

EXPLANATORY STATEMENT

ISSUED BY AUTHORITY OF THE MINISTER FOR FINANCE AND ADMINISTRATION

SUBJECT: TWENTY-FIRST AMENDING DEED TO THE DEED TO ESTABLISH AN OCCUPATIONAL SUPERANNUATION SCHEME FOR COMMONWEALTH EMPLOYEES AND CERTAIN OTHER PERSONS PURSUANT TO SECTION 5 OF THE SUPERANNUATION ACT 1990

AUTHORITY

The Minister for Finance, for and on behalf of the Commonwealth, established an occupational superannuation scheme to provide benefits for certain of the Commonwealth's employees and for certain other people by a Deed dated 21 June 1990 under section 4 of the *Superannuation Act 1990* (the 1990 Act). In this statement the Deed is called "the Trust Deed". The occupational superannuation scheme is known as the Public Sector Superannuation Scheme (PSS).

2. Section 5 of the 1990 Act provides that the Minister for Finance and Administration may amend the Trust Deed by signed instrument, subject to obtaining the PSS Board's consent to the amendment where necessary. Section 5A of that Act provides that amendments may be made to the Trust Deed under section 5 in relation to actions taken under the *Family Law Act 1975* (the FL Act). These amendments may provide for the Rules to determine benefits for the non-member spouse (that is the former spouse of a person with a superannuation interest in the scheme) and the subsequent reduction of benefits for a member spouse (that is a person with an interest in the scheme).

3. The Minister has amended the Trust Deed and the Rules for the Administration of the Superannuation Scheme set out in the Schedule to the Trust Deed by the following signed instruments:

Trust Deed	Date	Trust Deed	Date
First Amending Deed	21 June 1990	Eleventh Amending Deed	10 Dec 1996
Second Amending Deed	1 July 1991	Twelfth Amending Deed	25 Mar 1998
Third Amending Deed	30 June 1992	Thirteenth Amending Deed	5 Dec 1999
Fourth Amending Deed	21 Dec 1992	Fourteenth Amending Deed	20 Aug 2001
Fifth Amending Deed	16 June 1993	Fifteenth Amending Deed	25 Sep 2001
Sixth Amending Deed	24 Jan 1994	Sixteenth Amending Deed	26 Jun 2002
Seventh Amending Deed	7 May 1994	Seventeenth Amending Deed	3 April 2003
Eighth Amending Deed	28 June 1994	Eighteenth Amending Deed	27 June 2003
Ninth Amending Deed	22 June 1995	Nineteenth Amending Deed	26 Nov 2003
Tenth Amending Deed	29 Jan 1996	Twentieth Amending Deed	23 Mar 2004

4. On 9 May 2004 the Minister for Finance and Administration amended the Trust Deed and the Rules for the Administration of the PSS set out in the Schedule to the Trust Deed by signed instrument. That instrument is called the Twenty-first Amending Deed in this statement.

5. Sections 5 and 5A of the 1990 Act deal with amendments made to the Trust Deed. Those sections allow the Minister to amend the Trust Deed provided that the PSS Board has consented to the amendment.

6. Paragraph 5(1A)(b) of the 1990 Act, however, prescribes a number of exemptions where the PSS Board's consent is not required to an amendment to the Trust Deed. Subparagraph 5(1A)(b)(i) exempts an amendment that relates to a payment that will, after the making of the amendment, be required, or permitted, to be made under the 1990 Act by an employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act)). Subsection 5(1B) provides that for the purposes of that subparagraph a payment under the Trust Deed or the Rules is taken to be a payment by an employer-sponsor. Subparagraph 5(1A)(b)(iii) provides that amendments made in circumstances covered by regulations made under the SIS Act are also exempted from the requirement for approval. Those regulations cover, among other things, amendments involving the creation of a new membership.

7. As described below, the amendments included in the Twenty-first Amending Deed provide for the creation of a separate interest in the PSS, determination of benefits for the non-member spouse and the subsequent reduction of benefits for the member spouse as a result of actions under the FL Act and include a number of consequential amendments. As the amendments will relate to a payment by an employer-sponsor with the meaning of the SIS Act and the admission of new members (the non-member spouse) to the scheme they do not require the consent of the PSS Board.

DATE OF EFFECT OF THE TWENTY-FIRST AMENDING DEED

8. **Clause 1** specifies that the amendments of the Trust Deed and Rules made by the Twenty-first Amending Deed come into effect at the time when Schedule 1 to the *Superannuation Legislation (Family Law and Other Matters) Act 2004* commences, which is 14 days after the Royal Assent for that Act.

9. **Clause 2** puts this Deed in context with the Trust Deed and allows words or phrases in the Deed to have the same meaning as in the Trust Deed where appropriate.

PURPOSE OF THE TWENTY-FIRST AMENDING DEED

10. The *Superannuation Legislation Amendment (Family Law and Other Matters) Act 2004* (the amending Act) amended a number of Acts that provide superannuation to Australian Government civilian employees, members of the Defence Force and Federal Parliamentarians. The amendments are a consequence of the changes made to the FL Act by the *Family Law Legislation Amendment (Superannuation) Act 2001* (FL Superannuation Act) and consequential changes to the regulations under that Act which provided for a new Family Law regime in relation to superannuation.

11. The regime provided for in the FL Superannuation Act ensures that superannuation interests are treated as part of the property of married couples and provides for those interests to be able to be split between the parties where there is a property settlement following marriage breakdown. The Family Law regime provides a method for the valuation of an accrued superannuation interest in a defined benefit scheme, such as the PSS, at the time of marriage breakdown. That value can then be taken into account for the purposes of a property settlement and can be split between the parties. Parties may agree, or the Family Court may order, that the trustees of a superannuation scheme must allocate a base amount, or the amount calculated by applying a percentage to the valuation, to the former spouse of a scheme member (described in the Family Law regime as a non-member spouse). Under the Family Law default arrangement the amount allocated to the former spouse, if the benefit is not immediately payable, must be indexed until a benefit becomes payable to the member and the indexed amount deducted from the member benefit and paid to the former spouse.

