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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAMILY LAW LEGISLATION AMENDMENT  
(SUPERANNUATION) (CONSEQUENTIAL PROVISIONS) BILL 2002**

EXPLANATORY MEMORANDUM

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

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## **FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) (CONSEQUENTIAL PROVISIONS) BILL 2002**

### **GENERAL OUTLINE**

The Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Bill 2002 ('the Bill') makes amendments to relevant social security and veterans' affairs legislation to ensure that appropriate treatment of income streams is applied for the superannuation and separation reforms contained in the *Family Law Legislation Amendment (Superannuation) Act 2001* ('the Superannuation Act').

The Bill also makes amendments to ensure that the reforms contained in the Superannuation Act are applied to Commonwealth judicial pensions.

The Bill also makes minor amendments to clarify certain provisions of the Superannuation Act.

The following Acts are amended by the Bill:

- *Family Law Act 1975*;
- *Judges' Pensions Act 1968*;
- *Social Security Act 1991*; and
- *Veterans' Entitlements Act 1986*.

The Bill ensures appropriate treatment of Government income streams when a superannuation interest is split on marriage breakdown.

The Bill commences on the day on which it receives the Royal Assent. The substantive provisions of the Bill, contained in Schedules 1, 2, 3 and 4, commence immediately after the commencement of the *Family Law Legislation Amendment (Superannuation) Act 2001* ('the Family Law Superannuation Act').

### **FINANCIAL IMPACT STATEMENT**

The amendments to the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* are designed to ensure that superannuation interests that are split pursuant to a divorce settlement are assessed consistently with the current assessment of other income and assets under the means test. Accordingly, these amendments will have a negligible impact on administered expenses.

### **REGULATION IMPACT STATEMENT**

A Regulation Impact Statement for the superannuation and separation reforms was included in the Explanatory Memorandum to the *Family Law Legislation Amendment (Superannuation) Bill 2001* ('the Family Law Superannuation Bill').

## NOTES ON CLAUSES

### Clause 1 – Short title

1. Clause 1 provides that when the Bill is enacted it will be called the *Family Law Legislation Amendment (Superannuation) (Consequential Provisions) Act 2002* ('the Second Consequential Act').

### Clause 2 - Commencement

2. Clause 2 provides that the Second Consequential Act commences on the day on which it receives the Royal Assent.
3. Clause 2 also provides that the Schedules to the Second Consequential Act commence immediately after the commencement of the Family Law Superannuation Act.
4. Section 2 of the Family Law Superannuation Act provides that it will commence on a day to be fixed by Proclamation and that if it does not commence within 18 months beginning on the day it receives the Royal Assent, it commences on the first day after the end of that period, which will be 28 December 2002.

### Clause 3 – Schedule(s)

5. Clause 3 provides that each Act that is specified in a Schedule to the Second Consequential Act is amended as set out in the relevant Schedule.

## **SCHEDULE 1 – AMENDMENT OF THE *FAMILY LAW ACT 1975***

### **Summary of amendments**

6. The amendments of the *Family Law Act 1975* ('the Family Law Act') are minor correcting amendments to ensure the effective operation of the superannuation and family law reforms contained in Part VIIIIB of the Family Law Act, which was inserted by the Family Law Superannuation Act.

### **Item 1 – Section 90MD**

7. Item 1 of Schedule 1 to the Second Consequential Act inserts a definition of "reversionary beneficiary" into the Family Law Act.
8. The scheme of Part VIIIIB of the Family Law Act is that the courts can order or parties can agree to divide splittable payments in respect of a superannuation interest of a party to a marriage.
9. A splittable payment will, generally, be one to the spouse with the superannuation interest (eg. a payment to the member spouse after he or she retires) but, under paragraphs 90ME(1)(d) and (e) of the Family Law Act, will include, when such a spouse dies, a payment to a reversionary beneficiary or a payment to the legal personal representative of a reversionary beneficiary after the death of that reversionary beneficiary.
10. The term "reversionary beneficiary" is not defined in Part VIIIIB of the Family Law Act.
11. The policy intention behind paragraphs 90ME(1)(d) and (e) is that a person who receives any benefit on the death of the member spouse should be a reversionary beneficiary for the purposes of Part VIIIIB of the Family Law Act.
12. However, the term "reversionary beneficiary" is generally understood within the superannuation industry as only including a person who becomes the recipient of an ongoing pension or a commuted lump sum as a result of the death of a person already in receipt of a pension.
13. The superannuation industry does not, for example, generally understand the term to include a spouse or other dependent who receives a pension on the death of the member spouse who dies while still in employment (in those circumstances the member spouse would have been receiving a salary and not a pension) or such a spouse who receives lump sum benefits on the death of the member spouse.
14. Inserting a definition of "reversionary beneficiary" in section 90MD of the Family Law Act ensures that the intended meaning of the term is captured.

