one party wish to resile or perhaps the trustee not do what is required of them, it is necessary to give a court the power to make orders to enforce the superannuation agreement.

123. Section 90MR of new Part VIIIB will provide that a court may make such orders as it thinks necessary for the enforcement of a payment split or payment flag under new Division 2.

Division 3 – Payment splitting or flagging by court order

Section 90MS – Order under section 79 may include orders in relation to superannuation interests

124. An order dealing with a superannuation interest is to be made in the context of a property settlement order, pursuant to section 79 of the Family Law Act. However, a court will only be able to make an order about a superannuation interest in accordance with the provisions of new Part VIIIB, which deals specifically with superannuation interests.

125. Subsection 90MS(1) of new Part VIIIB will provide that in proceedings under section 79 with respect to the property of spouses, the court may, in accordance with new Division 3 of new Part VIIIB, also make orders in relation to superannuation interests of the spouses.

126. Subsection 90MS(2) of new Part VIIIB will provide that a court cannot make an order under section 79 in relation to a superannuation interest except in accordance with new Part VIIIB.

Section 90MT – Splitting order

127. Section 90MT of new Part VIIIB will provide that a court may make a splitting order in relation to a superannuation interest. Subsection 90MT(1) of new Part VIIIB will provide for the orders that a court is able to make in relation to a superannuation interest.

128. It should be noted that a court will only be able to make an order to the extent of the total value of the member's superannuation interest. A court could make an order that the non-member spouse is entitled to 100% of the entitlement of the member spouse. However, a court will not be able to make an order that would have the effect of entitling the member and the non-member to more than the total overall value of the member spouse's entitlement, as calculated according to the regulations.

129. Paragraph 90MT(1)(a) of new Part VIIIB will provide that whenever a splittable payment becomes payable in respect of the superannuation interest, a court may make a "splitting order", which has the effect that:

(i) the non-member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations (subparagraph 90MT(1)(a)(i)); and

(ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for the order (subparagraph 90MT(1)(a)(ii)).

130. Paragraph 90MT(1)(b) of new Part VIIIB will provide that a court will also be able to make such other orders as it thinks necessary for the enforcement of an order made under paragraph 90MT(1)(a).

131. A court will be making an order in relation to a superannuation interest in the context of an overall property settlement, pursuant to section 79 of the Family Law Act. Under subsection 79(2), the court shall not make an order unless it is satisfied that, in all the circumstances, it is just and equitable to make the order. In order to decide whether it is just and equitable, a court will need to take cognisance of, amongst other things, the value of the superannuation interest. Therefore, before making any order in relation to the superannuation interest, it will be necessary for a court to be able to value the superannuation interest.

132. Subsection 90MT(2) of new Part VIIIB will provide for the method by which a court is to assess the value of the superannuation interest under consideration. It

provides that before making a splitting order in relation to a superannuation interest, the court must:

(i) determine the overall value of the interest in accordance with the regulations (paragraph 90MT(2)(a)); and

(ii) allocate a base amount to the non-member spouse, not exceeding the overall value (paragraph 90MT(2)(b)).

133. The regulations will provide for the valuation of superannuation interests both in the accumulation and the payment phases. In the accumulation phase, the valuation will be able to be obtained for a superannuation interest that will be paid as a lump sum or as a pension or both. In the payment phase, the value of the lump sum will be clear, and the value of a pension income stream will be able to be obtained.

Section 90MU – Flagging order

134. As with superannuation agreements, in certain circumstances a court may consider that it more appropriate to make a flagging order in relation to a superannuation interest, rather than a splitting order. Section 90MU provides for flagging orders, that can be made on a superannuation interest that is not prescribed to be an unflaggable interest.

135. Subsection 90MU(1) of new Part VIIIB will provide that a court may make a flagging order in relation to a superannuation interest, which is not an unflaggable interest, that directs the trustee not to make a splittable payment in respect of the interest without the leave of the court (paragraph 90MU(1)(a)).

