

FAMILY LAW (SUPERANNUATION) AMENDMENT (2022 MEASURES NO. 1)
REGULATIONS 2022

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

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

Part VIIIB of the Family Law Act provides for the division of superannuation between married and de facto couples on relationship breakdown. The Family Law (Superannuation) Regulations 2001 (the FLS Regulations) have been prescribed to give effect to the distribution of superannuation interests under Part VIIIB of the Family Law Act.

The purpose of the *Family Law (Superannuation) Amendment (2022 Measures No. 1) Regulations 2022* (the Amendment Instrument) is to:

- include definitions and update references and terminology in the FLS Regulations, as a result of the merger between QSuper and Sunsuper on 28 February 2022;
- clarify that the Attorney-General has the power to make information determinations for hybrid superannuation funds (with both defined benefit and accumulation components), consistent with existing powers in the FLS Regulations to make information determinations for defined benefit and accumulation funds; and
- make two other minor amendments to update an out-of-date cross-reference and to fix a typographical error.

To facilitate the merger between QSuper and Sunsuper, the Queensland Government passed the *Superannuation (State Public Sector) (Scheme Administration) Amendment Act 2021* (Qld) (the ‘Amendment Act’). Section 60 of Part 6 of the Amendment Act provides that the *Superannuation (State Public Sector) Deed 1990* (Qld), which establishes the QSuper fund, will be repealed. However, section 12 in Division 3 of Part 2 of the Amendment Act provides that the scheme, as established by the *Superannuation (State Public Sector) Act 1990* (Qld) and the repealed *Superannuation (State Public Sector) Deed 1990* (Qld), will continue in existence. Following the commencement of Division 3 of Part 2 and Part 6 of the Amendment Act, the repealed provisions of the *Superannuation (State Public Sector) Deed*

1990 (Qld) were restated in a new instrument. This instrument is the new trust deed for the merged fund, which is known as the Australian Retirement Trust. The Amendment Instrument amends FLS Regulations 3, 9B and 12 of the FLS Regulations to reflect these changes.

The Minister has the power in the FLS Regulations to make information determinations for an accumulation fund (regulation 63) or for a defined benefit fund (regulation 64), but there is not currently a specific power to make an information determination for hybrid funds (funds with both defined benefit and accumulation components). The Amendment Instrument provides a specific power for the Minister to make an information determination for a hybrid superannuation fund, to clarify the Minister's power to make such determinations. This power applies retrospectively to ensure that any information determinations already in existence are given legislative certainty.

INCORPORATION BY REFERENCE

The Amendment Instrument incorporates by reference the *Superannuation (State Public Sector) Act 1990* (Qld) including the amendments made by the *Superannuation (State Public Sector) (Scheme Administration) Amendment Act 2021* (Qld). The *Superannuation (State Public Sector) Act 1990* (Qld) and *Superannuation (State Public Sector) (Scheme Administration) Amendment Act 2021* (Qld) can be accessed at:

<https://www.legislation.qld.gov.au/>

The Amendment Instrument also incorporates by reference the trust deed governing the scheme which is continued in existence under section 5 of the *Superannuation (State Public Sector) Act 1990* (Qld). The deed is incorporated as in force at the time that Part 1 of the Amendment Instrument commences. The new trust deed for the scheme is available at:

<https://www.australianretirementtrust.com.au/>.

CONSULTATION

The Attorney-General's Department consulted with QSuper and the Australian Government Actuary on the development of the amendments in relation to the merger. For the amendments addressing small drafting errors and creating the express power to make information determinations in relation to hybrid funds the Attorney-General's Department consulted with the Department of Finance, the Treasury, the Commonwealth Superannuation Corporation, the Department of Defence, the Department of Veterans' Affairs and the Australian Government Actuary. The purpose of the consultation was to ensure the accuracy of the proposed amendments, given their technical nature. The feedback was supportive of the amendments, and minor suggestions were incorporated.

The Office of Best Practice Regulation was consulted about this instrument and has advised that a Regulatory Impact Statement is not required (OBPR22-01665).

This Amendment Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is set out in **Attachment A**.

The Amendment Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. Details of the Amendment Instrument are set out in **Attachment B**.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Family Law (Superannuation) Amendment (2022 Measures No. 1) Regulations 2022

This disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the disallowable legislative instrument

The *Family Law (Superannuation) Amendment (2022 Measures No. 1) Regulations 2022* (the Amendment Instrument) amends the Family Law (Superannuation) Regulations 2001 (FLS Regulations), to ensure that the FLS Regulations remain accurate and fit for purpose. The Amendment Instrument updates definitions, references, and terminology in the FLS Regulations, following the merger of two superannuation funds, QSuper and Sunsuper. The Amendment Instrument also clarifies that the Attorney-General has the power to make information determinations for hybrid superannuation funds (with both defined benefit and accumulation components), consistent with existing powers in the FLS Regulations to make information determinations for defined benefit and accumulation funds. The Amendment Instrument also amends an out-of-date cross-reference and typographical error.