## **Item 2 – Subsection 90MX(3)**

15. Item 2 of Schedule 1 to the Second Consequential Act omits “another person” and substitutes “a person other than the member spouse”.
16. One aspect of Part VIIIB of the Family Law Act contemplates the possibility of a member spouse successively splitting future payments in respect of a superannuation interest if he or she then re-marries and this second marriage subsequently breaks down.
17. Section 90MX of the Family Law Act provides for the order of precedence where the one superannuation interest is subject to successive splits (the payment split with the earlier operative time is satisfied first).
18. The provision has been drafted on the basis that the person with the entitlement under the earlier payment split (the first former spouse) will be – as it will almost invariably be – a different person from the person with the entitlement under later payment splits (any second and subsequent former spouse).
19. However it is possible that parties to a marriage may divorce, have a property settlement (including a split of superannuation), remarry again, subsequently separate or divorce and again wish to split their superannuation.
20. If those circumstances were ever to occur, existing subsection 90MX(3) of the Family Law Act would not work as it provides that ‘the amount of the splittable payment is taken to be reduced by the amount to which *another person* (emphasis added) is entitled under’ the next earlier payment split.
21. Item 2 replaces the words “another person” with a formulation that covers the possibility that the first former spouse is in fact the same person as the subsequent former spouse.

## **Item 3 – Subsections 90MZ(1), (2) and (3)**

22. Item 3 of Schedule 1 to the Second Consequential Act omits “fund or RSA” and substitutes “fund, approved deposit fund, RSA or exempt public sector superannuation scheme”.
23. One aspect of the scheme in Part VIIIB, contained in section 90MZ of the Family Law Act, is that the entitlement of a non-member spouse under a payment split (that is, a superannuation agreement or a court order splitting future splittable payments in respect of a superannuation interest of a party to a marriage) is subject to the preservation requirements in relation to:
  - a split of an interest in a regulated superannuation fund or an approved deposit fund, in the Superannuation Industry (Supervision) Regulations;
  - a split of an RSA, in the Retirement Savings Account Regulations; and
  - a split of an interest in an exempt public sector superannuation scheme, in laws or other instruments (eg. the trust deed of the scheme).

24. The effect of these preservation requirements is generally that any amount that the non-member spouse is entitled to receive under a payment split because his or her former spouse has received a splittable payment must be preserved in the superannuation system (rather than being available as a cash payment) if the non-member spouse has not reached retirement age.
25. This item ensures that these preservation requirements will also apply to any interest that the non-member spouse has in an approved deposit fund or to an exempt public sector superannuation scheme.

**Item 4 – Section 90MZC**

26. Item 4 of Schedule 1 to the Second Consequential Act omits “date” and substitutes “time” in section 90MZC of the Family Law Act.
27. The reason for this is that during the House of Representatives’ debate on the Family Law Superannuation Act, a batch of Government amendments were moved to replace the term of “operative date”, which had been used in a number of provisions in the Family Law Superannuation Bill as introduced, with “operative time”, a term defined in the opening provisions of Part VIII B.

## **SCHEDULE 2 – AMENDMENT OF THE *JUDGES’ PENSIONS ACT 1968***

### **Summary of amendment**

28. The amendment of the *Judges’ Pensions Act 1968* (‘the Judges’ Pensions Act’) authorises the making of regulations to set out factors for use in determining the proportion of a judge’s pension that had accrued at the time of a judge’s marriage breakdown.

### **Item 1 – At the end of section 21**

29. Item 1 of Schedule 2 to the Second Consequential Act inserts new subsection 21(2) into the Judges’ Pensions Act.
30. The Family Law (Superannuation) Regulations 2001 prescribe an interest in the superannuation scheme constituted under the Judges’ Pensions Act (‘the Judges’ Pension Scheme’) as a percentage-only interest for the purposes of the Family Law Act. As such, splittable payments made in respect of an interest in the Judges’ Pension Scheme can only be split, by agreement or by court order, by one of the following two methods:
- a specified set percentage that is to apply to all splittable payments in respect of the interest; or
  - a specified percentage of, essentially, so much of each payment as can be considered to have accrued up until the date of the final separation of the parties.
31. When the second method is to be used, the relevant formulae in the Family Law (Superannuation) Regulations 2001 refer to the accrued benefit multiple, as defined in the governing rules of the relevant superannuation entity, at the dates of separation and payment. The Judges’ Pensions Act currently does not contain factors that would constitute accrued benefit multiples for the purposes of the formulae.
32. Section 21 of the Judges’ Pensions Act contains a regulation-making power in the standard form. New subsection 21(2) confers express power to make regulations to prescribe accrued benefit multiples for the purposes of Part VIIIB of the Family Law Act or regulations made under that Act in relation to the Judges’ Pensions Scheme.