136. In order to lift a flagging order, parties will need to know when a payment would become payable if it weren't for the flagging order of the court. Therefore, paragraph 90MU(1)(b) of new Part VIIIB will provide that the flagging order will also require the trustee to notify the court of the next occasion when a splittable payment becomes payable in respect of the superannuation interest that is dealt with in the order. The court order will specify the period within which the trustee is required to provide such notice to the court.

137. As noted above, it is envisaged that a flagging agreement will be chosen by parties in circumstances where a condition of release (for example, retirement) is imminent. The reason for this is that while the actual value of the superannuation interest is not known at the time that the parties are entering into the agreement, its precise value will be known in the near future. Therefore, parties may wish to use a flagging agreement to "defer" a final decision about a superannuation interest until such time as the actual value of the superannuation interest is known, because the member has met a condition of release.

138. Similarly, when a court is called upon to make a property settlement it may be that the actual value of the superannuation interest is unknown, but will become known in the very near future. While the regulations will provide for a method for valuing superannuation interests, a court may consider it more appropriate to "defer" final

decision on the superannuation, and in context some or all of the property, until the actual value of the superannuation interest is known.

139. In such circumstances, a flagging order may be appropriate. Subsection 90MU(2) gives guidance to the court about when it might be appropriate to make a flagging order. It will provide that the court:

(i) **must** take into account the likelihood that a splittable payment will soon become payable in respect of the superannuation interest (paragraph (90MU(2)(a)); and

(ii) **may** take into account any other matters as it considers relevant (paragraph 90MU(2)(b)).

Division 4 – General provisions about payment splitting

Section 90MV – Court may cancel payment split

140. Termination of a superannuation agreement will not, of itself, cancel a payment split and it is, therefore, necessary to provide that a court may cancel a payment split in appropriate circumstances

141. Subsection 90MV(1) of new Part VIIIB will provide that a court may, under existing section 79 of the Family Law Act, make an order terminating the operation of a payment split if:

(i) the superannuation agreement in respect of the payment split has ceased to be in force (paragraph 90MV(1)(a)); and

(ii) the non-member spouse has not served a waiver notice on the trustee, under section 90MZA, in respect of the payment split (paragraph 90MV(1)(b)). Under section 90MZA, a non-member spouse will be able to waive his or her entitlements to future payments made pursuant to a payment split. It is envisaged that the non-member spouse would agree to a waiver in consideration for payment of an amount of money from the trustee.

142. Subsection 90MV(2) of new Part VIIIB will provide that the termination of the operation of a payment split has effect for splittable payments that become payable after the date specified in the order. This will mean, in effect, that the termination of a payment split is not retrospective and that any payments made pursuant to the payment split before the termination of the payment split are not affected.

Section 90MW – Deductions from splittable payment before calculating payment split

143. It may be that a superannuation interest has attracted deductions in respect of it, for example the deductions pursuant to the superannuation surcharge legislation that are payable by the superannuation plan The trustee will be able to make these deductions before having to make any payments pursuant to the payment split.

144. Section 90MW of new Part VIIIB will provide that any deductions that the trustee is entitled to make from a splittable payment are to be deducted from the splittable payments before calculating the payment split, and specifically before applying section 90MX of new Part VIIIB.

Section 90MX – Multiple payment splits applying to same splittable payment

145. There may be circumstances in which the member marries a number of times. In such circumstances, there is likely to be more than one payment split operating on the same superannuation interest. Subsection 90MX(1) of new Part VIIIB will provide that section 90MX will apply if 2 or more payment splits apply to the same splittable payment.

146. Subsection 90MX(2) of new Part VIIIB will provide that the various payment splits, in the event of a sequence of marriages, will be calculated in order of their operative times. The intention of this provision is that previous non-member spouse(s) are not disadvantaged by the subsequent marriage(s) of the member spouse.

