

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2005 No. 261**

#### **Issued by authority of the Minister for Revenue and Assistant Treasurer**

*Superannuation Industry (Supervision) Act 1993*

*Retirement Savings Accounts Act 1997*

*Income Tax Assessment Act 1936*

*Superannuation Industry (Supervision) Amendment Regulations 2005 (No. 5)*

*Retirement Savings Accounts Regulations 2005 (No. 3)*

*Income Tax Amendment Regulations 2005 (No. 7)*

Subsection 353(1) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) provides in part that the Governor-General may make regulations prescribing matters required or permitted by the SIS Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the SIS Act. The *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations), among other matters, set out the rules for cashing of superannuation benefits.

Subsection 200(1) of the *Retirement Savings Accounts Act 1997* (the RSA Act) provides in part that the Governor-General may make regulations prescribing matters required or permitted by the RSA Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the RSA Act. The *Retirement Savings Accounts Regulations 1997* (the RSA Regulations), among other matters, set out the rules for cashing of Retirement Savings Account benefits.

Section 266 of the *Income Tax Assessment Act 1936* (the ITAA 1936) provides, in part, that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the ITAA 1936. The ITAA 1936, among other matters, sets out the taxation of superannuation death benefits.

The purpose of the Regulations is to specify matters that are, or are not, to be taken into account in determining whether two people have an interdependency relationship.

Regulations 6.22 and 4.26 of the SIS and RSA Regulations, respectively, require that the superannuation benefits of a deceased superannuation fund member or retirement savings account holder must be paid to one or more dependants and/or a legal personal representative of the deceased member/holder. If neither of these can be found, the benefits can be paid to another person. Death benefits paid to a dependant are tax free as per section 27AAA of the ITAA 1936 (up to the pension reasonable benefit limit which is \$1,297,886 in 2005-06).

Subsection 27A(1) of the ITAA 1936 and sections 10 and 20 of the SIS and RSA Acts, respectively, define the meaning of dependant to include a person who has an interdependency relationship with the member/holder.

Sections 27AAB, 10A and 20A of the ITAA 1936, SIS and RSA Acts, respectively, provide that two people have an interdependency relationship if:

- they have a close personal relationship; and
- live together; and
- one or each provides the other with financial support; and
- one or each of them provides the other with domestic support and personal care.

Furthermore, those sections state that two people who have a close personal relationship but who cannot satisfy all of the other requirements of an interdependency relationship because of a physical, intellectual or psychiatric disability, still have an interdependency relationship.

Given the complex nature of interdependency relationships, which were first provided for in superannuation and related tax law on 30 June 2004, it was not possible to account for all circumstances in the original amendments. Public consultation has demonstrated the need for further clarification.

The Regulations specify:

- matters that are, or are not, to be taken into account in determining whether two people have an interdependency relationship; and
- circumstances in which two people have, or do not have, an interdependency relationship as provided for in subsections 27AAB(3), 10A(3) and 20A(3) of the ITAA 1936, SIS and RSA Acts, respectively.

The three sets of Regulations are identical except for the section numbers that they refer to in their various Acts.

Neither the ITAA 1936, the SIS Act, nor the RSA Act specify any conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations are legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Public consultation was undertaken in relation to this instrument. The draft regulations were released for one month during which time numerous submissions were received and considered.

Details of the Regulations are as follows:

***Superannuation Industry (Supervision) Amendment Regulations 2005 (No. 5)***

**Regulation 1** specifies the name of the Regulations as the *Superannuation Industry (Supervision) Amendment Regulations 2005 (No. 5)*.

**Regulation 2** provides that the Regulations commence on the day after they are registered.

**Regulation 3** provides that Schedule 1 amends the *Superannuation Industry (Supervision) Regulations 1994*.

**Schedule 1** inserts new regulation 1.04AAAA, concerning interdependency relationships for the purposes of section 10A of the Act.

Subregulation 1.04AAAA(1) lists a number of matters that are to be taken into account when determining whether two people have an interdependency relationship, or whether two people had an interdependency relationship immediately before the death of one of them.

It is not necessary for each of the listed circumstances to be satisfied in order for an interdependency relationship to exist. There are circumstances in which it would be inappropriate to consider certain matters. For example, it would not be relevant to consider whether there was a sexual relationship when determining whether an interdependency relationship existed between siblings.