## **SCHEDULE 3 – AMENDMENT OF THE *SOCIAL SECURITY ACT 1991***

### **Summary of amendments**

33. The amendments made to the *Social Security Act 1991* (‘the Social Security Act’) by Schedule 3 to the Second Consequential Act are in consequence of Part VIIIIB of the Family Law Act, which was inserted by Schedule 1 to the Superannuation Act.
34. They provide a framework for allowing income stream payments in respect of a superannuation interest, that have been split pursuant to an order or agreement under Part VIIIIB of the Family Law Act to be assessed consistently with other income and assets under the social security means test.
35. Schedule 3 also makes other consequential amendments to the Social Security Act.

### **Item 1 – Subsection 9(1) (definition of *assessable growth component*)**

36. Item 1 of Schedule 3 to the Second Consequential Act repeals the definition of “assessable growth component” in subsection 9(1) of the Social Security Act.
37. The reason for this is that this definition is only currently used in relation to the operation of Subdivision A of Division 1C of Part 3.10 of the Social Security Act, which is being repealed by Item 15 of Schedule 3.

### **Item 2 – Subsection 9(1) (definition of *assessable period*)**

38. Item 2 of Schedule 3 to the Second Consequential Act repeals the definition of “assessable period” in subsection 9(1) of the Social Security Act.
39. The reason for this is that this definition is only currently used in relation to the operation of Subdivision A of Division 1C of Part 3.10 of the Social Security Act, which is being repealed by Item 16 of Schedule 3.

### **Item 3 – Subsection 9(1) (definition of *asset-tested income stream (long term)*)**

40. Item 3 of Schedule 3 to the Second Consequential Act amends the definition of “asset-tested income stream (long term)” in subsection 9(1) of the Social Security Act.
41. The reason for this is to include any secondary FLA income stream (as defined in Item 10 of Schedule 3) that satisfies the requirements of new section 9D, which is being inserted by Item 14 of Schedule 3.

**Item 4 – Subsection 9(1) (definition of *asset-tested income stream (short term)*)**

42. Item 4 of Schedule 3 to the Second Consequential Act amends the definition of “asset-tested” income stream (short term)” in subsection 9(1) of the Social Security Act.
43. The reason for this is to include any secondary FLA income stream (as defined in Item 10 of Schedule 3) that satisfies the requirements of new section 9D, which is being inserted by Item 14 of Schedule 3.

**Item 5 – Subsection 9(1)**

44. Item 5 of Schedule 3 to the Second Consequential Act inserts a short definition of “family law affected income stream” into subsection 9(1) of the Social Security Act.
45. This definition makes reference to the meaning of that term given at new subsection 9C(1), which is being inserted by Item 14 of Schedule 3.

**Item 6 – Subsection 9(1) (After paragraph (f) of the definition of *income stream*)**

46. Item 6 of Schedule 3 to the Second Consequential Act inserts new paragraph 9(1)(fa) into the Social Security Act.
47. The reason for this is so that a family law affected income stream, which is defined by new section 9C of the Social Security Act, will be an income stream for the purposes of that Act.

**Item 7 – Subsection 9(1)**

48. Item 7 of Schedule 3 to the Second Consequential Act inserts a short definition of “original family law affected income stream” into subsection 9(1) of the Social Security Act.
49. This definition makes reference to the meaning of that term given at new subsection 9C(1), which is being inserted by Item 14 of Schedule 3.

**Item 8 – Subsection 9(1)**

50. Item 8 of Schedule 3 to the Second Consequential Act inserts a short definition of “primary FLA income stream” into subsection 9(1) of the Social Security Act.
51. This definition makes reference to the meaning of that term given at new subsection 9C(1), which is being inserted by Item 14 of Schedule 3.

**Item 9 – Subsection 9(1)**

- 52. Item 9 of Schedule 3 to the Second Consequential Act repeals the definition of “realise” in subsection 9(1) of the Social Security Act.
- 53. The reason for this is that this definition is only currently used in relation to the operation of Subdivision A of Division 1C of Part 3.10 of the Social Security Act, which is being repealed by Schedule 3.

**Item 10 – Subsection 9(1)**

- 54. Item 10 of Schedule 3 to the Second Consequential Act inserts a short definition of “secondary FLA income stream” into subsection 9(1) of the Social Security Act.
- 55. This definition makes reference to the meaning of that term given at new subsection 9C(1), which is being inserted by Item 14 of Schedule 3.

**Item 11 – Subsections 9(10) and (11)**

- 56. Item 11 of Schedule 3 to the Second Consequential Act repeals subsections 9(10) and (11) of the Social Security Act.
- 57. The reason for this is subsections 9(10) and 9(11) of the Social Security Act only relate to the definition of “realise” in subsection 9(1) of the Social Security Act, which is being repealed by Item 9 of Schedule 3 to the Second Consequential Act.

**Item 12 – Paragraph 9A(2)(h)**

- 58. Item 12 of Schedule 3 to the Second Consequential Act inserts new subparagraph 9A(2)(h)(iva) into the Social Security Act.
- 59. New subparagraph 9A(2)(h)(iva) allows a superannuation provider to make provision in the contract or governing rules of their income stream products for commutations that will give effect to an entitlement of a member’s spouse, or former spouse, under a payment split pursuant to the Family Law Act, without that income stream necessarily losing its asset-test exempt status for social security means testing purposes.