147. Subsection 90MX(3) of new Part VIIIB will provide for the method of calculating each of the payment splits subsequent to the original split between the first non-member spouse and the member spouse. The effect of subsection 90MX(3) will be to reduce the amount of the splittable payment by the amount to which another person is entitled under a previous payment split.

148. The operation of subsection 90MX(3) is outlined in the example given. It should be noted that the example is intended only to explain the operation of multiple payment splits and is not in any way intended to suggest that the particular scenario does, or should, reflect any particular individual scenario. Clearly, how multiple payment splits will operate in any particular individual scenario will depend on the facts of the particular case.

Section 90MY – Fees payable to trustee for payment split

149. In implementing a payment split, pursuant to a superannuation agreement or a court order, the trustee of the superannuation plan will incur administrative costs. The policy intention is that the trustee will be able to charge the parties for any reasonable administrative costs so incurred.

150. Section 90MY of new Part VIIIB will provide for the fees payable to the trustee for a payment split. Subsection 90MY(1) of new Part VIIIB will provide that the regulations may prescribe:

(i) the fees that are payable to the trustee in respect of a payment split (paragraph 90MY(1)(a)); and

(ii) the person or persons liable to pay the fees (paragraph 90MY(1)(b)).

151. It may be that in certain circumstances, differential fees are appropriate. For example, the administrative costs of splitting a defined benefit interest may be

greater than the administrative costs of splitting an accumulation interest. Subsection 90MY(2) of new Part VIIIB will make it clear that the regulations may provide for different fees in different circumstances.

152. Subsection 90MY(3) of new Part VIIIB will provide that the fees for a payment split are due for payment at the operative time. Subsection 90MY(4) of new Part VIIIB will provide that if a fee remains unpaid after that time:

(i) the amount of the fee is increased by an interest component calculated in accordance with the regulations (paragraph 90MY(4)(a)); and

(ii) the trustee may recover any unpaid amount by deduction from amounts that would otherwise become payable to the person who is liable to pay the fee.

Section 90MZ – Superannuation preservation requirements

153. The Government's retirement incomes policy requires that, where appropriate and in keeping with the law governing the preservation of superannuation, money should be retained in the superannuation system. In keeping with this policy, it is necessary, where possible, to ensure that payments made pursuant to a payment split are preserved in the superannuation system. It is intended to amend the relevant regulations to provide for preservation of certain benefits.

154. Section 90MZ of new Part VIIIB will provide for the superannuation preservation requirements. Subsection 90MZ(1) of new Part VIIIB will provide that if the superannuation plan that is the subject of the payment split is a regulated fund within the meaning of the SIS Act, then the entitlement of the non-member spouse will be subject to any regulations made under the SIS Act that provide for preservation of benefits.

155. Similarly, subsection 90MZ(2) of new Part VIIIB will provide that if the superannuation plan that is the subject of the payment split is a retirement savings account within the meaning of the RSA Act then the entitlement of the non-member spouse will be subject to any regulations made under the RSA Act that provide for preservation of benefits.

156. Most of the State and Territory superannuation schemes and pension schemes, which provide superannuation for public servants, politicians and judges, are "constitutionally protected funds", within the meaning of section 267 of the *Income Tax Assessment Act 1936*. They are not regulated by the SIS Act and regulations, although most of them choose to comply with the SIS regulatory regime, and therefore it will not be possible to make them subject to regulations that provide for preservation of benefits.

157. However, where such schemes are subject to laws or other instruments that provide for the preservation of benefits, the policy intention is to extend such preservation requirements to payments made pursuant to a payment split.

158. Subsection 90MZ of new Part VIIIB will provide that if the superannuation plan for a superannuation split is a constitutionally protected fund, then the entitlement

of the non-member spouse is subject to any law or other instrument that is applicable to the plan and provides for preservation of benefits.

Section 90MZA – Waiver of rights under payment split

159. Some superannuation plans may prefer to "pay out" the non-member spouse's entitlement under the payment split, rather than continue to make payments pursuant to the payment split. This will only be possible where the law or the governing rules of the plan do not preclude such a pay out. For example, the plans that are regulated under the SIS Act and regulations are not able to pay out a non-member spouse.

