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Superannuation Legislation Amendment (Family Law) Bill 2002

Explanatory Memorandum

(Circulated by the authority of the Minister for Finance and Administration, Senator the Hon Nick Minchin)

Superannuation Legislation Amendment (Family Law) Bill 2002

General Outline

This Bill includes amendments to seven Acts. The Acts to be amended are the *Defence Act 1903* (the 1903 Act), the *Defence Forces Retirement Benefits Act 1948* (the 1948 Act), the *Defence Force Retirement and Death Benefits Act 1973* (the 1973 Act), the *Military Superannuation and Benefits Act 1991* (the 1991 Act), the *Superannuation Act 1922* (the 1922 Act), the *Superannuation Act 1976* (the 1976 Act) and the *Superannuation Act 1990* (the 1990 Act).

These Acts provide the rules for superannuation schemes. The 1903, 1948, 1973 and 1991 Acts provide schemes for members of the Defence Force, the 1922, 1976 and 1990 Acts for Commonwealth civilian employees.

The Acts are being amended as a consequence of the changes made to the *Family Law Act 1975* (the FLA Act) by the *Family Law Legislation Amendment (Superannuation Act 2001)* and consequential changes to the regulations under that Act (the new Family Law regime).

The new Family Law regime

The changes to the Family Law regime ensure that superannuation interests form part of the property of married couples and provide for those interests to be split between the parties where there is a property settlement. The new regime provides a method for the valuation of an accrued superannuation interest in a defined benefit scheme at the time of marital 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 ex-spouse of a scheme member, described in the Family Law regime as a non-member spouse. The new regime then provides, as a default option, for the indexation of that amount (if the benefit is not immediately payable) and for the amount or the indexed amount to be deducted from the benefit that is or becomes payable to the member and paid to the non-member.

The default option applies generally to all defined benefit superannuation schemes and the new regime recognises that it may not be the best approach on an individual scheme basis. As an alternative, the new regime allows superannuation scheme rules to be amended to provide for the creation of a separate interest for the non-member and the subsequent reduction of the benefit becoming payable to the member. The amount allocated to the non-member may be retained in the scheme, indexed in a manner consistent with the valuation of the interest and become payable to the

non-member in such form and in such circumstances as the scheme rules permit. The separate interest may also be transferred to another scheme if permitted by the scheme rules.

Proposed amendments

The Bill proposes to amend the Acts to apply the separate interest alternative approach to all the schemes provided for under those Acts. The separate interest approach ensures a clean break of superannuation entitlements between the parties at the time of marriage breakdown and also provides both parties with control over their respective individual benefits.

The new Family Law regime and the amendments proposed in this Bill will not mean that the Commonwealth or the scheme trustees or administrators will be determining property settlements. The separating parties or the Family Court will determine whether a member's superannuation benefit is to be split. If the parties or the Court wish to split superannuation then they will decide on the split between the parties.

Some of the detail of the proposed approach will be included in delegated legislation provided for under the relevant Acts either under existing provisions or new provisions to be inserted by this Bill.

Creation of separate interest

Under this approach, when scheme trustees are served with an agreement by separating parties or a Court Order, a separate interest will be created for the non-member and an amount of at least the value of the base amount or the percentage of the valuation specified in the agreement or Order will be transferred to the new interest. The transferred amount will include funded and unfunded components (where applicable) in similar proportions to those components of the member's interest at that time.

Restrictions on separate interest creation

It is proposed that the separate interest approach will not be applied in all cases. Where the member's interest in the scheme consists solely of a benefit that would not be a splittable benefit under the new Family Law regime, for example, a child's or orphan's pension, a separate interest will not be created. In addition, the separate interest can only be established if both the member and the non-member 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.

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

Variation of approach under the Acts

Under the 1922 Act, the 1948 Act, the 1976 Act, the 1990 Act and the 1991 Act the new interest will be created within the scheme rules. Where an agreement or Order is received in respect of an interest under the 1903 Act or 1973 Act, the proposed amendments will provide for a separate interest to be created under the 1991 Act.

Indexation of the separate interest

When the member benefit is in the growth phase, that is the benefit has not become payable, at the time that the separate interest is created the non-member's interest will be indexed until it becomes payable. The funded component of the 1991 Act benefit will reflect the unit value on the valuation day. Other funded components, where applicable, will be indexed at the crediting rate of the relevant

Fund while the unfunded components will be indexed at a rate to be determined by Order of the relevant Minister.

Payment rules for the separate interest

Where the separate interest is created during the growth phase of the member's benefit, the benefit to the non-member will become payable in one of a number of circumstances. It may become payable:

- from age 55 on request (subject to the general preservation rules);
- if and when the trustee decides that the non-member is totally and permanently incapacitated;
- to a legal personal representative on death; or
- at age 65.

Where the separate interest is created when the member is in receipt of a pension benefit, the non-member benefit can become payable immediately. The transfer amount will be converted into a pension using a methodology under Ministerial Orders and be immediately payable to the non-member.

The form of benefit paid to the non-member will vary between the schemes.

Consequential reduction of the member benefit

The amendments will provide that the member benefit will be reduced to reflect the amount transferred to the non-member spouse. Because the level of benefit payable to the member under the scheme rules is not determined until cessation of membership the reduction cannot occur until that time. However, the member will be aware of the impact of the reduction in the various circumstances that lead to cessation of membership.

Where the member is in receipt of a pension benefit when the separate interest is created the reduction of the member benefit will be immediate and reflect the transfer amount.

