

Family Law (Superannuation) Amendment Regulations 2004 (No. 2) **2004 No. 352**

EXPLANATORY STATEMENT

STATUTORY RULES 2004 No. 352

ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

FAMILY LAW ACT 1975

FAMILY LAW (SUPERANNUATION) AMENDMENT REGULATIONS 2004 (No. 2)

Subsection 125(1) of the *Family Law Act 1975* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part VIIIIB of the Act provides for the division of superannuation between parties to a marriage on marriage breakdown or divorce.

The *Family Law (Superannuation) Regulations 2001* (the Principal Regulations) contain much of the detail of the legislative scheme for the division of superannuation on marriage breakdown or divorce, including provisions for the method for valuing superannuation interests, the entitlement of parties when superannuation is divided and the provision of information before and after division occurs.

The purpose of the Regulations is to provide for a further situation where superannuation payments cannot be split and to make some amendments to overcome drafting deficiencies.

In particular, the Regulations:

- extend the existing arrangements, that allow for entitlements under a splitting order or agreement to be satisfied in some other way, to permit such entitlements for interests in a public sector superannuation scheme (for example, the closed Defence Force Retirement and Death Benefits scheme) to be satisfied by an entitlement to benefits under another public sector superannuation scheme; and
- correct several oversights which occurred when the Principal Regulations were amended by the *Family Law (Superannuation) Amendment Regulations 2004 (No.1)*.

Details of the Regulations are as follows:

Regulation 1 is formal.

Regulation 2 provides for the commencement of the Regulations on the date of their notification in the *Gazette*.

Regulation 3 provides for the amendment of the *Family Law (Superannuation) Regulations 2001* (the Principal Regulations) as set out in Schedule 1.

Schedule 1

Item 1: Regulation 3, after definition of percentage-only interest

Item 1 inserts a definition of the term 'public sector superannuation scheme' in regulation 3 of the Principal Regulations. The term is used in new subregulations 14G(6A) and 14N(5A) (see below).

Item 2: Regulation 14G, heading

Item 2 amends the heading to regulation 14G of the Principal Regulations consequential to the amendments to regulation 14G by Items 3 to 6 below.

Item 3: Subregulation 14G(2)

Item 3 amends subregulation 14G(2) of the Principal Regulations consequential to the insertion of new subregulation 14G(6A) by Item 4.

Item 4: After subregulation 14G(6)

Item 4 inserts new subregulation 14G(6A) to provide for a further category of payments in respect of a superannuation interest of a member spouse that are not splittable.

A member spouse is the person who has the superannuation interest to which a splitting order or agreement under VIIIIB of the *Family Law Act 1975* (the Family Law Act) applies. By contrast, a non-member spouse is the spouse for whose benefit such a splitting order or agreement has been made.

Regulation 14G of the Principal Regulations is one of a number of provisions in Division 2.2 of the Principal Regulations that provide for the particular circumstances in which payments in respect of superannuation interest, to which a splitting order or agreement under Part VIIIIB of the Family Law Act applies, are not splittable for the purpose of applying Part VIIIIB to the order or agreement.

The scheme of Division 2.2 is that such payments are not splittable for that purpose, effectively bringing to an end the operation of the splitting order or agreement, where the non-member spouse's entitlement under the order or agreement has been satisfied in some other way.

One way in which regulation 14G effectively brings to an end the operation of such a splitting order or agreement is where a new interest has been created for the non-member spouse, in respect of his or her entitlement under the order or agreement, in the superannuation fund in which the member spouse's interest is held.

By operation of amendments made to:

- the *Defence Force Retirement and Death Benefits Act 1973* (the DFRDB Act) and the *Military Superannuation and Benefits Act 1991* (the MSB Act) by the *Superannuation Legislation Amendment (Family Law and Other Matters) Act 2004* (the 2004 Act); and
- the Military Superannuation and Benefits Rules since the commencement of the 2004 Act;

where a member spouse with an interest in the scheme constituted by the DFRDB Act (the DFRDB scheme) is not yet receiving a pension under that scheme at the time that the order or agreement commences, an entitlement to benefits arises for the non-member spouse under the scheme established under the MSB Act (the MSB scheme), rather than under the DFRDB scheme.