12. As an alternative to the default arrangements, the regime also allows superannuation scheme rules to be amended to allow for a separate interest to be created in the scheme for the former spouse of the member when the trustee receives an agreement or Court order. The separate interest must be at least the value of the base amount or the percentage of the valuation specified in the agreement or order. The amount allocated to the former spouse may be retained in the scheme, indexed in a manner consistent with the valuation of the interest and become payable to the former spouse in such form and in such circumstances as the scheme rules permit.

13. The amending Act amended the various Acts to apply the separate interest approach to the schemes provided for under those Acts. The 1990 Act was amended to insert section 5A that provides that amendments may be made to the Trust Deed to implement family law interest splitting under the Deed. Those amendments may provide for benefits for the former spouse and for the reduction of benefits for the member and for other provisions relating to, or consequential upon, such amendments.

AMENDMENTS TO THE TRUST DEED

14. **Clause 3** provides for the amendment to the Trust Deed.

15. Clause 2.1 of the Trust Deed establishes the Public Sector Superannuation Scheme (PSS) for the benefit of certain specified classes of persons. **Clauses 3.1 to 3.3** of the amending Deed amend Clause 2.1 to include a class of persons who have an entitlement to an associate benefit, that is former spouses who have acquired an interest in the PSS as a result of the receipt by the Board of a splitting agreement or splitting order under Part VIIIB of the FL Act.

16. Clause 3 of the Trust Deed describes the functions and powers of the Board to administer the PSS and manage and invest the PSS Fund. Clause 3 refers, in a number of circumstances, to members and preserved benefit members, for example, in relation to the payment of benefits and the investment of the PSS Fund. **Clauses 3.4 to 3.10** of the amending Deed make various amendments to clause 3 to ensure that former spouses are given the same consideration as members and preserved benefit members.

17. Clause 9 of the Trust Deed provides for the management and investment of the PSS Fund by the Board. It describes the elements of the Fund and provides for the payment of moneys into and out of the Fund including when benefits become payable to scheme members. **Clauses 3.11 to 3.14** of the amending Deed amend clause 9, where necessary, to include benefits applicable or payable to former spouses.

AMENDMENTS TO THE RULES

Overview

18. The Schedule to the Trust Deed provides the Rules for the administration of the PSS (the Rules). There are contributory members (members) and persons who have left the scheme and have an entitlement to a preserved benefit in the future (preserved benefit members). There are also persons in receipt of pension (pensioners) including retired contributory members and eligible spouses and orphans of deceased contributory members and retired members. All of these persons are considered under the FL Act to have superannuation interests in the PSS. In addition a former spouse, defined as an associate in the Rules, will be considered to have a superannuation interest in the PSS.

19. The amending Deed amends the Rules to provide for the separate interest approach to be applied when the PSS Board receives an agreement or Court order in relation to a person who has a superannuation interest in the scheme.

20. Where the relevant superannuation interest is in the growth phase, that is there are no benefits currently being paid to the person, the separate interest gives rise to an associate preserved benefit. The separate interest is to be based on the base amount specified in or calculated under the agreement or order. The associate preserved benefit will be indexed in the scheme and become payable to the former spouse in one of a number of circumstances. Those circumstances are generally similar to the circumstances in which preserved benefits become payable to preserved benefit members. The former spouse has access to the same benefit options as the member including the possibility of a pension. The pension, however, does not have a reversionary component. The member's accrued benefit will be reduced, when the separate interest is created, to reflect the amount transferred to the former spouse.

21. Where the relevant superannuation interest is a pension in payment, the separate interest is in the form of an immediately payable indexed pension without a reversionary component based on the base amount specified in or calculated under the agreement or order. The member's pension will be reduced, when the separate interest is created, to reflect the amount on which the separate interest is based.

22. Part 16 provides for the creation of the separate interest, for the indexation (where relevant) and payment of that interest and for the consequential reduction of the original interest. There are a number of consequential amendments to the Rules that arise from the creation of the separate interest and reduction of the original interest.

AMENDMENTS TO THE RULES

Detailed description - Introduction

23. **Clause 4** provides that the following provisions amend the Rules.

24. In the introduction to the Rules Division 1 of Part 1 describes the structure of the Rules. **Clauses 4.1 to 4.3** amend Rule 1.1.1 to include, and describe, Parts 15 and 16. Part 15 was included in the Rules by the Fourteenth Amending Deed but Rule 1.1.1 was not amended at that time to include a reference to that Part.

25. Division 2 of Part 1 defines words and phrases and some concepts used in the Rules. **Clause 4.4** amends Rule 1.2.1 to replace a number of definitions as a consequence of the insertion of Part 16.

26. The definitions of **accumulated member contributions**, **accumulated productivity contributions** and **unfunded preserved benefit** are replaced by new definitions which provide for the reduction of those amounts by Rules 16.4.2 or 16.4.5 on the creation of a separate interest for the former spouse.

27. **Clause 4.5** inserts a number of new definitions in Rule 1.2.1 as a consequence of the insertion of Part 16. The phrase **accumulated transfer amount** that was previously described by Rule 11.1.4 has now been defined in Rule 1.2.1. The phrase is defined in relation to a member or a preserved benefit member and relates to an amount that has been transferred into the PSS, a transfer amount. The new definition also ensures that the amount is reduced where necessary on the creation of a separate interest. The word **associate** has been defined as a person who has an entitlement to an **associate benefit**. All the other inserted definitions are signposts to more detailed definitions included in Part 16.

28. **Clause 4.6** inserts Rule 1.2.2 to ensure that words or phrases that are defined in the Rules other than in Rule 1.2.1 maintain their meaning unless excluded by context.

Reduction multiples

29. Part 5 of the Rules concerns benefits accrued by and payable to members. **Clauses 4.7 to 4.12** amend the Rules to reflect the reduction of an accrued benefit under Part 16 when a separate interest is created after the PSS Board has received an agreement or order in respect of a contributing member's interest.

30. Overall benefits accrue in the PSS in the form of multiples of average salary. Within the overall benefits there are funded amounts arising from member and employer productivity contributions, and certain other possible accumulation amounts including transferred amounts, paid to the PSS Fund with the remainder of the benefit being unfunded. The overall benefit is to be reduced when a separate interest is created as well as the funded amounts. This is necessary because the separate interest is to have the same proportion of funded and unfunded components as the original interest.