Each of the matters listed is to be given the appropriate weighting under the circumstances. The degree to which any matter is met or is present or not, as the case may be, does not necessarily of its own accord, confirm or preclude the existence of an interdependency relationship.

Generally speaking, it is not expected that children will be in an interdependency relationship with their parents.

*Example*

*Daniel died at age 23, leaving behind a superannuation benefit of \$30,000. Daniel was not married, nor did he have any children, and lived with his parents and younger brother in his parent's home.*

*Given that Daniel was 23, he and his parents had of course known each other for some time (subparagraph (1)(a)(i)). While both parties may have intended to remain an important part of each other's lives, it is reasonable to assume that the relationship would have changed significantly over time. That is neither Daniel, nor his parents, would have expected to be providing each other the same level of domestic support and personal care that they did prior to Daniel's death, for the next forty years, had he not died (subparagraphs (iv) and (viii)).*

*He did not own the house, nor was he a mortgagee (subparagraph (iii)).*

*While Daniel sometimes cooked dinner for his younger brother and provided other care and support to him, it was no more than would generally be expected of an older sibling and was far less than the care and support that his parents provided (subparagraph (v)).*

*Friends, neighbours and associates of Daniel and his parents all considered that the relationship between Daniel and his parents was a reasonably normal, healthy, relationship for a young man living with his parents. They attended family functions together and occasionally attended functions organised by each*

*other's friends. For example, when Daniel's long time friend was married, Daniel's parents were also invited to attend. However, generally speaking, they did not socialise together (subparagraph (vi)).*

*When his mother's close friend died three month's prior to Daniel's death, he provided emotional support to his mother, however, it was Daniel's father who took time off work and who cancelled social and sporting engagements in order to be with her and provide support (subparagraph (vii)).*

*It would be reasonable to expect that Daniel would have moved out of his parent's home at some stage. That is, it was convenient (and possibly expected) on a number of fronts for Daniel as a young adult to live with his parents, including financially, domestically and emotionally. However, while it was never specifically discussed, it was generally accepted that he would move out eventually (subparagraphs (viii) and (iv)).*

*Based on the facts of this case, Daniel and his parents were not in an interdependency relationship.*

The existence of a statutory declaration signed by the person claiming to be in, or claiming to have been in, an interdependency relationship may also be taken into consideration when determining the presence of an interdependency relationship.

Subregulation 1.04AAAA(2) provides that two people have an interdependency relationship if they meet the requirements of paragraphs 10A(1)(a) to (c) of the SIS Act (that is, they have a close personal relationship, they live together and one or each of them provides the other with financial support) and one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a mere friend or flatmate.

The preparation of a meal or assistance with medication when a person is unwell would not normally of itself satisfy this provision. More likely the kind of care and support normally provided in a close personal relationship would extend to constant care (for example, overnight), attending medical appointments with the person or the provision of personal and physical assistance where required.

This provision distinguishes between the kind of care outlined above and the care that a friend or flatmate might reasonably be expected to provide, for example merely checking in on a person when they are unwell and cooking or providing pre-cooked meals.

Not all relationships are going to experience the type of sickness or distress that would require a significant level of support and care. In those circumstances the manner in which minor levels of support and care are provided would be relevant.

Subregulation 1.04AAAA(3) enables two people who have a close personal relationship but who do not meet the other requirements of 10A(1) of the SIS Act (that is, they do not live together, they do not provide each other with financial support and/or do not provide each other with domestic support and personal care) to be in an interdependency relationship if the reason they do not meet the other requirements is because they are temporarily living apart.

*Example*

*Two elderly sisters, June and Betty, were living together in an interdependency relationship at the time that June was sentenced to two years in gaol. During that period they were not able to live together, or provide each other with financial support or domestic support and personal care. They did, however, maintain their close personal relationship. June and Betty were still in an interdependency relationship during the period that June was in gaol because in the absence of evidence to the contrary, it would be reasonable to assume that if she was not in gaol, they would have continued to have met the definition as they did prior to her incarceration.*

It is expected that two people who have a close personal relationship, who do not and have never lived together and yet could argue that they were temporarily living apart, (for example, they planned to move in together on a certain date) would have a significantly more difficult task in demonstrating that if they were living together they would meet, or would have met, the definition of an interdependency relationship.