160. In order to facilitate this, should it be possible, Section 90MZA of new Part VIIIB will provide for the waiver of rights under a payment split. The waiver will only be possible if the non-member spouse agrees with it, and funds will not be able to unilaterally waive the non-member spouse's entitlement. The policy intention is that the trustee of the fund would pay out the non-member spouse's entitlement from the entitlement of the member spouse.

161. Subsection 90MZA(1) of new Part VIIIB will provide that if the non-member spouse serves a waiver notice on the trustee in respect of a payment split, then for each splittable payment that becomes payable after the date specified in the waiver notice:

(i) the non-member spouse will not be entitled to be paid any amount under the payment split in respect of the splittable payment (paragraph 90MZA(1)(a)); and

(ii) the entitlement of the person to whom the splittable payment would have been made will continue to be reduced in the same way as it would have been reduced if the entitlement of the non-member spouse had not been terminated (paragraph 90MZA(1)(b)).

162. Subsection 90MZA(2) of new Part VIIIB will provide for the formal requirements of the waiver notice, which will have to be in the prescribed form and be accompanied by:

(i) a statement that the non-member spouse has been provided with independent financial advice as to the financial effect of the waiver notice (paragraph 90MZA(2)(a)); and

(ii) a certificate signed by the person who provided the financial advice, stating that the advice was provided (paragraph 90MZA(2)(b)).

Section 90MZB – Trustee to provide information

163. In order to calculate the value of a superannuation interest, particularly in a defined benefit plan, the parties or a court will need certain information from the trustee of the superannuation plan.

164. Section 90MZB of new Part VIIIB will provide that the trustee is to provide information. Subsection 90MZB(1) of new Part VIIIB will provide that an eligible person may make an application to the trustee of a superannuation plan for information about a superannuation interest of a member of the plan.

165. Subsection 90MZB(2) of new Part VIIIB will set out the formal requirements for an application for information from the trustee. The application will have to be accompanied by a declaration, in the prescribed form, stating that the applicant requires the information to assist the applicant:

(i) to properly negotiate a superannuation agreement (paragraph 90MZB(2)(a)); and/or

(ii) in connection with the operation of new Part VIIIB in relation to the applicant (paragraph 90MZB(2)(b)). This will enable the necessary information to be obtained in order for a court to make an order about a superannuation interest.

166. Subsection 90MZB(3) of new Part VIIIB will provide that if the trustee receives a properly completed application, the trustee must, in accordance with the regulations, provide information about the superannuation interest to the applicant. As outlined above, the regulations will prescribe the particular information that the trustees will be required to provide. The penalty, should the trustee fail to comply with subsection 90MZB(3) will be 50 penalty units.

167. The note to subsection 90MZB(3) explains that, pursuant to section 4B(3) of the *Crimes Act 1914*, if a corporate body commits the offence the penalty will be 250 penalty units.

168. Subsection 90MZB(4) of new Part VIIIB will provide a definition of *eligible person* for the purposes of section 90MZB,

<u>Section 90MZC – Death of non-member spouse</u>

169. Section 90MZC of new Part VIIIB will provide for what will happen if the non-member spouse dies after the operative date for a payment split. In these circumstances:

(i) the payment split will continue to operate (subsection 90MZC(a)); and

(ii) the payment split will operate in favour of, and is binding on, the legal personal representative of the deceased spouse (subsection 90MZC(b)); and

(iii) the legal personal representatives will have all the rights that the deceased spouse would have had in respect of the payment split (subsection 90MZC(c)).

Division 5 – Miscellaneous

Section 90MZD – Orders binding on trustee

170. Section 90MZD will provide for the circumstances in which an order under new Part VIIIB will be binding on the trustee. Subsection 90MZD(1) of new Part VIIIB will provide that an order in relation to a superannuation interest may be expressed to bind the person who is the trustee of the superannuation plan at the time when the order takes effect but only if the person has been accorded procedural fairness in relation to the making of the order. It is intended that procedural fairness, in this context, will imply that the trustee has been given notice of the proceedings, been informed of when the proceedings will be heard by the court and been given an opportunity to be heard in the proceedings.