31. Contributing members may have a number of different types of multiple that arise from various options under the Rules. All members are entitled to an on-going multiple arising from the level of member contribution and may be entitled to other multiples arising from, for example, the payment of transfer amounts to the PSS Fund, previous membership of the Commonwealth Superannuation Scheme, or previous periods of PSS membership. Rule 5.2.1 provides, as a quick guide in relation to regular members, a table of various multiples that are then described in detail in the following provisions of Division 2. Rule 5.3.1 and Division 3 have similar provisions in relation to casual members. The total of the relevant multiples is the Benefit Accrual Multiple that is used to establish benefit entitlements for members.

32. **Clause 4.7** amends Rule 5.2.1 to include a reference to a Reduction Multiple in the table. **Clause 4.8** inserts Rule 5.2.26 to describe a Reduction Multiple in relation to a regular member to whom Part 16 applies. The Reduction Multiple itself is to be calculated under Rule 16.4.3 and is to be used to reduce the Benefit Accrual Multiple.

33. **Clauses 4.9 and 4.10** similarly amend Rule 5.3.1 and insert Rule 5.3.26 in relation to a casual member to whom Part 16 applies.

34. Rule 16.4.2 and the definitions of the various accumulated amounts that are replaced by clause 4.4 will provide for the reduction of the funded amounts of the member's benefit.

Maximum Benefits

35. Divisions 6 and 7 of Part 5 provide for a contributing member to become a maximum benefits member at certain dates and in certain circumstances. When a person becomes a maximum benefits member all contributions cease and no further benefits accrue. These Divisions also provide for the final benefit that becomes payable to the person when membership ceases. A person whose benefit is reduced by Part 16 should not be able to accrue additional benefits that they would not have been able to otherwise accrue because of the maximum benefits provisions.

36. **Clauses 4.11 and 4.12** amend Divisions 6 and 7 to ensure that a Reduction Multiple is not taken into account for the purposes of establishing when a person becomes a maximum benefits member. The clauses further provide, however, that the level of maximum benefit that becomes payable is reduced where necessary under Part 16.

Medical and invalidity matters

37. Part 10 of the Rules contains a number of Rules that relate to invalidity matters. Most of those Rules relate to retirement from employment on the grounds of invalidity and will not have any application to persons who have an interest in the PSS as a result of Family Law actions rather than through employment.

38. However, an associate preserved benefit can become payable when the Board decides that the associate is suffering from a terminal medical condition or is totally and permanently incapacitated. This trigger for the payment of an associate preserved benefit is similar to a trigger for the payment of a benefits to a preserved benefit member. Part 10 includes Rules that assist the Board in determining if a preserved benefit should become payable in those circumstances. **Clauses 4.13 to 4.16** amend those Rules to provide similar assistance to the Board in relation to the payment of an associate preserved benefit.

39. Division 6 of Part 10 provides for the establishment, responsibility and role of invalidity assessment panels that may be used by the Board to provide assistance in making decisions about the physical or mental health of persons. **Clauses 4.13 to 4.15** amend Division 6 where reference is made to preserved benefit members to include a person who is seeking payment of an associate preserved benefit.

40. Division 8 of Part 10 provides for the processes that are to be carried out in relation to the Board's decision to pay, or not to pay, a preserved benefit to a former member. **Clause 4.16** inserts Division 8A to provide for similar processes in relation to the payment of an associate preserved benefit.

Additional accumulations

41. Part 11 of the Rules provides for contributing members to be able to transfer money into the PSS in certain circumstances. For example a member may transfer to the PSS a payment that the member has received from another superannuation entity other than a payment arising from physical and mental incapacity. The Part then provides, generally, that such money should be treated as an additional accumulation amount in the scheme and become payable as an additional lump sum on cessation. In certain circumstances, an amount that was transferred into the PSS before 1 January 1996 may be converted into pension along with other benefits that have become payable. **Clauses 4.17 to 4.25** amend Part 11 in relation to a member to whom Part 16 applies as a consequence of the reduction of the member's interest under that Part.

42. Existing Rule 11.1.4 provides for a transferred amount to be updated with interest while the person is a contributing member and for that transferred amount plus interest to be called the Accumulated Transfer Amount. Because the phrase Accumulated Transfer Amount is used in the new Part 16 it is now defined in Rule 1.2.1 (see clause 4.5). As a consequence **Clause 4.17** amends Rule 11.1.4 to remove the definitional part of the Rule.

43. Under the Rules, phrases defined in Rule 1.2.1 appear in **bold print** throughout the Rules. Phrases defined internally in Rules or Parts are not presented in **bold print** but are capitalised. Because the term Accumulated Transfer Amount has now been defined as **accumulated transfer amount** under Rule 1.2.1, a number of consequential amendments are necessary. **Clauses 4.18, 4.21, 4.22 and 4.25** amend various provisions in Part 11 to replace Accumulated Transfer Amount with **accumulated transfer amount**.

44. Existing Rule 11.3.1 provides for the benefit entitlement on cessation for a member who has paid a transferred amount into the PSS before 1 January 1996. Under this Rule the member is entitled to the greater of the Accumulated Transfer Amount (already defined) and a Transfer Multiple Amount that is worked out under the Rule.

45. **Clauses 4.19 and 4.20** amend Rule 11.3.1 and insert two additional rules. Amended Rule 11.3.1 provides the method of working out a Transfer Multiple Amount only. Rule 11.3.1A provides that the Transfer Multiple Amount is subject to reduction under Part 16 where a separate interest has been created for a former spouse. The new definition of accumulated transfer amount included in Rule 1.2.1 provides that that amount is subject to reduction under Part 16.

46. Rule 11.3.1B provides that a member who has paid a transferred amount into the PSS before 1 January 1996 is entitled, in respect of a transfer amount, to the greater of the two forms of benefit, accumulated transfer amount or Transfer Multiple Amount on cessation.

47. Existing Rules 11.3.10 and 11.3.11 apply to a member who has paid in a transfer amount before 1 January 1996 and chooses to convert all or part of the Accumulated Transfer Amount, if it becomes payable, into pension. These rules provide a date on which such a person may be taken to have become a maximum benefits member and also for the maximum benefit that becomes payable as a result of cessation of membership.

48. **Clause 4.23** makes a consequential amendment to the definition of TM included in Rule 11.3.10.