Subregulation 1.04AAAA(4) enables two people who have a close personal relationship but who do not meet the other requirements of subsection 10A(1) of the SIS Act (that is, they do not live together, they do not provide each other with financial support and/or do not provide each other with domestic support and personal care) to be in an interdependency relationship if the reason they do not meet the other requirements is because either or both of them suffer from a disability. This subregulation addresses the possibility that certain disabilities that may be debilitating, for example some acquired brain injuries, may not be a physical, intellectual or psychiatric disability.

Subregulation 1.04AAAA(5) states that two people do not have an interdependency relationship if one of them provides domestic support and personal care to the other under an employment contract or a contract for services or on behalf of another person or organisation such as a government agency, a body corporate or a benevolent or charitable organisation.

It is not intended that this provision will affect people who otherwise meet the definition of an interdependency relationship but who receive a carer's allowance or similar payment from a government or other organisation.

***Retirement Savings Accounts Amendment Regulations 2005 (No. 3)***

**Regulation 1** specifies the name of the Regulations as the *Retirement Savings Accounts Amendment Regulations 2005 (No. 3)*.

**Regulation 2** provides that the Regulations commence on the day after they are registered.

**Regulation 3** provides that Schedule 1 amends the *Retirement Savings Accounts Regulations 1997*.

**Schedule 1** inserts new regulation 1.09, concerning interdependency relationships for the purposes of section 20A of the Act.

Subregulation 1.09(1) lists a number of matters that are to be taken into account when determining whether two people have an interdependency relationship, or whether two people had an interdependency relationship immediately before the death of one of them.

It is not necessary for each of the listed circumstances to be satisfied in order for an interdependency relationship to exist. There are circumstances in which it would be inappropriate to consider certain matters. For example, it would not be relevant to consider whether there was a sexual relationship when determining whether an interdependency relationship existed between siblings.

Each of the matters listed is to be given the appropriate weighting under the circumstances. The degree to which any matter is met or is present or not, as the case may be, does not necessarily of its own accord, confirm or preclude the existence of an interdependency relationship.

Generally speaking, it is not expected that children will be in an interdependency relationship with their parents.

*Example*

*Daniel died at age 23, leaving behind a superannuation benefit of \$30,000. Daniel was not married, nor did he have any children, and lived with his parents and younger brother in his parent's home.*

*Given that Daniel was 23, he and his parents had of course known each other for some time (subparagraph (1)(a)(i)). While both parties may have intended to remain an important part of each other's lives, it is reasonable to assume that the relationship would have changed significantly over time. That is neither Daniel, nor his parents, would have expected to be providing each other the same level of domestic support and personal care that they did prior to Daniel's death, for the next forty years, had he not died (subparagraphs (iv) and (viii)).*

*He did not own the house, nor was he a mortgagee (subparagraph (iii)).*

*While Daniel sometimes cooked dinner for his younger brother and provided other care and support to him, it was no more than would generally be expected of an older sibling and was far less than the care and support that his parents provided (subparagraph (v)).*

*Friends, neighbours and associates of Daniel and his parents all considered that the relationship between Daniel and his parents was a reasonably normal, healthy, relationship for a young man living with his parents. They attended family functions together and occasionally attended functions organised by each other's friends. For example, when Daniel's long time friend was married, Daniel's parents were also invited to attend. However, generally speaking, they did not socialise together (subparagraph (vi)).*

*When his mother's close friend died three month's prior to Daniel's death, he provided emotional support to his mother, however, it was Daniel's father who took time off work and who cancelled social and sporting engagements in order to be with her and provide support (subparagraph (vii)).*

*It would be reasonable to expect that Daniel would have moved out of his parent's home at some stage. That is, it was convenient (and possibly expected) on a number of fronts for Daniel as an adult to live with his parents, including financially, domestically and emotionally. However, while it was never specifically discussed, it was generally accepted that he would move out eventually (subparagraphs (viii) and (ix)).*

*Based on the facts of this case, Daniel and his parents were not in an interdependency relationship.*

The existence of a statutory declaration signed by the person claiming to be in, or claiming to have been in, an interdependency relationship may also be taken into consideration when determining the presence of an interdependency relationship.

Subregulation 1.09(2) provides that two people have an interdependency relationship if they meet the requirements of paragraphs 20A(1)(a) to (c) of the RSA Act (that is, they have a close personal relationship, they live together and one or each of them provides the other with financial support) and one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a mere friend or flatmate.

The preparation of a meal or assistance with medication when a person is unwell would not normally of itself satisfy this provision. More likely the kind of care and support normally provided in a close personal relationship would extend to constant care (for example, overnight), attending medical appointments with the person or the provision of personal and physical assistance where required.