171. An order to split a superannuation interest may take effect some considerable time before any splittable payments become payable, if, for example, the member spouse has many years before reaching a condition of release. The policy intention is that the order should continue to be binding on the trustee of the superannuation plan, even if the person who is the trustee has changed, for example because of elections for membership of the board of trustees, between the time when the order takes effect and the time when the splittable payments become payable, which may be some considerable time after the order takes effect.

172. Subsection 90MZD(2) of new Part VIIIB will provide that if an order is binding on the person who is the trustee of the superannuation plan when the order takes effect then the order will also be binding on any person who subsequently becomes the trustee of that superannuation plan.

Section 90MZE – Protection for trustee

173. The policy intention is that the trustee should not be penalised for acting in good faith. For example, if the trustee acts in reliance on a superannuation agreement which subsequently is proved to be a forgery, the trustee should not be liable for any loss or damage suffered because the trustee acted in accordance with the superannuation agreement.

174. Section 90MZE of new Part VIIIB will provide that the trustee of a superannuation plan is not liable for loss or damage suffered because of things done (or not done) by the trustee in good faith in reliance on:

(i) any document served on the trustee for the purposes of new Part VIIIB (subsection 90MZE(a)); or

(ii) an order made by a court in accordance with new Part VIIIB (subsection 90MZE(b)).

Section 90MZF – Service of documents on trustee

175. Order 18 of the *Family Law Rules 1984* (‘Rules of Court’) provides for the methods of service of documents for the purposes of the Family Law Act.

Subsection 90MZF(1) of new Part VIIIB will provide that if a document is required or permitted to be served on the trustee of a superannuation plan, the document may be served in accordance with the Rules of Court.

176. Subsection 90MZF(2) of new Part VIIIB will provide that subsection 90MZF(1) is in addition to any other method of service permitted by law. In effect this means that service according to the Rules of Court is not the only permissible method of service for documents that have to be served on the trustee.

Section 90MZG – False declarations

177. New Part VIIIB will provide, in various circumstances, that a declaration is to be served on the trustee of a superannuation plan. Section 90MZG of new Part VIIIB will provide for the consequences of making a false declaration.

178. Subsection 90MZG(1) of new Part VIIIB will provide that a person is guilty of an offence if:

(i) the person makes a statement in a declaration, knowing that the statement is false or misleading (paragraph 90MZG(1)(a)); and

(ii) the declaration is served on the trustee of a superannuation plan for the purposes of new Part VIIIB (paragraph 90MZG(1)(b)).

179. The penalty for an offence against subsection 90MZG(1) will be imprisonment for a period of up to 12 months (subsection 90MZG(2)). Subsection 90MZG(3) of new Part VIIIB will provide, in effect, that a person is not guilty of an offence, pursuant to subsection 90MZG(1), if the statement is not false or misleading in a material particular.

Superannuation Industry (Supervision) Act 1993

180. The SIS Act provides a member of a superannuation fund with certain rights and certain protections.

Item 5 – Subsection 10(1)

181. Section 10 of the SIS Act provides for the definitions that are used in the SIS Act.

182. Item 5 of Schedule 1 to the Superannuation Bill will insert a definition of *member* into existing subsection 10 of the SIS Act, that will provide that member has a meaning affected by new section 15B, which will be inserted by Item 6 of the Superannuation Bill.

Item 6 – After section 15A

183. Item 6 of Schedule 1 to the Superannuation Bill will insert new section 15B in the SIS Act. New section 15B will provide that the regulations may provide that a person is to be treated, or is not to be treated, as being a member of a

superannuation fund for the purposes of the SIS Act or for the purposes of specified provisions of the SIS Act.