49. **Clause 4.24** inserts Rule 11.3.11A to ensure that any reduction multiple is not taken into account for the purposes of establishing the date on which the member is taken to have become a maximum benefits member but that the benefit will be reduced under Part 16 where a separate interest has been created for a former spouse.

When a benefit option may be chosen

50. Part 12 includes a number of Rules relating to general benefit provisions. Division 1 relates to the choosing of benefit options. It provides, among other things, for the period within which a member or former member may choose an option, for another person to be able to make a choice for the member or former member in certain circumstances and for a person to be able to change a benefit choice with Board approval.

51. **Clauses 4.26 to 4.28** amend Division 1 of Part 12 to provide that the rules concerning choice of options apply to associate benefits as well as other benefits payable under the Rules.

52. Division 2 of Part 12 includes a number of Rules about the Board's powers relating to benefits. **Clauses 4.29 to 4.33** amend those provisions, where appropriate, so that they cover associate preserved benefits as well as other benefits payable under the Rules.

53. Existing Rules 12.2.7 to 12.2.10 provide for the reduction of benefits payable under the Rules as a result of the application of the Superannuation Contributions Tax. Rule 12.2.9 provides for a cap on the reduction based on a set level of the employer-financed component of that part of the benefits payable to the person that accrued after 20 August 1996. **Clauses 4.34 and 4.35** amend Rule 12.2.9 and insert new Rule 12.2.9A to ensure that any Reduction Multiple is not taken into account for the purposes of establishing the cap on the reduction of benefits arising from the Superannuation Contributions Tax. This is necessary to ensure that the reduction of a member's benefit arising from the creation of a separate interest for a former spouse does not result in an inappropriate reduction in the amount of Superannuation Contributions Tax payable by the member.

54. Division 3 of Part 12 provides for the payment of additional interest if there is a delay in the payment of a benefit. **Clause 4.36** amends Rule 12.3.3 to provide that any additional interest so calculated becomes payable on the payment of an associate preserved benefit as well as other benefits payable under the Rules.

Review of decisions

55. Part 13 of the Rules provides for the process for reconsideration of decisions made by the Board. This Part will generally apply without amendment to decisions related to an associate preserved benefit. Rule 13.3.6 is about the referral of a reconsideration request to an Assessment Panel in certain circumstances. **Clause 4.37** amends Rule 13.3.6 to apply the rule to an associate preserved benefit as well as other benefits payable under the Rules.

Insertion of new Part

56. **Clause 4.38** inserts a new Part 16 to deal with Family Law superannuation splitting. This Part provides for the creation of a separate interest for a former spouse of a member, preserved benefit member, associate preserved benefit member or a pensioner when the Board receives a relevant splitting agreement or order. It provides for the immediate payment of a benefit to the former spouse in relation to a pensioner. In all other circumstances, it provides for the indexation of the separate interest until it becomes payable and then provides for the payment of the benefit to the former spouse with similar benefit options that are available to members and preserved benefit members. The Part further provides for the reduction of the original interest, that is, of the member, pensioner, preserved beneficiary, or associate preserved beneficiary following the creation of a separate interest to reflect the amount transferred to the former spouse.

Division 1 – Words and Phrases

57. Division 1 of Part 16 provides for the definition of a number of words and phrases used in the Part. Reference is also made in Rule 1.2.1 to these definitions.

58. **Rule 16.1.1** provides for a word or phrase defined in the FL Act to generally have the same meaning when used in Part 16.

59. **Rule 16.1.2** provides for a number of definitions including some signposts to FL Act definitions.

60. **Additional accumulation amount, member contributions amount and productivity contributions amount** are all defined in terms of the funded components of a benefit that would have become payable to the member if he or she had ceased membership at the operative time (see definition below).

61. **Additional accumulation component, member contributions component and productivity contributions component** are all defined to mean the amount calculated by applying the separation factor (also defined in Rule 16.1.2) to the relevant amount referred to in the preceding paragraph. These are components of the separate interest. These definitions are used to ensure that the amount transferred to the former spouse has the same proportion of funded components as the original interest when the separate interest is created.
62. **Associate benefit** means associate preserved benefit, associate preserved pension or associate standard pension. **Associate preserved benefit, associate preserved pension and associate standard pension** are all defined in terms of later provisions in the Part.
63. **Base amount** is defined to include a base amount specified in or calculated under a splitting agreement made between the parties or an amount allocated by a splitting order from the Family Court.
64. **Family law value** is the amount that would be the value of a superannuation interest in the PSS as determined under the FL Act at the operative time (see definition below).
65. **Funded component** is defined to mean, other than in relation to a member spouse whose interest in the PSS is an entitlement to associate preserved benefit, the total of the additional accumulation component, the member contributions component and the productivity contributions. Where the member spouse's interest in the PSS is an entitlement to an associate preserved benefit it is the funded amount that would have become payable to the member spouse at the operative time (defined below) multiplied by the separation factor. It is a component of the separation amount that forms the basis of the separate interest for the former spouse. It is deducted from the separation amount to arrive at the unfunded component as defined below.
66. **Member spouse, non-member spouse, payment split, splitting order and superannuation interest** are all defined to have the same meaning as those words and phrases have in Part VIIIB of the FL Act.
67. **Non-standard pension** is defined to mean a pension under the Rules that is not a standard pension (see definition below). A non-standard pension is, generally, a pension that would not be a splittable pension under the FL Act, such as a pension payable to an orphan.
68. **Operative time** is defined in terms of the FL Act in relation to a splitting agreement or order. For a splitting agreement this is the beginning of the fourth business day after the agreement and other documentation is served on the trustee. For a splitting order the operative time is specified in the order.
69. **Original interest** is defined in terms of a superannuation interest in the PSS of a member, pensioner, preserved benefit member or associate to which Division 2 applies, that is, where the Board has received a splitting agreement or order in respect of that interest.
70. **Scheme value** is the amount determined under Rule 16.2.2. This value will be arrived at by applying a method and factors specifically relating to the PSS to establish whether this is a higher valuation of the superannuation interest than the family law value. The definition of separation amount (see below) provides that the valuation to be used to arrive at that amount in each case will be the greater of the family law value and the scheme value.
71. The definition of **separation amount** varies according to certain conditions. The separation amount forms the basis of an associate preserved benefit that comprises the separate interest created for the former spouse. The splitting agreement or order will specify a base amount to be transferred to the former spouse or a splitting percentage that will be used to calculate a base amount.

