

## **Explanatory Memorandum to Modification Declaration No. 1 of 2006**

### **EXPLANATORY STATEMENT**

#### **Prepared by the Australian Prudential Regulation Authority (APRA)**

This explanatory statement relates to Modification Declaration No.1 (*MD 1*) made by APRA under section 332 of the *Superannuation Industry (Supervision) Act 1993 (the SIS Act)* on date month 2006. Section 332 of the SIS Act provides that the Regulator (which includes APRA<sup>1</sup>) may, in writing, declare that a modifiable provision of the SIS Act is to have effect, in relation to a particular person or class of persons, as if it were modified as specified in the declaration. The modifiable provisions<sup>2</sup> include the operating standards for superannuation entities made under Part 3 of the SIS Act which are contained in the *Superannuation Industry (Supervision) Regulations 1994 (the SIS Regulations)*.

MD 1 modifies regulation 6.42 of the SIS Regulations which deals with contributions splitting between a member and the member's spouse. MD 1 adds a new regulation 6.42A which enables funds to voluntarily provide contribution splitting services where splittable contributions received in the period 1 January 2006 to 30 June 2006 (inclusive) have been rolled over or transferred on one or more occasions during that period.

#### **1. Background**

A splittable contribution is defined in subregulation 6.42(1) of the SIS Regulations as:

- a contribution to a regulated superannuation fund made on or after 1 January 2006; or
- an amount allocated from a surplus within a fund to meet an employer's contribution obligations on or after 1 January 2006.

In subregulation 6.42(2) of the SIS Regulations, each of the following, received for a member of a regulated superannuation fund, is not a splittable contribution:

- an amount that has been rolled over or transferred;
- an amount allotted under the contributions splitting regime;
- a lump sum payment from an eligible non-resident non-complying superannuation fund;
- an amount or payment under the definition of eligible termination payment in the *Income Tax Assessment Act 1936*.

Subregulation 6.44(1) provides that a member of a regulated superannuation fund may apply to the trustee of the fund to roll over, transfer or allot an amount of the member's benefit for the benefit of the member's spouse with the amount determined by reference to the amount of contributions made by, for, or on behalf of the member in either the previous financial year or, where their entire benefit is to be rolled over or transferred in that financial year, during the financial year.

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<sup>1</sup> *Regulator* is defined in subsection 10(1) of the SIS Act.

<sup>2</sup> *Modifiable provisions* is defined in section 327 of the SIS Act.

The introduction of contributions splitting has coincided with the last 6 months of the transitional period during which trustees of APRA regulated superannuation funds must either obtain an RSE licence or else transfer any funds under trusteeship to a licensed trustee. A large number of trustees have decided not to seek a licence and are instead making arrangements to transfer the members of funds under their trusteeship to other funds such as master trusts and industry funds. This consolidation of funds through successor fund transfers and other rollovers of benefits could result in a significant number of fund members not being given the opportunity to split contributions made from 1 January to 30 June 2006.

Trustees of APRA regulated superannuation funds who are not seeking an RSE licence are likely to be focused on either transferring their fund to a trustee with an RSE Licence or else transferring all members to other funds before winding up their fund before 1 July 2006. Trustees in this situation who wish to offer contributions splitting for contributions made from 1 January to 30 June 2006 therefore may be unable to schedule the process within the timeframe given other priorities or may otherwise be unable to justify the expense of developing contributions splitting systems and processes in a fund that is winding up.

## **2. Purpose of the instrument**

MD 1 provides relief in respect of contributions made in the latter part of the licensing transitional period. The relief does not extend to self managed superannuation funds (SMSFs). These funds are regulated by the Australian Taxation Office and are unaffected by APRA licensing requirements for trustees.

The modification declaration is intended to prevent unnecessary additional expenditure of fund resources to develop a contributions splitting service before the end of the transitional licensing period where available resources may already be committed to the transfer of funds and members.

MD 1 applies to rollovers and transfers made before 1 July 2006 and which contain amounts related to splittable contributions made between 1 January to 30 June 2006. MD 1 is also intended to cater for multiple transfers so that, for example, the merger of XYZ Super Fund into ABC Super Fund followed by the merger of ABC Super Fund into DEF Super Fund during the transitional licensing period will not prevent the trustee of the DEF Super Fund from offering contributions splitting to the former members of the XYZ Super Fund and the ABC Super Fund in respect of the contributions made to those funds between 1 January and 30 June 2006. In other words, a “receiving fund” for the purposes of r.6.42A can also be a “transferring fund” in a subsequent rollover or transfer. This example assumes that the DEF Super Fund intends to offer a contributions splitting service to members and that the XYZ and ABC Super Funds provided the required contribution information to the DEF Super Fund. Nothing in the law or this modification declaration makes it compulsory for a trustee to offer contributions splitting.

## **3. Operation of the instrument**

MD 1 allows affected members to submit contributions splitting applications to their new funds as if their benefits had not been transferred or rolled over. MD 1 is unlikely

to result in a cost increase for industry and does not impact on the voluntary nature of the contributions splitting regime.

MD 1 allows a regulated superannuation fund to give effect to a contributions splitting application where:

- contributions were made to a regulated superannuation fund (other than an SMSF) in the period 1 January 2006 to 30 June 2006;
- an amount related to the contributions is transferred or rolled over to another regulated superannuation fund before 1 July 2006;
- the member has applied to split some or all of the amount with their spouse and the application is made before 1 July 2007; and
- no trustee has processed an application for contributions splitting in respect of the amount rolled over or transferred.

The provision will only be available where the trustee of the fund has opted to allow contribution splitting and has also received, from the trustee of the fund from which the rollover or transfer was received, sufficient information to allow the contributions to be split. That information will include information that a split has not previously been made by the trustee of any fund in relation to those contributions.

The transitional arrangements for splittable contributions are implemented through the new regulation 6.42A. Subregulation 6.42A(1) modifies the meaning of splittable contribution in r.6.42 by providing for a transfer or rollover received by a regulated fund before 1 July 2006 to be taken to be a splittable contribution to the extent that the rollover or transfer includes an amount that was a splittable contribution in the transferring fund and where the exceptions set out in r.6.42A(2) do not apply..

Subregulation 6.42A(2) provides that a rollover or transfer from an SMSF will not be taken to be a splittable contribution. Subregulation 6.42A(2) also precludes a rollover or transfer (under r.6.45) which would itself have arisen from a contributions splitting application. The other preclusion under r.6.42A(2) is where the trustee of any transferring fund has previously given effect to an application for a roll over, transfer or allotment of a splittable amount included in the rollover or transfer (this is to ensure compliance with the requirement under regulation 6.44 that there can be only one valid application in respect of the splittable contributions made during a financial year).

#### **4. Consultation**

Section 17 of the *Legislative Instruments Act 2003* imposes consultation obligations on the makers of legislative instruments. APRA provided a draft modification declaration to organisations representing trustees of regulated superannuation funds and other superannuation regulators. Some concerns with the draft wording of the modification declaration were addressed in a revised drafting of the modification declaration and in the explanatory statement. The only substantive change made to the modification declaration was to preclude an SMSF from being a transferring fund (an SMSF may still be a receiving fund). This clarification recognised that the rationale for the modification declaration was to provide transitional relief from the

potential impact of licensing of trustees of APRA regulated funds and that SMSFs are not affected by these licensing requirements.

## **5. Commencement**

MD 1 comes into force on the date it is registered on the Federal Register of Legislative Instruments.