**Item 13 – Paragraph 9B(2)(h)**

- 60. Item 13 of Schedule 3 to the Second Consequential Act inserts new subparagraph 9B(2)(h)(iva) into the Social Security Act.
- 61. New subparagraph 9B(2)(h)(iva) allows a superannuation provider to make provision in the contract or governing rules of their income stream products for commutations that will give effect to an entitlement of a member’s spouse, or former spouse, under a payment split pursuant to the Family Law

Act, without that income stream necessarily losing its asset-test exempt status for social security means testing purposes.

**Item 14 – After section 9B**

62. Item 14 of Schedule 3 to the Second Consequential Act inserts new sections 9C and 9D into the Social Security Act.
63. New section 9C provides for the definitions of “original FLA income stream”, “primary FLA income stream”, “secondary FLA income stream” and “family law affected income streams”.
64. New paragraph 9C(1)(a) provides that where a person (member) acquires or purchases a relevant income stream from a relevant superannuation fund then that income stream is the “original FLA income stream” for the purposes of the Social Security Act.
65. New subsection 9C(2) provides the definitions of a “relevant income stream” and a “relevant superannuation fund”. A “relevant income stream” is an income stream that falls within paragraphs (a) through (c) of the definition of “income stream” in subsection 9(1). A “relevant superannuation fund” is basically any superannuation fund that can be affected by a payment split under Part VIII B of the Family Law Act.
66. New subsection 9C(1) provides that where a member’s spouse, or former spouse, becomes entitled to be paid some or all of the original FLA income stream pursuant to a payment split under Part VIII B of the Family Law Act then the part of the income stream that is to be paid to the spouse as an income stream will be a “secondary FLA income stream” for the purposes of the Social Security Act. The remainder of the original FLA income stream, which belongs to the member, is defined as the “primary FLA income stream” for the purposes of the Social Security Act.
67. As an example, if the member’s spouse, or former spouse, receives a lump sum payment from the income stream then this payment will not be a secondary FLA income stream. Where the spouse uses the lump sum to buy a new income stream, or rolls it over into a new income stream, this income stream will not be a secondary FLA income stream, or a family law affected income stream, because the spouse has not received it as a series of ongoing payments. After the payment of any lump sum to the member’s spouse, or former spouse, and any secondary FLA income stream, what is left of the original FLA income stream will be the primary FLA income stream.
68. New subsection 9D(1) provides that where a primary FLA income stream meets the definition of an asset-tested income stream (long term) or (short term), or would meet that definition if it were subject to the Social Security Act, then any related secondary FLA income stream will also be treated as falling within this same definition for social security purposes. For example, if the primary FLA income stream is an asset-tested income stream (short

term), then any related secondary FLA income stream would also be treated as an asset-tested income stream (short term).

69. New subsection 9D(2) provides that if there is no primary FLA income stream in relation to an original FLA income stream, but there is a secondary FLA income stream in relation to the original FLA income stream then, if there had been a primary FLA income stream and it would have been either an asset-tested income stream (long term) or (short term), the secondary FLA income stream will also be treated as having that same character. It is possible under the Family Law Act for the whole amount of the original FLA income stream to be transferred to the spouse, in which case there will be no relevant primary FLA income stream in relation to a secondary FLA income stream, but only a secondary FLA income stream.

#### **Item 15 – Subdivision A of Division 1C of Part 3.10**

70. Item 15 of Schedule 3 to the Second Consequential Act repeals Subdivision A of Division 1C of Part 3.10 of the Social Security Act, including sections 1096 and 1097.
71. Sections 1096 and 1097 of the Social Security Act contain rules that count part of the profit component of a withdrawal from a superannuation fund by a person under age 55 as income of the person for 12 months.
72. If these provisions were not repealed, it would mean that if a superannuation interest in the growth phase was split pursuant to Part VIIIB of the Family Law Act, then, for social security purposes, this would be considered to be a withdrawal by the member spouse. This could result in the inequitable outcome that part of the superannuation withdrawal paid to the other spouse could be treated as income of the member spouse.
73. Additionally, the need for these provisions has been greatly reduced by other policy changes in recent years, to the point where they affect very few customers. It was announced in the 2001 Federal Budget that people over 55 would be exempted from these provisions, and, it should be noted that, superannuation is generally inaccessible until age 55. The repeal of these complex provisions is also in accord with the policy objective of simplifying social security arrangements wherever this is possible, given the need to achieve other policy objectives.

#### **Item 16 – Subdivision B of Division 1C of Part 3.10 (heading)**

74. Item 16 of Schedule 3 to the Second Consequential Act repeals the existing heading of Subdivision B of Division 1C of Part 3.10 of the Social Security Act and substitutes a new heading.
75. The reason for this is that this subdivision will now only deal with income streams that are **not** family law affected income streams.