72. Where a base amount is specified, the family law value and the scheme value of the superannuation interest will be calculated. If the family law value is equal to or more than the scheme value then the base amount will be the separation amount. Where the scheme value is higher than the family law value then the separation amount will be calculated by applying the proportion that the base amount is to the family law value to the scheme value. This method of calculating the separation amount ensures that the former spouse receives the benefit of the higher of the two methods of valuation. This is necessary because the scheme value is a more reliable indicator of the value of the member benefit that will become payable in the future because it has been determined having regard to the actuarial economic assumptions underpinning the cost of the PSS whereas the family law value is based on generic economic assumptions.

73. **Separation factor** is determined by dividing the separation amount by the scheme value. The factor is used to calculate the funded components of the separation amount to ensure that the separate interest includes funded and unfunded components in the same proportion as the original interest.

74. **Splitting agreement** is defined to mean a splitting agreement or a flag lifting agreement under the FL Act.

75. **Splitting percentage** is defined to mean the percentage specified in a splitting agreement or splitting order under the FL Act.

76. **Standard pension** is defined to include a number of pensions payable under the Rules including an associate pension. It does not include a pension that would not be a splittable pension under the FL Act such as a pension payable to an orphan. These pensions are therefore non-standard pensions (see definition above).

77. **Unfunded component** represents the separation amount less the funded component (see definitions above).

Division 2 – Benefits for non-member spouse

78. **Rule 16.2.1** provides that, where the PSS Board receives a splitting agreement or order in relation to a member spouse who has a superannuation interest in the PSS, this Division applies subject to certain conditions. The conditions are that:

- the operative time of the splitting agreement or order is on or after the commencement of Schedule 1 to the *Superannuation Legislation Amendment (Family Law and Other Matters) Act 2004*;
- if the operative time of the splitting agreement or order is prior to the commencement of Schedule 1 to the *Superannuation Legislation Amendment (Family Law and Other Matters) Act 2004*, no benefits have become payable in respect of the interest at the time Schedule 1 commences;
- the member spouse's interest is not an orphan's pension;
- both the member spouse and former spouse are alive at the time; and
- the base amount is not more than the family law value of the interest.

79. The separate interest will not be created if the operative time of the agreement or order is before the commencement of Schedule 1 to the *Superannuation Legislation Amendment (Family Law and Other Matters) Act 2004* and the member spouse is receiving benefits at the commencement time. Also the separate interest will not be created if the member spouse's interest consists solely of an orphan's benefit that would not be a splittable benefit under the Family Law regime. In addition, the separate interest can only be established if both the member and the former spouse are alive at the time. That is, it will not be created if either party should die after an agreement or order has been made and before the operative time of the agreement or order.

80. Finally, a separate interest cannot be created if the base amount is more than the FL value of the interest at the time. This last restriction is necessary because separating parties may arrive at their own valuation without any reference to information provided by the PSS Board to assist the process. Where a separate interest is not created, the default arrangements under the Family Law regime will still provide for the splitting of the interest when it becomes payable to the member.

81. **Rule 16.2.2** provides for the calculation of scheme value. Part 16 provides for two separate valuations of a member spouse's interest in the PSS for the purposes of determining the separation amount which forms the basis of the separate interest. The family law value is the amount determined under regulations made for the FL Act. The other valuation is the scheme value that is to be determined under this Rule. The separation amount will be based on whichever is the greater of these two valuations.

82. The regulations under the FL Act provide a default methods and factors for determining the value of a defined benefit interest such as a PSS entitlement. However the Attorney-General may approve specific methods or factors for determining the value of a defined benefit interest in a particular superannuation scheme. On 2 March 2004, the Attorney-General approved specific methods and factors to determine the value of an interest that a person has in the PSS for the purposes of the FL Act. Prior to the approval of those methods and factors for the PSS, the regulations under the FL Act determined the value of a PSS interest by the default valuation process. Any property settlement finalised before the approval would have been based on the default valuation.

83. After that date, the regulations under the FL Act will determine the value of such an interest by the approved specific methods and factors. The approved specific methods or factors involve a substantially different process from that provided by the default valuation and the process for determining the scheme value under this Rule will reflect the approved methods or factors rather than the default valuation.

84. It is not appropriate to compare the scheme value of the interest as calculated under this Rule to the family law default value because of the substantially different process used to arrive at the two valuations. In order to protect the integrity of a property settlement that had been finalised prior to the approval of specific methods and factors and based on the family law default value, it is appropriate to provide that, prior to the commencement of this Part, the scheme value is the family law value.

85. Prior to 2 March 2004, this will be the Family Law default value and from that date it will be the family law value provided by the approved specific methods and factors.

86. **Paragraph 16.2.2(a)** provides, that if the operative time is before the commencement of Part 16 the scheme value is the family law value.

87. **Subparagraph 16.2.2(b)(i)** provides that, if the operative time is on or after the commencement of Part 16, the scheme value is to be determined by using the methods and factors set out in Division 8. The methods are the same as the methods used to obtain the family law value under the approved specific process but the factors reflect the different actuarial assumptions that apply to the PSS.

88. **Subparagraph 16.2.2(b)(ii)** provides for the scheme value to be determined by an actuary if the operative time is on or after the commencement of Part 16 and if it is not able to be determined under subparagraph 16.2.2(b)(i).

Associate pension for former spouse if operative time in payment phase

89. **Rule 16.2.3** provides that, where the member spouse is in receipt of standard pension at the operative time, the former spouse is entitled to associate standard pension from that date.

90. **Rule 16.2.4** calculates the annual rate of associate standard pension that is to be paid.

91. **Paragraph 16.2.4(a)** provides a three step process to calculate that rate. Step 1 requires that the separation amount be identified. The amount is defined in Rule 16.1.1 by reference to the splitting agreement or order. Step 2 works out a factor by a formula which uses a valuation factor provided by Table 1 in Division 7 based on the former spouse's gender and age in years and months at the operative time. Step 3 divides the lump sum identified at step 1 by the factor worked out at step 2 to arrive at an annual rate of associate standard pension that becomes payable to the former spouse.