Reason for these amendments

184. It is proposed that amendments to the SIS Regulations will build on the amendments made in new Part VIIIB. The proposed SIS regulations will enable the non-contributing spouse to be treated, with respect to their status in the superannuation fund, in a manner similar to the contributing spouse.

185. It is intended that the SIS regulations will be amended to enable the division of a superannuation interest in the accumulation phase on marriage breakdown and a new interest to be created for a non-contributing spouse. A non-contributing spouse will be able to serve a notice, accompanied by either a superannuation agreement or court order, on the trustee of a superannuation fund requesting the trustee to establish an immediate interest for non-contributing spouse and to make the non-contributing spouse a member of the fund. The non-contributing spouse's superannuation interest will be carved out of the vested component of the contributing spouse's superannuation interest.

186. It is intended that membership in a superannuation fund will provide the new member with certain protection from unconscionable behaviour by the trustee of the fund, in respect of the new interest in the fund, or by other members in the fund, for example the contributing spouse. Membership in the fund will also give the non-contributing spouse certain rights such as the right to receive annual statements, other information, and the right to be paid when a condition of release is met by the non-contributing spouse.

187. It is intended that both the non-contributing spouse and the contributing spouse will be able to rollover or transfer their superannuation interest into another regulated superannuation fund, should they so choose. For defined benefit funds the agreement of the trustee will be required. However, for accumulation funds, the trustee will be required to give effect to a rollover or transfer requested by the (contributing or non-contributing) member that allows an orderly realisation of any assets required to give effect to the rollover. Trustees of funds will also be able to rollover or transfer the interest held by the non-contributing spouse to a new fund. Fund trustees will be able to recover from the parties their reasonable costs incurred in administering the creation of a new superannuation interest.

Superannuation (Resolution of Complaints) Act 1993

188. The Complaints Act provides for a low cost disputes resolution mechanism to deal with complaints made by members and beneficiaries of superannuation funds about decisions of trustees that are not settled through a fund's internal complaints mechanism. The policy intention is that the non-contributing spouse, for whom a new interest in the fund is created, will be able to make complaints to the Superannuation Complaints Tribunal about their treatment by the superannuation fund.

Item 7 – Subsection 3(2)

189. Subsection 3(2) of the Complaints Act provides for the definitions that are used in the Complaints Act.

190. Item 7 of Schedule 1 to the Superannuation Bill will insert a definition of *beneficiary*, which will have a meaning affected by new section 4B.

Item 8 – Subsection 3(2)

191. Item 8 of Schedule 1 to the Superannuation Bill will insert a definition of *member*, which will have a meaning affected by new section 4B.

Item 9 – After section 4A

192. Item 9 of Schedule 1 to the Superannuation Bill will insert new section 4B in the Complaints Act.

193. New section 4B of the Complaints Act will provide for the modified meanings of *beneficiary* and *member*. New subsection 4B(1) will provide that a person is to be treated, or is not to be treated as being, for the purposes of the Complaints Act or for specified provisions of it:

(i) a **member** of a superannuation fund; or

(ii) a **beneficiary** of an approved deposit fund.

194. New subsection 4B(2) of the Complaints Act will provide that regulations for the purposes of new subsection 4B(1) may be made in relation to a person who is entitled to become, or has applied to become, a member of a superannuation fund or a beneficiary of an approved deposit fund.

195. New subsection 4B(3) of the Complaints Act will provide that the Complaints Act will apply with such modifications, if any, as are prescribed in relation to a person who is a member of a superannuation fund or a beneficiary of an approved deposit fund because of regulations made for the purposes of new subsection 4B(3).

196. New subsection 4B(4) of the Complaints Act will provide for the definition of *modifications* for the purposes of new section 4B.

197. The practical effect of these amendments to the Complaints Act will be that a person who becomes a member or a beneficiary, pursuant to the creation of a new interest following an agreement or order for a payment split, will in appropriate circumstances be able to access the complaints mechanisms created by the Complaints Act.