**Item 17 – Before section 1098 in Subdivision B of Division 1C of Part 3.10**

- 76. Item 17 of Schedule 3 to the Second Consequential Act inserts new section 1097A into the Social Security Act.
- 77. New section 1097A provides that the scope of Subdivision B of Division 1C of Part 3.10 of the Social Security Act is confined to income streams that are not family law affected income streams.

**Item 18 – Sections 1098, 1099 and 1099A**

- 78. Item 18 of Schedule 3 to the Second Consequential Act omits the term “asset-test exempt income stream” and substitutes the term “asset-test exempt income stream to which this Subdivision applies” in sections 1098, 1099 and 1099A of the Social Security Act. These sections relate to the income testing of an asset-test exempt (ATE) income stream.
- 79. The reason for this is that those sections apply only to ATE income streams other than family law affected ATE income streams. Family law affected ATE income streams will be subject to the income test under new section 1099DB, which is inserted by Item 20 of Schedule 3 to the Second Consequential Act.

**Item 19 – Sections 1099B, 1099C and 1099D**

- 80. Item 19 of Schedule 3 to the Second Consequential Act omits the term “asset-tested income stream (long term) and substitutes the term “asset-tested income stream (long term) to which this Subdivision applies” in Sections 1099B, 1099C and 1099D of the Social Security Act. These sections relate to the income testing of an asset-tested income stream (long term).
- 81. The reason for this is that those sections apply only to asset-tested income streams (long term) other than family law affected asset-tested income streams (long term). Family law affected asset-tested income streams (long term) are subject to the income test under new section 1099DC, which is inserted by Item 20 of Schedule 3 to the Second Consequential Act.

**Item 20 – At the end of Division 1C of Part 3.10**

- 82. Item 20 of Schedule 3 to the Second Consequential Act inserts new Subdivision C into Division 1C of Part 3.10 of the Social Security Act, which deals with the income testing of family law affected income streams.
- 83. New section 1099DA of the Social Security Act provides that new Subdivision C applies to family law affected income streams.
- 84. New section 1099DB of the Social Security Act provides that where a social security customer has a family law affected income stream, which is also an ATE income stream, then that customer will be taken to receive from that income stream each year an amount calculated with reference to guidelines

determined by the Secretary for the purposes of paragraph (a), if the income stream is not a defined benefit income stream, or paragraph (b) if the income stream is a defined benefit income stream.

85. New section 1099DC of the Social Security Act provides that where a social security customer has a family law affected income stream that is also an asset-tested income stream (long term), then that customer will be taken to receive from that income stream each year an amount calculated with reference to guidelines determined by the Secretary for the purposes of paragraph (a), if the income stream is not a defined benefit income stream, or paragraph (b) if the income stream is a defined benefit income stream.
86. New section 1099DD of the Social Security Act provides that any guideline made by the Secretary under sections 1099DB or 1099DC is a disallowable instrument, for the purposes of the *Acts Interpretation Act 1901*.

#### **Item 21 – Subsections 1119(1) and 1120(1)**

87. Item 21 of Schedule 3 to the Second Consequential Act amends subsections 1119(1) and 1120(1) of the Social Security Act so that they only apply to income streams that are not family law affected income streams.
88. These subsections relate to the valuation of asset-tested income streams other than family law affected income streams. Subsection 1119(1) relates to income streams that are not defined benefit income streams, and subsection 1120(1) applies to defined benefit income streams. Family law affected income streams, which are not ATE income streams, will be valued in accordance with new section 1120A, inserted by Item 22 of Schedule 3 to the Second Consequential Act.

#### **Item 22 – After section 1120**

89. Item 22 of Schedule 3 to the Second Consequential Act inserts new section 1120A, which deals with the asset-testing of family law affected income streams, into the Social Security Act.
90. New section 1120A of the Social Security Act applies to the valuation of family law affected income streams that are not ATE income streams for social security purposes.
91. New subsection 1120A(2) of the Social Security Act provides that a family law affected income stream that is not a defined benefit income stream will be taken to have an asset value, for social security purposes, that is calculated in accordance with guidelines determined by the Secretary for the purposes of this subsection.
92. New subsection 1120A(3) of the Social Security Act provides that a family law affected income stream that is a defined benefit income stream will be taken to have an asset value, for social security purposes, that is calculated in

accordance with guidelines determined by the Secretary for the purposes of this subsection.

93. New subsection 1120A(4) of the Social Security Act provides that any guideline made by the Secretary under subsection 1120A(2) or 1120A(3) of the Social Security Act is a disallowable instrument, for the purposes of the *Acts Interpretation Act 1901*.