Human rights implications

Schedule 1 engages the following rights:

- the equality of rights and responsibilities of spouses at the dissolution of a marriage or de facto relationship in Article 23(4) of the International Covenant on Civil and Political Rights (ICCPR);
- the obligation to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property in Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);

Article 23(4) of the ICCPR states that ‘States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.’

Article 16 of CEDAW asserts the same rights should exist for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Schedule 1 promotes these rights by providing certainty to separating couples, courts and trustees about the division of superannuation after a relationship breaks down. This will ensure superannuation interests affected by the amendments can be accurately valued and divided in accordance with the law under Part VIIIB of the Family Law Act. This promotes the just and equitable division of property between spouses, and the timely resolution of property disputes about separating spouses' respective rights of ownership of property of the relationship.

Conclusion

The Amendment Instrument is compatible with human rights freedoms because it advances the protection of human rights.

Details of the Family Law (Superannuation) Amendment (2022 Measures No. 1) Regulations 2022

Section 1 – Name

Section 1 provides that the name of the Amendment Instrument is the Family Law (Superannuation) Amendment (2022 Measures No. 1) Regulations 2022.

Section 2 - Commencement

Section 2 provides that Part 1 of Schedule 1 of the Amendment Instrument is to commence on the day after registration of the instrument and that Part 2 of Schedule 1 of the Amendment Regulations is to commence on 28 December 2002. Part 2 of Schedule 1 operates retrospectively to provide legislative certainty for any information determinations for hybrid funds which have already been made.

Section 3 - Authority

Section 3 provides that the Family Law (Superannuation) Amendment (2022 Measures No. 1) Regulations 2022 is made under the *Family Law Act 1975*.

Section 4 – Schedules

Section 4 is a technical provision which provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1 – Amendments commencing day after registration

Item 1: Regulation 3

Item 1 amends Regulation 3 to insert definitions of ‘Deed’, ‘Government Division Rules’ and ‘Participation Schedule’ for the purposes of FLS Regulations. These terms comprise parts of the new trust deed of the Scheme continued in existence by the *Superannuation (State Public Sector) Act 1990* (Qld) following the merger. The purpose of this amendment is to provide definitions for terms used in the FLS Regulations, to assist with the interpretation of the FLS Regulations.

Item 2: Regulation 9B (heading)

Item 2 repeals the current heading of Regulation 9B which is ‘Meaning of *percentage-only interest* – parliament 70 category under *Superannuation (State Public Sector) Deed 1990 (Qld)*’ and substitutes it with ‘Meaning of *percentage-only interest* – parliament 70 category under the Deed’. ‘Deed’ is defined in FLS Regulation 3, as inserted by Item 1.

This reflects the changes arising as a result of the merger and the subsequent commencement of the *Superannuation (State Public Sector) (Scheme Administration) Amendment Act 2021 (Qld)* which repeals the *Superannuation (State Public Sector) Deed 1990 (Qld)* but enables the Scheme established under the *Superannuation (State Public Sector) Act 1990 (Qld)* to continue in existence. This amendment ensures that terminology in the FLS Regulations remains accurate and fit for purpose.

Item 3: Subregulation 9B(1)

Item 3 updates a reference to the repealed *Superannuation (State Public Sector) Deed 1990 (Qld)* (the Deed) and replaces it with a reference to the Government Division Rules which is defined in Regulation 3, as inserted by Item 1. This amendment reflects the new structure of the Deed and ensures that terminology in the FLS Regulations remains accurate and fit for purpose.

Item 4: Paragraphs 9B(2)(c) and (d)

Item 4 updates a reference to the repealed *Superannuation (State Public Sector) Deed 1990 (Qld)* (the Deed) and replaces it with a reference to the ‘Participation Schedule’. This amendment reflects the new structure of the Deed and ensures that terminology in the FLS Regulations remains accurate and fit for purpose.

Item 5: Subregulation 9B(3) (definition of *Deed*)

Item 5 repeals the definition of *Deed* for the purposes of subregulation 9B(3). This reflects the changes to the Deed that occurred as a result of the merger. Item 1 inserts a new definition of *Deed* into Regulation 3 for the purposes of the FLS Regulations. This amendment ensures that terminology in the FLS Regulations remains accurate and fit for purpose.

