**EXPLANATORY STATEMENT**

Issued by the authority of the Attorney-General

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

*Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023*

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.

Parts VIIIB and VIIIC of the Family Law Act provide for the division of superannuation interests between married and de facto couples on relationship breakdown. The *Family Law (Superannuation) Regulations 2001* (the FLS Regulations) give effect to the distribution of superannuation interests under Parts VIIIB and VIIIC of the Family Law Act.

The FLS Regulations provide ‘default’ methods and factors for valuing superannuation interests. Where the default methods and factors are not appropriate for valuing interests in a particular scheme, regulations 38 and 43A of the FLS Regulations authorise the Attorney‑General to approve scheme-specific methods and factors used to determine the gross value of particular superannuation interests.

The *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (the Approval) currently sets out methods and factors approved by the Attorney-General for determining the value of interests for over thirty superannuation funds or schemes, including for the Parliamentary Contributory Superannuation Scheme (PCSS).

Lifetime PCSS pensions or annuities may be payable under the *Parliamentary Contributory Superannuation Act 1948* (the PCS Act) to former parliamentarians who entered Federal Parliament prior to 9 October 2004, to their eligible dependants upon their death, or to a former spouse as a result of a family law superannuation splitting order or agreement. Part 5 of Schedule 1 of the Approval contains the scheme-specific methods and factors to determine the family law value for PCSS interests.

The purpose of the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023* (Amendment Approval) is to rectify an anomaly in the Approval relating to the determination of the family law value of a PCSS pension or annuity in circumstances where that benefit has been temporarily reduced under arrangements specified in section 21 of the PCS Act. Section 21 of the PCS Act reduces the rate of the PCSS pension while a member is receiving a salary or an allowance for being a member of a state or territory parliament, by the rate of that salary.

The Amendment Approval ensures that the family law value in respect of a PCSS pension or annuity that has been temporarily reduced under section 21 of the PCS Act is determined by reference to the *substantive* *value* of the retiring allowance or annuity rather than its temporarily reduced rate. This is consistent with the method for determining the family law value of a PCSS pension or annuity that has been temporarily reduced under section 21B of the PCS Act (reduction due to “office of profit” income), and with the broader objectives of the superannuation splitting framework as provided under the Family Law Act, to ensure superannuation agreements and orders are made on just and equitable terms.

The amendments apply to an amount determined in relation to a PCSS interest identified in an agreement or order made on or after the commencement of the Amendment Approval, notwithstanding whether the operative time in relation to the payment split was before, on or after the commencement of the Amendment Approval.

The Amendment Approval is a legislative instrument for the purposes of the *Legislation Act 2003*. The Amendment Approval is not subject to disallowance by operation of item 3 of Regulation 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The Amendment Approval and the Approval are not subject to sunsetting. Item 6 of the table in section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, made under paragraph 54(2)(b) of the *Legislation Act 2003*, exempts legislative instruments (other than regulations) that relate to superannuation from the sunsetting regime set out under Part 4 of Chapter 3 of that Act. Instruments pertaining to family law superannuation splitting of PCSS interests are intended to have enduring operation and the existence of uncertainty in respect of an individual’s scheme entitlements would not be appropriate.

Subsection 33(3) of the *Acts Interpretation Act 1901*provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

The Amendment Approval commences on the later of the day after the Amendment Approval is registered on the Federal Register of Legislation, or the day after the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023* (a related instrument) is registered. However, the Amendment Approval does not commence at all if the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023* is not registered.

**Consultation**

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Finance to ensure the amendments will achieve a consistent method for the determination of the family law value of PCSS pensions that have been temporarily reduced.

The Office of Impact Analysis was also consulted on this instrument and advised that an Impact Analysis is not required for these amendments: OIA23-05155.

Details of the Amendment Approval are set out at Attachment A.

ATTACHMENT A

**Details of the** ***Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023***

This attachment sets out the details of the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023* (the Amendment Approval).

The Amendment Approval amends the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (the Approval) torectify an anomaly relating to the determination of the family law value of a life-time pension or annuity payable under the *Parliamentary Contributory Superannuation Act 1948* (PCS Act). The family law value of the interest (in addition to the scheme value) is required to determine the applicable transfer amount to be allocated from the member spouse’s PCSS interest to the non-member (former) spouse.

Clause 3 of Part 5 of Schedule 1 to the Approval provides the method to determine the gross family law value of a PCSS interest in the payment phase. Relevantly, item 1 provides a formula for determining the value of a section 18 entitlement (former parliamentarian retiring allowance/pension) or section 19 entitlement (spouse annuity entitlement) payable for life under the PCS Act. One of the variables in that formula, “A”, is defined by reference to the annual pension or annuity payable under sections 18 or 19 of the PCS Act. The value “A” is then multiplied by the applicable age factor for the person as specified in the Approval to determine the family law value of the member spouse’s PCSS pension or annuity.