This provision distinguishes between the kind of care outlined above and the care that a friend or flatmate might reasonably be expected to provide, for example merely checking in on a person when they are unwell and cooking or providing pre-cooked meals.

Not all relationships are going to experience the type of sickness or distress that would require a significant level of support and care. In those circumstances the manner in which minor levels of support and care are provided would be relevant.

Subregulation 1.09(3) enables two people who have a close personal relationship but who do not meet the other requirements of 20A(1) of the RSA Act (that is, they do not live together, they do not provide each other with financial support and/or do not provide each other with domestic support and personal care) to be in an interdependency relationship if the reason they do not meet the other requirements is because they are temporarily living apart.

#### *Example*

*Two elderly sisters, June and Betty, were living together in an interdependency relationship at the time that June was sentenced to two years in gaol. During that period they were not able to live together, or provide each other with financial support or domestic support and personal care. They did, however, maintain their close personal relationship. June and Betty were still in an interdependency relationship during the period that June was in gaol because in the absence of evidence to the contrary, it would be reasonable to assume that if*

*she was not in gaol, they would have continued to have met the definition as they did prior to her incarceration.*

It is expected that two people who have a close personal relationship, who do not and have never lived together and yet could argue that they were temporarily living apart, (for example, they planned to move in together on a certain date) would have a significantly more difficult task in demonstrating that if they were living together they would meet, or would have met, the definition of an interdependency relationship.

Subregulation 1.09(4) enables two people who have a close personal relationship but who do not meet the other requirements of subsection 20A(1) of the RSA Act (that is, they do not live together, they do not provide each other with financial support and/or do not provide each other with domestic support and personal care) to be in an interdependency relationship if the reason they do not meet the other requirements is because either or both of them suffer from a disability. This subregulation addresses the possibility that certain disabilities that may be debilitating, for example some acquired brain injuries, may not be a physical, intellectual or psychiatric disability.

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It is not intended that this provision will affect people who otherwise meet the definition of an interdependency relationship but who receive a carer's allowance or similar payment from a government or other organisation.

### ***Income Tax Amendment Regulations 2005 (No. 7)***

**Regulation 1** specifies the name of the Regulations as the *Income Tax Amendment Regulations 2005 (No. 7)*.

**Regulation 2** provides that the Regulations commence on the day after they are registered.

**Regulation 3** provides that Schedule 1 amends the *Income Tax Regulations 1936*.

**Schedule 1** inserts new regulation 8A, concerning interdependency relationships for the purposes of section 27AAB of the Act.

Subregulation 8A(1) lists a number of matters that are to be taken into account when determining whether two people have an interdependency relationship, or whether two people had an interdependency relationship immediately before the death of one of them.

It is not necessary for each of the listed circumstances to be satisfied in order for an interdependency relationship to exist. There are circumstances in which it would be inappropriate to consider certain matters. For example, it would not be relevant to consider whether there was a sexual relationship when determining whether an interdependency relationship existed between siblings.

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Subregulation 8A(2) provides that two people have an interdependency relationship if they meet the requirements of paragraphs 27AAB(1)(a) to (c) of the ITAA 1936 (that is, they have a close personal relationship, they live together and one or each of them provides the other with financial support) and one or each of them provides the other with support and care of a type and quality normally provided in a close personal relationship, rather than by a mere friend or flatmate.

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Subregulation 8A(3) enables two people who have a close personal relationship but who do not meet the other requirements of 27AAB(1) of the ITAA 1936 (that is, they do not live together, they do not provide each other with financial support and/or do not provide each other with domestic support and personal care) to be in an interdependency relationship if the reason they do not meet the other requirements is because they are temporarily living apart.

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Subregulation 8A(4) enables two people who have a close personal relationship but who do not meet the other requirements of section 27AAB(1) of the ITAA 1936 (that is, they do not live together, they do not provide each other with financial support and/or do not provide each other with domestic support and personal care) to be in an interdependency relationship if the reason they do not meet the other requirements is because either or both of them suffer from a disability. This subregulation addresses

the possibility that certain disabilities that may be debilitating, for example some acquired brain injuries, may not be a physical, intellectual or psychiatric disability.

Subregulation 8A(5) states that two people do not have an interdependency relationship if one of them provides domestic support and personal care to the other under an employment contract or a contract for services or on behalf of another person or organisation such as a government agency, a body corporate or a benevolent or charitable organisation.

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