92. **Paragraph 16.2.4(b)** provides for the annual rate of associate standard pension to be calculated by an actuary if it cannot be calculated under subparagraph 16.2.4(a).

93. Pensions payable under the Rules can include a funded component if the member does not take the full funded component as a lump sum. The note to this Rule states that an associate standard pension should have a funded component in similar circumstances.

94. **Rule 16.2.5** provides for the former spouse to be able to elect to commute an associate standard pension to a lump sum where the rate of that pension is below \$1300. **Rule 16.2.6** provides that the amount of \$1300 is to be indexed in the same way as pensions in payment under the Rules are indexed under Division 6 of Part 9 which provides for twice yearly indexation by the Consumer Price Index.

95. **Rule 16.2.7** provides for the timing of any election that may be made under Rule 16.2.5 and **Rule 16.2.8** provides for an amount equal to the separation amount to become payable to the former spouse following such an election.

Associate preserved benefit if operative time in growth phase

96. **Rule 16.2.9** provides that, if standard pension is not payable to the member spouse at the operative time, usually because the member spouse is still a contributing member or has a preserved benefit, the former spouse is entitled to associate preserved benefit in accordance with Division 3 of Part 16.

Division 3 – Benefits for the former spouse – associate preserved benefit

97. Associate preserved benefit is based on the separation amount and has funded and unfunded components arising from that amount. Division 3 of Part 16 provides for the increase of the components until payment, for the circumstances in which the benefit becomes payable and the payment options available to the former spouse.

98. **Rule 16.3.1** provides for the components of an associated preserved benefit.

99. **Paragraph 16.3.1(a)** provides that the benefit includes a lump sum equal to the funded component of the separation amount and interest on that lump sum as determined by the Board.

100. **Paragraph 16.3.1(b)** provides that the benefit includes a lump sum equal to the unfunded component of the separation amount and then sets out the process by which that lump sum is increased until the benefit becomes payable.

101. Both these paragraphs require that any reductions to the associate preserved benefit arising from an application of rule 16.5.2 are taken into account.

102. Step 1 requires the unfunded component of the separation amount at the operative time to be identified.

103. Step 2 provides for the increase of the amount identified at step 1 between the operative time and the date at which the benefit first becomes payable. The rate of increase to be used is the 10 year Treasury bond rate. The particular rate to be used for a full year increase is to be the rate published on the last working day of the previous financial year.

104. The unfunded component is to be increased at the end of each financial year during the period and immediately before the associated preserved benefit first becomes payable.

105. Step 3 provides that there is to be a pro-rata increase for the period between the operative date and the end of the first financial year after that date, or the day before the benefit becomes payable if that is an earlier date, based on the number of days in that period.

106. Step 4 provides the rate of increase that is to apply for any full financial years.

107. Step 5 provides a pro-rata increase for the period between the end of the last financial year before the payment date and that date.

108. **Rule 16.3.2** provides for the circumstances in which an associate preserved benefit can become payable to a former spouse. These circumstances are generally similar to the circumstances in which a preserved benefit becomes payable to a former member of the PSS.

109. The benefit becomes payable at the later of the operative time and the relevant time. The relevant time is the earlier of a number of possible dates described in paragraphs (a) to (e).

110. Paragraph (a) is the date on which the Board decides that the former spouse is suffering from a terminal medical condition. Paragraph (b) is the date the Board decides that the former spouse is unlikely to work again because of a physical or mental incapacity. Amendments made to Part 10 of the Rules by this Deed will assist the Board in determining if an associate preserved benefit should become payable in these circumstances.

111. Paragraph (c) is the date on which a former spouse to whom Rule 16.3.9 applies satisfies the Board that he or she has permanently departed from Australia. Rule 16.3.9 applies where payment is permitted under the SIS Act to a person who is departing from Australia permanently.

112. Paragraph (d) is a date notified to the Board under Rule 16.3.3. Paragraph (e) is the date on which the former spouse reaches age 65.

113. **Rule 16.3.3** provides that a former spouse may request payment of the associate preserved benefit at a date after he or she reaches age 55. Rule 16.3.4 ensures that the benefits payable will be subject to the SIS Act preservation rules.

Benefit options

114. When an associate preserved benefit becomes payable under Rule 16.3.2, the former spouse will have similar options in relation to the form of benefit as a former member has when a preserved benefit becomes payable. The options include taking the full benefit as either a lump sum or a pension or taking the benefit as a combination of at least 50% pension and the remainder as a lump sum. In addition, the former spouse may gain early access to a portion, or portions, of their benefit in certain circumstances such as severe financial hardship or compassionate grounds. The right to take any portion of the benefit as pension is lost if any of the funded component has been withdrawn from the scheme before the full benefit becomes payable.

Benefit Options on reaching certain ages

115. **Rule 16.3.4** applies to a former spouse whose benefit becomes payable either at age 65 (Paragraph 16.3.2(e)) or on request after age 55 (Paragraph 16.3.2(d)). In these circumstances, **paragraph 16.3.4(a)** provides that the former spouse may choose to receive a lump sum of not more than the amount that could be payable in cash under the SIS Act. If the balance of the benefit is 50% or more of the total benefit the former spouse may choose to take it as a pension. If the former spouse does not choose the pension option, or the balance is less than 50%, the balance will have to be rolled over to another superannuation fund.

116. **Paragraph 16.3.4(b)** provides that the former spouse may choose to take the full benefit as a pension and **paragraph 16.3.4(c)** provides that he or she may choose to roll over the full benefit to another superannuation fund.

117. Neither pension option is available if any of the funded component has been withdrawn or if the SIS Act does not permit the payment of a pension in the individual circumstance of the former spouse.

118. **Rule 16.3.5** provides for the calculation of the annual rate of associate preserved pension when the former spouse chooses one of the pension options available under Rule 16.3.4.

Paragraph 16.3.5(a) provides a three step method of calculation.