## **SCHEDULE 4 – AMENDMENT OF THE *VETERANS’ ENTITLEMENTS ACT 1986***

### **Summary of amendments**

94. The amendments made to the *Veterans’ Entitlements Act 1986* (‘the Entitlements Act’) by Schedule 3 are in consequence of the insertion of Part VIIIIB of the Family Law Act, which was inserted by Schedule 1 to the Superannuation Act.
95. They provide a framework for the means test treatment of income stream payments in respect of superannuation interests, that have been split under an agreement or by a court order under the provisions of Part VIIIIB of the Family Law Act. The amendments provide for the income stream payments to be treated consistently with other income and assets under the means test.

### **Item 1 – Section 5 (Index of definitions)**

96. Item 1 of Schedule 4 to the Second Consequential Act inserts a listing of the location for the individual definitions “family law affected income stream, 5JC(1)”; “original family law affected income stream, 5JC(1)”; “primary FLA income stream, 5JC(1)” and “secondary FLA income stream, 5JC(1)” into section 5 (index of definitions).
97. These individual definitions are being inserted into the Entitlements Act by Items 8, 9, 10 and 11 respectively and it is, therefore, necessary to include the new definitions in the index of definitions.

### **Item 2 – Section 5 (Index of definitions)**

98. Item 2 of Schedule 4 to the Second Consequential Act repeals the section 5 (index of definitions) listing for and the location of the individual definitions “assessable growth component, 5J(1)” and “assessable period, 5J(1)”.
99. These individual definitions are being repealed by Items 3 and 4 and it is, therefore, not necessary to include them in the index of definitions.

### **Item 3 – Subsection 5J(1) (definition of *assessable growth component*)**

100. Item 3 of Schedule 4 to the Second Consequential Act repeals the definition of “assessable growth component” from subsection 5J(1).
101. The reason for this is that the definition is only used in the provisions of Subdivision A of Division 4 of Part IIIB of the Entitlements Act, which are being repealed by Item 15 of Schedule 4.

**Item 4 – Subsection 5J(1) (definition of *assessable period*)**

102. Item 4 of Schedule 4 to the Second Consequential Act repeals the definition of “assessable period” from subsection 5J(1).
103. The reason for this is that the definition is only used in the provisions of Subdivision A of Division 4 of Part IIIB of the Entitlements Act, which are being repealed by Item 15 of Schedule 4.

**Item 5 – Subsection 5J(1) (definition of *asset-tested income stream (long term)*)**

104. Item 5 of Schedule 4 to the Second Consequential Act amends the definition of “asset-tested income stream (long term)” in subsection 5J(1) of the Entitlements Act.
105. The reason for this is to include any secondary FLA income stream (as defined in Item 11 of Schedule 4) that satisfies the requirements of new section 5JD, which is being inserted by Item 14 of Schedule 4.

**Item 6 – Subsection 5J(1) (definition of *asset-tested income stream (short term)*)**

105. Item 6 of Schedule 4 to the Second Consequential Act amends the definition of “asset-tested income stream (short term)” in subsection 5J(1) of the Entitlements Act.
106. The reason for this is to include any secondary FLA income stream( as defined in Item 11 of Schedule 4) that satisfies the requirements of new section 5JD, which is being inserted by Item 14 of Schedule 4.

**Item 7 – Subsection 5J(1)**

107. Item 7 of Schedule 4 to the Second Consequential Act inserts a short definition of “family law affected income stream” into subsection 5J(1) of the Entitlements Act.
108. This definition makes reference to the meaning of that term given at new subsection 5JC(1), which is being inserted by Item 14 of Schedule 4.

**Item 8 – Subsection 5J(1) (after paragraph (f) of the definition of *income stream*)**

109. Item 8 of Schedule 4 to the Second Consequential Act inserts new paragraph 5J(1)(fa) into the Entitlements Act.
110. The reason for this is so that a family law income stream, which is defined by new subsection 5JC(1) of the Entitlements Act, will be an income stream for the purposes of that Act.

**Item 9 – Subsection 5J(1)**

- 111. Item 9 of Schedule 4 to the Second Consequential Act inserts a short definition of “original family law affected income stream” into subsection 5JC(1) of the Entitlements Act.
- 112. This definition makes reference to the meaning of that term given at new subsection 5JC(1), which is being inserted by Item 14 of Schedule 4.

**Item 10 – Subsection 5J(1)**

- 113. Item 10 of Schedule 4 to the Second Consequential Act inserts a short definition of “primary FLA income stream” into subsection 5J(1) of the Entitlements Act.
- 114. This definition makes reference to the meaning of that term given at new subsection 5JC(1), which is being inserted by Item 14 of Schedule 4.

**Item 11 – Subsection 5J(1)**

- 1154. Item 11 of Schedule 4 to the Second Consequential Act inserts a short definition of “secondary FLA income stream” into subsection 5J(1) of the Entitlements Act.
- 116. This definition makes reference to the meaning of that term given at new subsection 5JC(1), which is being inserted by Item 14 of Schedule 4.