Item 6: Paragraph 11(1A)(a)

Item 6 omits the numeral ‘(1)’ in paragraph 11(1A)(a) and replaces it with the word ‘one’. This is a technical amendment to correct a drafting error.

Item 7: Paragraph 12(1)(c)

Item 7 amends paragraph 12(1)(c) to omit the reference to ‘subregulation 6.01(2)’ and substitute it with ‘regulation 1.03C’. This updates an out-of-date cross-reference to a provision in the Superannuation Industry (Supervision) Regulations 1994. This amendment ensures that terminology in the FLS Regulations remains accurate and fit for purpose.

Item 8: Paragraph 12(1)(ea)

Item 8 amends paragraph 12(1)(ea) to omit ‘established by the *Superannuation (State Public Sector) Deed 1990* (Qld)’ and substitute it with ‘continued in existence by the *Superannuation (State Public Sector) Act 1990* (Qld)’.

This reflects the changes arising as a result of the merger and the subsequent commencement of section 5 of the *Superannuation (State Public Sector) (Scheme Administration) Amendment Act 2021* (Qld) which repeals the *Superannuation (State Public Sector) Deed 1990* (Qld) but enables the Scheme established under the *Superannuation (State Public Sector) Act 1990* (Qld) to continue in existence. This amendment ensures that terminology in the FLS Regulations remains accurate and fit for purpose.

Item 9: Subparagraphs 12(1)(ea)(i), (ii) and (iii)

Item 9 omits all references to the ‘*Superannuation (State Public Sector) Deed 1990* (Qld), as in force at the commencement of the *Family Law Legislation Amendment (Superannuation) Act 2001*’ in subparagraphs 12(1)(ea)(i), (ii) and (iii) and substitutes them with ‘Participation Schedule’. ‘Participation Schedule’ is defined in Regulation 3, as inserted by Item 1. This amendment ensures that terminology in the FLS Regulations remains accurate and fit for purpose.

Item 10: At the end of paragraph 12(1)(ea)

Item 10 inserts a note at the end of paragraph 12(1)(ea) stating that ‘In 2022, the scheme continued in existence by the *Superannuation (State Public Sector) Act 1990* (Qld) was known as the Australian Retirement Trust’. This amendment records the current name of the Scheme as of 2022.

Part 2 – Amendments commencing 28 December 2002

Item 11: Subregulation 64(2)

Item 11 inserts a cross-reference to subregulation 64(7AA) into subregulation 64(2). Subregulation 64(7AA) is prescribed in Item 12. This amendment allows subregulation 64(2) to apply to determinations made under subregulation 64(7AA). This amendment ensures that the new subregulation 64A(7AA) is properly incorporated within the FLS Regulations and referred to where necessary.

Item 12: After subregulation 64(7)

Item 12 inserts a new subregulation 64(7AA) to enable the Minister to make an information determination in respect of a hybrid superannuation fund (that is, a fund which has both defined benefit and accumulation components). Information determinations set out what information a trustee is required to provide in relation to a superannuation interest. This brings the treatment of hybrid funds in line with the Minister’s existing powers to make determinations under the FLS Regulations for accumulation funds (regulation 63) and

defined benefit funds (regulation 64). Subregulation 64(7AA) will operate retrospectively to provide legislative authority for any information determinations for hybrid funds which have already been made.

While retrospective in its application, subregulation 64(7AA) does not engage subsection 12(2) of the *Legislation Act 2003*, as it does not affect the rights of a person so as to disadvantage the person nor to impose liabilities on a person prior to the instrument's registration. The subregulation provides a clear legislative basis to support the provision of complete information by superannuation trustees in relation to the valuation of superannuation interests for a hybrid fund, where information determinations have been made. It would also minimise the administrative burden in respect of an information determination for a hybrid fund.

Item 13: Subregulation 64(8)

Item 13 inserts a cross-reference to subregulation 64(7AA) into subregulation 64(8). Subregulation 64(7AA) is prescribed in Item 12. This amendment provides that a determination made by the Minister under subregulation 64(7AA) is a legislative instrument. This amendment ensures that the new subregulation 64A(7AA) is properly incorporated within the FLS Regulations and referred to where necessary.

Item 14: Subparagraph 64A(1)(c)(i)

Item 14 inserts a cross-reference to subregulation 64(7AA) into subparagraph 64A(1)(c)(i). Subregulation 64(7AA) is prescribed in Item 12. This provides that the definition of 'underlying valuation information' applies to determinations made under subregulation 64(7AA). This amendment ensures that the new subregulation 64A(7AA) is properly incorporated within the FLS Regulations and referred to where necessary.