119. Step 1 requires the identification the amount of the associate preserved benefit to be converted to pension. The note to that step clarifies that the amount is either the balance described in paragraph 16.3.4(a)(ii), being the balance left after the available cash lump sum has been paid to the former spouse if that balance is 50% or more of the benefit, or the full amount if paragraph 16.3.4(b) applies

120. Step 2 works out a pension factor by a formula which uses a valuation factor from Table 2 in Division 7 based on the former spouse's gender and age in years and months on the date from which the associate preserved pension becomes payable.

121. Step 3 divides the amount identified at step 1 by the pension factor identified by step 2 to arrive at an annual rate of associate preserved pension to become payable to the former spouse.

122. **Paragraph 16.3.5(b)** provides that, if it is not possible to calculate the annual rate of associate preserved pension using paragraph (a), it should be calculated by an actuary appointed by the Board for this rule.

Benefit options – terminal medical condition or incapacity

123. **Rule 16.3.6** applies to a former spouse whose associate preserved benefit becomes payable as a result of a terminal medical condition (paragraph 16.3.2(a)) or a physical or mental incapacity (paragraph 16.3.2(b)). In these circumstances, the former spouse may take the benefit as full pension, full lump sum or combination of lump sum or pension providing none of the funded component has been previously withdrawn.

124. **Rule 16.3.7** provides for the calculation of the annual rate of associate preserved pension. **Paragraph 16.3.7(a)** provides a three step method of calculation.

125. Step 1 requires the identification of the amount of the associate preserved benefit to be converted to pension. The note to that step clarifies that the amount is either the full amount as provided for in subparagraph 16.3.6(a)(i) or the part amount provided for by subparagraph 16.3.6(a)(ii).

126. Step 2 works out a pension factor by a formula which uses a valuation factor from Table 3 in Division 7 based on the former spouse's gender and age in years and months on the date from which the associate preserved pension becomes payable.

127. Step 3 divides the amount identified at step 1 by the pension factor identified by step 2 to arrive at an annual rate of associate preserved pension to become payable to the former spouse.

128. **Paragraph 16.3.7(b)** provides that, if it is not possible to calculate the annual rate of associate preserved pension using paragraph (a), it should be calculated by an actuary appointed by the Board for this rule.

Payment of lump sum on death of a former spouse

129. If the former spouse dies before the associate preserved benefit becomes payable under Rule 16.3.2, **Rule 16.3.8** provides that the benefit must be paid as a lump sum to his or her legal personal representative if available or otherwise to any individual or individuals that the Board determines.

Payment of lump sum on leaving Australia permanently

130. If the Board is satisfied that a former spouse is leaving Australia permanently and the SIS Act permits the payment to be made **Rule 16.3.9** provides that the benefit should be paid as a lump sum. Generally a superannuation benefit does not become payable in cash when a person leaves Australia but there are circumstances when a person who is a non-resident of Australia may gain access to their benefit earlier than is usually allowed.

Access to all or part of associate preserved benefit

131. The SIS Act allows a preserved benefit, or part of a preserved benefit, to become payable in cash directly to a person prior to their preservation age (55 to 60, according to their year of birth) in certain circumstances where scheme rules would permit the payment. Fund trustees are able to release benefits where a person is in severe financial hardship as defined in the SIS Act. A person may also apply to the Australian Prudential Regulation Authority for early release on compassionate grounds.

132. **Rule 16.3.10** provides that the Board may approve the early release of all or part of an associate preserved benefit to a person on the grounds of severe financial hardship.

133. **Rule 16.3.11** provides for the payment to a former spouse of a lump sum as approved by the Australian Prudential Regulation Authority.

134. Where only part of the benefit has been released under either of these Rules, the remainder of the benefit remains preserved in the PSS. **Rule 16.3.12** provides that further payments under Rules 16.3.10 and 16.3.11 may be paid at a later date.

Payment of amounts by the Board to the Commonwealth

135. Section 16A of the 1990 Act provides that, where an associate benefit becomes payable under the Rules, the Commonwealth must pay that benefit to the relevant person and that the Board must pay to the Commonwealth any amount required under the Rules. **Rule 16.3.13** ensures that, where a funded component becomes payable, an equal amount must be transferred from the PSS Fund to the Commonwealth.

Division 4 – Reduction of benefits for member – operative time during growth phase

136. A superannuation interest in the PSS in the growth phase (that is when no pension is being paid to the person) has a number of possible components both funded and unfunded. If the member spouse is not a preserved benefit member or an associate there will be an overall entitlement that is a multiple of average salary described as the Benefit Accrual Multiple in Part 5 of these Rules. Within the overall entitlement there will be accumulated member contributions, accumulated productivity contributions and possibly an accumulated transfer amount. If the member spouse is a preserved benefit member there will be an unfunded preserved benefit and there may be, in addition, some funded preserved benefit which may include some or all of the funded amounts.

137. **Rule 16.4.1** provides that Division 4 applies if, at the operative time, the member spouse is not an associate or a person in receipt of pension. This means it applies to a member spouse who is a contributing member or a preserved benefit member.

Reduction of funded components

138. **Rule 16.4.2** provides for the reduction of any funded amounts at the operative time where the member spouse is either a contributory member or a preserved benefit member. The various amounts, if applicable, are reduced by the equivalent component of the separation amount. The components are calculated by multiplying the original funded amounts by the separation factor.

Reduction of benefit multiple

139. **Rule 16.4.3** provides for the reduction of the overall benefit of a contributing member spouse. This Rule does not apply to a preserved benefit member who does not have an overall benefit because the funded and unfunded benefit components are calculated on cessation of contributing membership and are increased by different methods during the preservation period. A preserved benefit member spouse will have his or her funded components reduced by whichever of the definitions of accumulated member contributions, accumulated productivity contributions is relevant, and the unfunded component by rule 16.4.5.

140. The overall benefit is calculated by applying the Benefit Accrual Multiple calculated under Part 5 of the Rules to average salary. This Rule provides for a Reduction Multiple that is calculated by multiplying the Benefit Accrual Multiple that applies to the member spouse immediately before the operative time by the separation factor. The Reduction Multiple is described in Rules 5.2.26 and 5.3.26 with reference to this Rule.

141. As an example, if the member spouse had a Benefit Accrual Multiple immediately before the operative time of 4 and the separation factor was .5 (arising from a 50/50 split of the interest) then the Reduction Multiple would be 2, that is $4 \times .5$. This would reduce the Benefit Accrual Multiple to 2 at the operative time.