The approach taken by the DFRDB scheme reflects the unique position of that scheme as an unfunded and closed defined benefit superannuation scheme.

New subregulation 14G(6A) removes the possibility that a non-member spouse, with a splitting order or agreement in respect of a member spouse's interest in the DFRDB scheme, might seek to both retain his or her entitlement to benefits under the MSB scheme and enforce the order or agreement against the trustee of the DFRDB scheme.

It is possible that some other State or Territory public sector superannuation schemes may take a similar approach to that taken by the DFRDB scheme when splitting orders or agreements commence to apply.

New subregulation 14(6A), therefore, extends the additional category of payments that are not splittable beyond those made under Commonwealth superannuation schemes. The additional category will also apply where the member spouse's interest was held in a public sector superannuation scheme, and the entitlement to benefits arises under the governing rules of that scheme, or the governing rules of some other public sector superannuation scheme.

Item 5: After subregulation 14G(7)

Item 5 inserts new subregulation 14G(7A) to impose a condition that must be met before the additional category of payments may become not splittable under new subregulation 14G(6A). Before a payment may become not splittable, the governing rules of the public sector superannuation scheme in which the member spouse's interest is held must not provide for a reduction of the benefit payable to any other member of the scheme other than the member spouse or a reversionary beneficiary of a member spouse. A similar condition currently applies under subregulation 14G(7) where the effective operation of a splitting order or agreement is brought to an end by a new interest being created in the scheme.

Item 6: Subregulation 14G(8)

Item 6 amends subregulation 14G(8) of the Principal Regulations consequential to the insertion of new subregulation 14G(6A) by Item 4.

Items 7 to 10: Paragraphs 14G(9)(a) and (b); Subregulation 14G(10)

Subregulations 14G(8) to (11) of the Principal Regulations provide for the calculation of the non-member spouse's entitlement in respect of a superannuation interest to which a splitting order or agreement applies. A new interest that is created for a non-member spouse must have at least the value of the non-member spouse's entitlement in respect of the superannuation interest before payments in respect of the member spouse's interest become not splittable.

Subregulation 14G(9) provides a method for calculating a non-member spouse's entitlement in respect of a superannuation interest where the splitting order or agreement provides for a base amount which is less, or if required to be adjusted would be less, than the first or next splittable payment payable in respect of the member spouse's interest.

Item 7 amends paragraphs 14G(9)(a) and (9)(b) to make drafting amendments to both provisions and to clarify paragraph 14G(9)(b) in two respects, namely:

- that the method in subregulation 14G(9) applies when the next splittable payment that would become payable in respect of the member spouse's interest after the time that the new interest is created for the non-member spouse is more than a particular amount; and
- that that amount, where there is no adjusted base amount, is the sum of any base amount applicable to the non-member spouse at that time less any fees payable by the non-member spouse under regulation 59 of the Principal Regulations, which permits a superannuation fund trustee to charge reasonable fees for things done when an interest is subject to a splitting order or agreement.

Subregulation 14G(10) provides a method for calculating a non-member spouse's entitlement in respect of a superannuation interest in other cases where the splitting order or agreement provides for a base amount.

Items 8, 9 and 10 amend subregulation 14G(10) to correct an error in the treatment of any fees payable by the non-member spouse in the formula in the provision.

At present, the definition of V , one of the factors in the formula in subregulation 14G(10), inappropriately reduces the value of a member spouse's interest in a self managed superannuation fund (and in no other fund) by any fees payable by a non-member spouse under regulation 59.

The amendments to subregulation 14G(10) ensure that the fees payable by a non-member spouse are properly taken into account when calculating a non-member spouse's entitlement under the provision. The amount of those fees will be subtracted from the product of the proportion of the future payments in respect of the interest to which the non-member spouse would be entitled under the order or agreement and the value of the interest determined in accordance with Division 5.2 of the Principal Regulations.

Item 11: Regulation 14N, heading

Item 11 amends the heading to regulation 14N of the Principal Regulations consequential to the amendments to regulation 14N by Items 12 to 14.

Item 12: Subregulation 14N(2)

Item 12 amends subregulation 14N(2) of the Principal Regulations consequential to the insertion of new subregulation 14N(5A) by Item 13.