**Item 12 – After subparagraph 5JA(2)(h)(iv)**

- 117. Item 12 of Schedule 4 to the Second Consequential Act inserts new subparagraph 5JA(2)(h)(iva) into the Entitlements Act.
- 118. New subparagraph 5JA(2)(h)(iva) allows a superannuation provider to make a provision in the contract or governing rules of an income stream product for a commutation to give effect to the entitlement of a member’s spouse, or former spouse, to the payment of an income stream split as the result of an agreement or by a court order as provided for in the Family Law Act. An asset-test exempt income stream commuted in such circumstances will not lose its asset-test exempt status for the purposes of the income and assets tests.

**Item 13 – After subparagraph 5JB(2)(h)(iv)**

- 119. Item 13 of Schedule 4 to the Second Consequential Act inserts new subparagraph 5JB(2)(h)(iva) into the Entitlements Act.
- 120. New subparagraph 5JB(2)(h)(iva) allows a superannuation provider to make a provision in the contract or governing rules of an income stream product for a commutation to give effect to the entitlement of a member’s spouse, or former spouse, to the payment of an income stream split as the result of an

agreement or by a court order as provided for in the Family Law Act. An asset-test exempt income stream commuted in such circumstances will not lose its asset-test exempt status for the purposes of the income and assets tests

#### **Item 14 – After section 5JB**

121. Item 14 of Schedule 4 to the Second Consequential Act inserts new sections 5JC and 5JD into the Entitlements Act.
122. New section 5JC provides for the definitions of the individual terms that are collectively referred to as “family law affected income streams”. The individual terms are “original family law affected income stream”, “primary FLA income stream” and “secondary FLA income stream”.
123. Paragraph 5JC(1)(a) provides that where a person (member) acquires or purchases the relevant income stream from the relevant superannuation fund then that income stream is the “original family law affected income stream”.
124. Subsection 5JC(2) defines the terms “relevant income stream” and “relevant superannuation fund”. A “relevant income stream” is an income stream that falls within paragraphs (a) through (c) of the definition of “income stream” in subsection 5J(1). A “relevant superannuation fund” is a superannuation fund that can be affected by a payment split under Part VIIIIB of the Family Law Act.
125. Subsection 5JC(1) is applicable in the circumstances where a member’s spouse, or former spouse, becomes entitled to be paid some or all of the original family law affected income stream pursuant to a payment split under Part VIIIIB of the Family Law Act. In such circumstances that part of the income stream that is to be paid to the spouse as an income stream is defined as the “secondary FLA income stream”. The remainder of the original family law affected income stream belonging to the member will be defined as being the “primary FLA income stream”.
126. In some circumstances the split will not result in the creation of either a “secondary FLA income stream” or a “primary FLA income stream”. An example of such an occurrence will result, where the spouse (or former spouse) receives a lump sum payment instead of an entitlement to income stream payments from the income stream. The lump sum payment will not be a “secondary FLA income stream” and neither would the use by the spouse of the lump sum to buy a new income stream, or the rolling over of the lump sum into a new income stream result in the creation of a “secondary FLA income stream” or a family law affected income stream.
127. After the payment of any lump sum to the member’s spouse or former spouse or of any secondary FLA income stream, what is left of the original FLA income stream will be regarded as being the primary FLA income stream.

128. New subsection 5JD(1) provides that where a primary FLA income stream meets the definition of an asset-tested income stream (long term) or (short term), or would meet that definition if it were subject to the Entitlements Act, then any related secondary FLA income stream will also be treated as falling within this same definition for the purposes of the income and assets tests. For example, if the primary FLA income stream is an asset-tested income stream (short term) then any related secondary FLA income stream would also be treated as an asset-tested income stream (short term).
129. Subsection 5JD(2) is applicable in the circumstances where there is no primary FLA income stream in relation to an original FLA income stream, but there is a secondary FLA income stream. In such circumstances, if there had been a primary FLA income stream that would have been either an asset-tested income stream (long term) or an asset-tested income stream (short term), the secondary FLA income stream will be treated as having that same character. Such circumstances will arise where the whole amount of the original FLA income stream has been transferred to the spouse with the result that there will be no relevant primary FLA income.

**Item 15 – Subdivision A of Division 4 of Part IIIB**

130. Item 15 of Schedule 4 to the Second Consequential Act repeals Subdivision A of Division 4 of Part IIIB of the Entitlements Act, which comprises sections 46Q and 46R.
131. Item 15 repeals Subdivision A of Division 4 of Part IIIB of the Entitlements Act, which comprises sections 46Q, 46R and 46S.
132. Sections 46Q and 46R of the Entitlements Act contain the rules that treat part of the profit component of a withdrawal from a superannuation fund by a person under age 55 as income of the person for 12 months.
133. If these provisions were not repealed, it would mean that if a superannuation interest was split during its growth phase under the provisions of Part VIIIB of the Family Law Act, then the split would be treated as a withdrawal by the member spouse. This would result in the inequitable outcome that part of the superannuation withdrawal paid to the partner of the member spouse could be treated as the income of the member spouse.
134. Section 46S of the Entitlements Act provides for an adjustment to the ordinary income of a person who has realised an investment at a loss. It is only applicable in the circumstances where there has been a realisation and section 46R is applicable. With the repeal of section 46R the provision becomes obsolete.
135. Additionally, the need for these provisions has been greatly reduced by other policy changes in recent years, to the point where they affect very few pensioners. The 2001 Federal Budget exempted people over 55 from these provisions, and superannuation is generally inaccessible until age 55.