Reduction of maximum benefits

142. There is a limit applied to the benefit accrual in the PSS which is known as the maximum benefit limit. This may be in the form of a fixed lump sum, a fixed multiple of average salary, or a combination of these two, depending on the level of the member's salary. Divisions 6 and 7 of Part 5 of the Rules and Rules 11.3.10, 11.3.11 and 11.3.11A provide for the maximum benefit. These have been amended or inserted by these Rules to reduce the maximum benefit where the member's interest has been split.

143. When a person becomes a maximum benefits member all contributions cease and no further benefits accrue. However increases in PSS salary will continue to be taken into account for the purposes of calculating benefits under the scheme, including the maximum benefit. Therefore the maximum benefit that eventually becomes payable to a person may not be the same as the maximum benefit that the person first reaches.

144. **Rule 16.4.4** provides the method for calculation of the reduced maximum benefit that becomes payable to a person to whom Part 16 applies and who has reached his or her maximum benefit during membership. The method used has regard to the possibility that the maximum benefit limit may reduce after the operative time.

145. The Rule provides for a 6 step approach. Step 1 identifies the original reduction multiple calculated under the relevant rule that applied at the operative time. Step 2 calculates the unreduced maximum benefit lump sum. Step 3 divides the amount so calculated by average salary to produce a new multiple. Step 4 multiplies the new multiple by the separation factor to produce a revised reduction multiple. Step 5 compares the two reduction multiples and Step 6 recalculates the maximum benefit by using the lesser of the two reduction multiples.

146. For example, a person may be a maximum benefits member with a salary of \$40,000 and a multiple of 8 at the time of the interest split. If that split was intended to give 50% of the interest to the former spouse the result of the split would be a reduction multiple of 4 reducing the final multiple to 4 if the member had been entitled to the benefit at that time. If that person continues membership for some years and receives increases in salary to a final average salary of \$100,000 he or she will move to another line in the Maximum Benefits Table contained in rule 5.6.1 and be entitled to a maximum benefit of \$369,000 plus 3 times average salary before the application of a reduction multiple. This benefit would be \$669,000 which equates to 6.69 times final average salary. Applying a reduction multiple of 4 to that benefit would result in a final benefit of only \$269,000 becoming payable. This would mean that the member would lose considerably more than 50% of his or her final benefit. Rule 16.4.4 provides instead for a reduction multiple of 3.34.

147. The reduction multiple calculated at the operative time in a case such as this is not appropriate when the benefit finally becomes payable. A new reduction multiple should be calculated at the time a maximum benefit becomes payable and the lesser of the two reduction multiples used to arrive at the final maximum benefit.

Reduction of unfunded preserved benefit

148. Where the member spouse is a preserved benefit member at the operative time **Rule 16.4.5** provides for the reduction of the unfunded preserved benefit by the amount of the unfunded component of the separation amount.

149. The funded components of a preserved benefit, if any, will be reduced by whichever of the definitions of accumulated member contributions, accumulated productivity contributions is relevant.

Reduction not to affect later non-standard pension

150. A non-standard pension may become payable on the death of a contributing member, for example, where the only reversionary beneficiary is an orphan. Such a pension is an unsplitable pension under the FL Act and should not be subject to reduction as a result of the creation of a separate interest. **Rule 16.4.6** provides that, if a non-standard pension becomes payable at any time after the reduction of the interest has occurred, the reduction should be ignored when calculating that pension.

Division 5 – Reduction of associate preserved benefit

151. Following the creation of a separate interest and before the associate preserved benefit has become payable, it is possible that the associate may again become involved in a marriage breakdown which may lead to an agreement or order being served on the Board in respect of that associate preserved benefit. Division 5 of Part 16 provides for the reduction of that benefit from the operative time of the second or later agreement or order.

152. **Rule 16.5.1** provides that the Division applies to an associate preserved benefit which has not become payable as a pension.

153. **Rule 16.5.2** provides for the reduction of both the funded component (if any) and the unfunded component of the associate preserved benefit by the funded and unfunded components of the later separation amount arising from the splitting agreement or order applying to the associate preserved benefit at the operative time of that agreement or order.

Division 6 – Reduction of pensions

154. Division 6 of Part 16 provides for the reduction of standard pension where that pension is payable in respect of the original interest at the operative time. **Paragraph 16.6.1(a)** provides for a 7 step process to calculate the reduced rate of standard pension to become payable from the operative time.

155. Step 1 requires the identification of the annual rate of standard pension payable to the member at the operative time.

156. Step 2 requires, if the standard pension payable to the member spouse has been increased because of the existence of children, that the annual rate identified at step 1 should not take into account that increase.

157. Step 3 works out a pension factor by a formula which uses a valuation factor provided by Table 4 in Division 7 based on the member spouse's gender and age at the operative time and the kind of pension.

158. Step 4 multiplies the annual rate identified at step 1 by the pension factor worked out at step 3.

159. Step 5 subtracts the separation amount from the amount identified in step 4.

160. Step 6 divides the lump sum worked out at step 5 by the pension factor worked out in step 3 to arrive at an annual rate.

161. Step 7 provides, where step 2 has applied, that the increase in the annual rate arising from the existence of children should be added to the rate worked out by step 6.

162. These steps arrive at the annual rate of standard pension that becomes payable to the member spouse from the operative time.

163. **Paragraph 16.6.1(b)** provides for the reduction of the annual rate of standard pension to be calculated by an actuary if the reduction cannot be calculated under paragraph 16.6.1(a).

164. **Rule 16.6.2** provides that, if a non-standard pension become payable at any time after the reduction of the standard pension has occurred, the reduction should be ignored when calculating that pension.

Division 7 – Pension factor tables

165. Division 7 provides the pension factors that are required for the purposes of Rules 16.2.4, 16.3.5, 16.3.7 and 16.6.1. The factors have been provided by an actuary.

Division 8 – Determination of scheme value

166. Division 8 provides for the methods and factors necessary to determine the scheme value for the purposes of subparagraph 16.2.2(b)(i) in all the various circumstances of persons who have superannuation interests in the PSS.

167. **Rules 16.8.1 to 16.8.5** provide the methods to be used and **Rule 16.8.6** provides the tables of valuation factors needed to apply those methods.