Items 13 and 14: After subregulation 14N(5), After subregulation 14N(6)

Items 13 and 14 inserts new subregulations 14N(5A) and (6A), in identical terms to subregulations 14G(6A) and (7A) inserted by Items 4 and 5, to provide for a further category of payments in respect of a percentage-only superannuation interest that is not splittable.

A 'percentage-only' superannuation interest is one that has been prescribed under regulation 9A of the Principal Regulations, and generally provides benefits which increase exponentially on the happening of a particular event (for example, pensions are only payable under the judicial superannuation schemes that have been prescribed once a judge has attained the age of 60 years and served for 10 years).

Before that event occurs, it is unlikely that future benefits can be readily divided by reference to an actuarially derived value of the interest.

Percentage-only interests can only be split by reference to a percentage of future payments that will be made to the member spouse.

Regulation 14N of the Principal Regulations provides, for percentage-only superannuation interests, for the same alternative ways in which a non-member spouse's entitlement under a splitting order or agreement can be satisfied as provided under regulation 14G of those Regulations for other superannuation interests. The alternative ways only apply when the percentage-only interest is in the payment phase, once it is certain what benefits will be paid to the member spouse.

Item 15: Paragraph 43(2)(a)

Item 15 amends paragraph 43(2)(a) of the Principal Regulations to correct an oversight following the insertion of subregulation 42(5) in those Regulations by the *Family Law (Superannuation) Amendment Regulations 2004 (No.1)* (Statutory Rule No. 290 of 2004).

Subregulation 43(2) of the Principal Regulations provides a method for determining the gross value of a superannuation interest paying a pension where a lump sum is also payable at the time of valuation. For these interests, the gross value is the sum of the value of the pension (determined under whichever of the three methods set out in subregulation 42(2), (3) or (4) is applicable) and the lump sum. New subregulation 42(5) provided a fourth method that applies where the pension is a market linked pension. New paragraph 43(2)(a) will ensure that where an interest is paying a market linked pension and a lump sum is also payable at the time of valuation, the gross value of the interest is the sum of the value of the pension determined using the method in subregulation 42(5) and the lump sum.

Item 16: Paragraph 64(4A)(c)

Item 16 amends paragraph 64(4A)(c) of the Principal Regulations consequential to the insertion of new paragraphs 64(4A)(d) and (e) by Item 17.

Item 17: After paragraph 64(4A)(c)

Item 17 inserts new paragraphs 64(4A)(d) and (e) to correct an oversight following the insertion of new paragraphs 64(2)(e) and (eaa) and subregulation 64(4A) in the Principal Regulations by the *Family Law (Superannuation) Amendment Regulations 2004 (No.1)*.

The *Family Law (Superannuation) Amendment Regulations 2004 (No.1)* inserted default methods into Schedule 2 of the Principal Regulations for determining the gross value of a defined benefit superannuation interest held by a member spouse as a result of employment in which he or she was no longer engaged at the time of valuation and which will pay benefits at a future time (referred to hereafter as 'preserved benefit stage defined benefit superannuation interests'). Consequential amendments were made to the information provisions in regulation 64 of the Principal Regulations supporting the new default methods, including the insertion of new paragraphs 64(2)(e) and (eaa) and subregulation 64(4A). However, in making those amendments, it was overlooked that requirements to provide information relating to:

- relevant preservation components (new paragraph 64(4A)(d));
- surcharge liability (paragraph 64(4)(j) mentioned in new paragraph 64(4A)(e));
- tax components (paragraph 64(4)(m) mentioned in new paragraph 64(4A)(e));
- whether or not an alternative valuation method had been approved (paragraph 64(4)(n) mentioned in new paragraph 64(4A)(e));
- whether or not information had been given under the *Superannuation Industry (Supervision) Regulations 1994* about reconstruction or termination of the fund (paragraph 64(4)(o) mentioned in new paragraph 64(4A)(e)); or
- the gross value of the interest (paragraph 64(4)(p) mentioned in new paragraph 64(4A)(e));

which formerly applied in relation to all defined benefit superannuation interests, also needed to be reproduced for this category of preserved benefit stage defined benefit superannuation interests.