The rate of the pension or annuity referred to in “A” expressly does not take into account any temporary reduction under section 21B of the PCS Act. Section 21B temporarily reduces a member spouse’s PCSS pension or annuity while the member spouse is in receipt of income from an “office of profit” (being certain Commonwealth and state government offices or positions).

However, the definition of “A” does not require any reduction to the member spouse’s PCSS pension or annuity under section 21 of the PCS Act, as a result of income the member spouse receives as a member of a state parliament or territory legislative assembly, to be disregarded. This means that to the extent that a member’s pension or annuity is reduced at the point in time when their former spouse’s interest is valued, applying the existing formula could result in a determination of a family law value of the interest, and consequently the value of the annuity entitlement in the PCSS for the former spouse, of an artificially low amount – including an amount of zero. This is not a desired policy outcome, and does not properly reflect the value of the interest, given reductions to the PCSS pension or annuity under section 21 are temporary in nature.

The Amendment Approval amends the Approval to ensure that the family law value determined in respect of the PCSS pension or annuity would disregard any reduction made to the pension or annuity under section 21 of the PCS Act. This will therefore provide consistent valuation of a PCSS pension or annuity that is subject to any temporary reduction, whether made under section 21 or section 21B of the PCS Act.

After commencement of the Amendment Approval, the amendments will provide that a former spouse’s entitlement to any PCSS associate immediate annuity is calculated by reference to the substantive PCSS pension or annuity, regardless of whether it is subject to a section 21 or 21B reduction. This will ensure that PCSS pensions or annuities, temporarily reduced for different reasons, are consistently valued for the purpose of a just and equitable property settlement under the *Family Law Act 1975*.

**Part 1—Preliminary**

**Section 1 – Name**

This section provides that the title of the instrument is the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023.*

**Section 2 – Commencement**

This section provides that the instrument will commence on the later of the day after the instrument is registered on the Federal Register of Legislation or the day after the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023* are registered. That instrument makes equivalent changes to the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Orders 2004.* However, the Amendment Approval does not commence at all if the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023* are not registered, to ensure that the substantive instruments relating to calculation of PCSS interest values remain consistent.

**Section 3 – Authority**

This section provides that the instrument is made under regulation 43A of the *Family Law (Superannuation) Regulations 2001*.

**Section 4 – Schedules**

This section 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. Any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1—Amendments**

***Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003***

**Item 1 - Before section 1**

**Item 1** inserts before section 1 the heading ‘Part 1—Preliminary’. This is a technical amendment consequential to Item 3 below to improve the readability and ease of reference of the Approval.

**Item 2 - Before section 4**

**Item 2** inserts before section 4 the heading ‘Part 2—Methods and factors for valuing particular superannuation interests’. This is a technical amendment consequential to Item 3 below to improve the readability and ease of reference of the Approval.

**Item 3 - After section 4**

**Item 3** inserts after section 4 the heading ‘Part 3—Application, saving and transitional provisions’ and a new section 5. New section 5 provides that the amendment made by Item 4 would only apply to amounts in relation to the determination of a value of an interest in the PCSS identified in an agreement or order made under Part VIIIB or VIIIC of the Family Law Act on or after the commencement of the Amendment Approval, notwithstanding whether the operative time in relation to the relevant payment split is before, on or after commencement of the Amendment Approval.

**Item 4 - Clause 3 of Part 5 of Schedule 1 (table item 1, column headed “Method or factor”)**

**Item 4** amendsClause 3 of Part 5 of Schedule 1 which relates to methods and factors for valuing interests of members in the payment phase.

This amendment rectifies an anomaly relating to the determination of the family law value of a lifetime pension or annuity interest payable under the PCS Act that is subject to a reduction under section 21 of the PCS Act. Section 21 of the PCS Act requires the member spouse’s PCSS pension or annuity to be reduced by the amount of salary received by the member spouse as a result of serving in a state parliament or territory legislative assembly.

Item 4 omits ‘21B’ and substitutes ‘21 or 21B’ in table item 1, column headed “Method or factor” in Clause 3 of Part 5 of Schedule 1 to the Approval. This will provide that the value of “A” will be the unreduced amount of the annual PCSS pension or annuity as any temporary reduction to the pension or annuity under section 21 will be disregarded in the same way as “office of profit” reductions under section 21B are disregarded. The amendment will enable a consistent method for the determination of the family law value for temporary reductions to a PCSS pension, whether that temporary reduction is due to the member spouse receiving a state or territory parliamentary salary or Commonwealth or state “office of profit” income.