**Item 16 – Subdivision B of Division 4 of Part IIIB (heading)**

136. Item 16 of Schedule 4 to the Second Consequential Act repeals the existing heading of Subdivision B of Division 4 of Part IIIB and substitutes a new heading.
137. The reason for this is that this subdivision will now only deal with income streams that are **not** family law affected income streams.

**Item 17 – Before section 46T in Subdivision B of Division 4 of Part IIIB**

138. Item 17 of Schedule 4 to the Second Consequential Act inserts new section 46SA into the Entitlements Act.
139. New section 46SA provides that the Subdivision applies to income streams that are not family law affected income streams.

**Item 18 – Sections 46T, 46U and 46V**

140. Item 18 of Schedule 4 to the Second Consequential Act omits the term “asset-test exempt income streams” and substitutes the term “asset-test exempt income stream to which this Subdivision applies” in sections 46T, 46U and 46V of the Entitlements Act. These sections relate to the income test treatment of ATE income streams.
142. The reason for this amendment is that family law affected ATE income streams are subject to the income test provisions of new section 46ZA, which is being inserted into the Entitlements Act by Item 20 of Schedule 4.

**Item 19 – Sections 46W, 46X and 46Y**

143. Item 19 of Schedule 4 to the Second Consequential Act omits the term “asset-tested income stream (long term) and substitutes the term “asset-tested income stream (long term) to which this Subdivision applies”. These sections relate to the income testing of an asset-tested income stream (long term).
144. The reason for this amendment is that family law affected asset-tested income streams (long term) will be subject to the income test provisions of new section 46ZB, which is being inserted into the Entitlements Act by Item 20 of Schedule 4.

**Item 20 – At the end of Division 4 of Part IIIB**

145. Item 20 of Schedule 4 to the Second Consequential Act inserts new Subdivision C into Division 4 of Part IIIB of the Entitlements Act, which deals with the income testing of family law affected income streams.
146. New section 46Z provides that new Subdivision C is applicable to family law affected income streams.

147. New section 46ZA is applicable where a person has a family law affected income stream which is an asset-test exempt income stream. The person will be taken to receive from that income stream each year an amount of ordinary income that is to be calculated by referring to the guidelines determined by the Repatriation Commission for the purpose. New paragraphs 46ZA(a) and (b) provide that separate guidelines are to be determined by the Repatriation Commission for income streams that are not defined benefit income streams and for income streams that are defined benefit income streams.
148. New section 46ZB is applicable where a person has a family law affected income stream which is an asset-tested income stream (long term). The person will be taken to receive from that income stream each year an amount of ordinary income that is to be calculated by referring to the guidelines determined by the Repatriation Commission for the purpose. New paragraphs 46ZB(a) and (b) provide that separate guidelines are to be determined by the Repatriation Commission for income streams that are not defined benefit income streams and for income streams that are defined benefit income streams.
149. New section 46ZC provides that the guidelines made by the Repatriation Commission under sections 46ZA or 46ZB are disallowable instruments, for the purposes of section 46A of the *Acts Interpretation Act 1901*.

**Item 21 – At the end of subsections 52A(1) and 52B(1)**

150. Item 21 of Schedule 4 to the Second Consequential Act amends subsections 52A(1) and 52B(1) of the Entitlements Act so that they are only applicable to income streams that are not family law affected income streams.
151. These subsections provide for the valuation of asset-tested income streams. Subsection 52A(1) applies to income streams that are not defined benefit income streams and subsection 52B(1) applies to defined benefit income streams. Family law affected income streams, which are not asset-test exempt, will be valued in accordance with new section 52BA, which is being inserted by Item 22 of Schedule 4.

**Item 22 – After section 52B**

152. Item 22 of Schedule 4 to the Second Consequential Act inserts new section 52BA into the Entitlements Act.
153. New section 52BA provides that, for the purposes of the assets test, the value of the income stream is to be calculated by referring to the guidelines determined by the Repatriation Commission for that purpose. New subsection 52BA(2) and (3) provide that separate guidelines are to be determined by the Repatriation Commission for income streams that are not defined benefit income streams and for income streams that are defined benefit income streams.

154. New subsection 52BA(4) provides that the guidelines made by the Repatriation Commission under subsections 52BA(2) or (3) are disallowable instruments, for the purposes of section 46A of the *Acts Interpretation Act 1901*.