Item 18: Paragraph 64(6)(c)

Item 18 amends paragraph 64(6)(c) of the Principal Regulations, again to correct an oversight following the insertion of new paragraphs 64(2)(e) and (eaa) and subregulation 64(4A) by the *Family Law (Superannuation) Amendment Regulations 2004 (No.1)*.

Paragraph 64(6)(c) permits a spouse to request a superannuation fund trustee to provide a valuation of a superannuation interest in accordance with the applicable method under the Principal Regulations. If the trustee chooses to do so, it can provide the valuation in accordance with that method, instead of particular other information needed to value the interest using the method.

When the consequential amendments were made to the information provisions in regulation 64 of the Principal Regulations supporting the new default methods, including the insertion of new paragraphs 64(2)(e) and (eaa) and subregulation 64(4A), the need to also amend paragraph 64(6)(c) was overlooked.

The amendment to paragraph 64(6)(c) will ensure that a trustee, if it chooses to do so, can provide a valuation of a preserved benefit stage defined benefit superannuation interest in accordance with whichever of the new methods is applicable, instead of the information needed to value the interest using that method.

Items 19 and 20: Paragraph 64(6A)(c), Paragraph 64(6B)(b)

Items 19 and 20 amend paragraphs 64(6A)(c) and (6B)(b) of the Principal Regulations, again to correct an oversight following the insertion of new paragraphs 64(2)(e) and (eaa) and subregulation 64(4A) by the *Family Law (Superannuation) Amendment Regulations 2004 (No.1)*.

Subregulations 64(6A) and (6B) of the Principal Regulations set out a procedure for a spouse, where the trustee of a superannuation fund has earlier provided a valuation of a superannuation interest in accordance with the applicable method under the Regulations (instead of providing the information needed to value the interest using that method), to request further information to check whether the value of the interest has been correctly calculated using that method.

When the consequential amendments were made to the information provisions in regulation 64 of the Principal Regulations supporting the new default methods, including the insertion of new paragraphs 64(2)(e) and (eaa) and subregulation 64(4A), the need to also amend paragraphs 64(6A) and (6B) was overlooked.

The amendments, which would amend subparagraph 64(6A)(c)(i) and insert new subparagraph 64(6A)(c)(ii) and new paragraph 64(6B)(b), will ensure that the procedure to request further information can be used when the trustee has earlier provided a valuation of a preserved benefit stage defined benefit superannuation interest in accordance with one of the new default methods.

Item 21: Paragraph 64(7)(a)

Item 21 amend paragraph 64(7)(a) of the Principal Regulations, again to correct an oversight following the insertion of new paragraphs 64(2)(e) and (eaa) and subregulation 64(4A) by the *Family Law (Superannuation) Amendment Regulations 2004 (No.1)*.

Subregulation 64(7) of the Principal Regulations provides a power for the Minister to determine the items of information to be provided to a spouse in response to an application under section 90MZB of the *Family Law Act 1975* in relation to a defined benefit superannuation interest for which an alternative valuation method has been approved.

When the consequential amendments were made to the information provisions in regulation 64 of the Principal Regulations supporting the new default methods, including the insertion of new

paragraphs 64(2)(e) and (eaa) and subregulation 64(4A), the need to also amend paragraph 64(7)(a) was overlooked.

The amendment extends the power so that, where an alternative method has been approved for valuing a preserved benefit stage defined benefit superannuation interest, the Minister is able to determine that the trustee is not required to provide particular information which is relevant only to one of the default methods that the alternative method replaces.

Items 22 to 26: Schedule 1A

Items 22 to 26 amend Schedule 1A of the Principal Regulations consequential on the proposed amendments to regulation 14N by Items 12 to 14.

Schedule 1A sets out the method for calculating the value of a non-member spouse's entitlement in respect of a percentage-only interest that is in the payment phase.

A new interest that is created for a non-member spouse must have at least the value of the non-member spouse's entitlement in respect of the superannuation interest before payments in respect of the member spouse's percentage-only interest are, by operation of regulation 14N, not splittable.

Item 27: Schedule 6

Item 27 amends the definition of GVP, a factor used in a formula in subclause 3(1) of the Principal Regulations, to correct an oversight following the insertion of subregulation 42(5) in those Regulations by the *Family Law (Superannuation) Amendment Regulations 2004 (No.1)* (Statutory Rule No. 290 of 2004).