Financial Implications

The proposed amendments in relation to the Commonwealth civilian schemes will result in a minor bring forward of benefit payments in those schemes. The estimated impact on the underlying cash balance is -\$0.19m in 2002/03, -\$0.67m in 2003/04, -\$1.02m in 2004/05, -\$1.39m in 2005/06 and -\$1.62m in 2006/07. The proposed amendments in relation to the Commonwealth military schemes are not expected to have any impact on the underlying cash balance as there is no bring forward of benefit payments in those schemes.

terms used in explanatory notes

"1903 Act" means the *Defence Act 1903*;

"1922 Act" means the *Superannuation Act 1922*;

"1948 Act" means the *Defence Forces Retirement Benefits Act 1948*;

"1973 Act" means the *Defence Force Retirement and Death Benefits Act 1973*;

"1976 Act" means the *Superannuation Act 1976*;

"1990 Act" means the *Superannuation Act 1990*;

"1991 Act" means the *Military Superannuation and Benefits Act 1991*;

"CSS" means the Commonwealth Superannuation Scheme;

"DFRDB Authority" means the Defence Force Retirement and Death Benefits Authority;

"DFRB Scheme" means the superannuation scheme under the 1948 Act;

"DFRDB Scheme" means the superannuation scheme under the 1973 Act;

"MSB Scheme" means the superannuation scheme under the 1991 Act;

"FLA" means the *Family Law Act 1975* and regulations under that Act;

"FLA member" means a member spouse under the FLA;

"FLA non-member" means a non-member spouse under the FLA;

"MSB Board" means the Military Superannuation and Benefits Board of Trustees No.1;

"PSS" means the Public Sector Superannuation Scheme;

"Rules" means the Rules for the administration of the PSS set out in the Schedule to the Trust Deed under the 1990 Act;

"SG" means the *Superannuation Guarantee (Administration) Act 1992* and the regulations under that Act;

"SIS" means the *Superannuation Industry (Supervision) Act 1993* including the regulations under that Act.

notes on clauses

Clause 1 Short title

Clause 1 provides for the short title of the Act to be the *Superannuation Legislation Amendment (Family Law) Act 2002*.

Clause 2 Commencement

2. **Clause 2** provides for the commencement of the Act 14 days after Royal Assent, apart from clauses 1 to 4 which commence on Royal Assent.

Clause 3 Schedules

3. **Clause 3** provides that the Acts specified in the Schedules are to be amended or repealed according to the applicable items set out in each of the Schedules.

Clause 4 Application of Amendments

4. The arrangements provided by the superannuation scheme amendments included in Schedule 1 will provide for the creation of separate interests as a result of a splitting agreement by separating parties or a splitting order from the Family Court. Those agreements or orders will have an operative time as provided for by the FLA. **Clause 4** provides that the amendments included in Schedule 1 (other than **items 24 and 34** which allow regulations to be made in the future to ensure the 1976 and 1990 Acts can continue to comply with future changes to the family law regime) will apply to agreements or orders with an operative time that is after the commencement of the Act. The clause also provides that the amendments will apply to agreements or orders with an operative time prior to that commencement if no benefits have

become payable in respect of FLA member under the particular scheme rules at the commencement.

5. Separating parties and the Court will be able to arrive at agreements or orders from 28 December 2002, however this Bill will not achieve passage until after that date. Because the amendments included in this Bill will allow for a clean break between parties where possible, it is appropriate to cover all agreements or orders. It is not possible to cover agreements or orders where benefits have been paid or commenced to be paid before the commencement of the Bill.

Schedule 1

Commonly defined terms

6. The amendments to a number of Acts included in Schedule 1 define a number of terms in a common fashion.
7. The definitions of **associate deferred benefit**, **associate deferred pension**, **associate pension**, **Orders**, and **original interest** refer directly to other provisions being inserted into the relevant Act. The terms of **member spouse**, **non-member spouse**, **payment split**, **splitting order** and **superannuation interest** are all defined with reference to the definitions in the FLA.
8. **Base amount** is defined to include a base amount specified in or calculated under a splitting agreement made between the parties as well as an amount allocated by a splitting order from the Family Court.
9. **Family law value** is the amount that would be the value of a superannuation interest under the relevant Act as determined under the FLA at the operative time (see definition below).
10. **Non-standard pension** is defined to mean a pension under the relevant Act 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 FLA such as a pension payable to an orphan.
11. **Operative time** is defined in terms of the FLA 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.
12. **Scheme value** is an amount to be determined under Orders under the relevant Act to assist in the calculation of the transfer amount under scheme rules. This value will be arrived at by using scheme specific methodology and factors that may arrive at a higher valuation of the superannuation interest than the family law value. It is intended that the valuation to be used to arrive at the transfer amount in each case will be the greater of the family law value and the scheme value.
13. **Splitting agreement** is defined to mean either a splitting agreement or a flagging lifting agreement under the FLA.
14. **Splitting percentage** is defined to mean the percentage specified in a splitting agreement or splitting order under the FLA.
15. **Standard pension** is defined to be a pension payable under a number of provisions of the relevant Act including an associate pension. Provisions of that Act that provide for a pension that would not be a splittable pension under the FLA such as a pension payable to an orphan are not included and are therefore non-standard pensions (see definition above).

Amendments to the Defence Act 1903

16. The 1903 Act provides for the payment and management of employer productivity contributions for members of the Defence Force who are contributing to the DFRDB Scheme. The scheme was closed to new entrants from 1 October 1991 with the introduction of the MSB Scheme. At that time, serving members of the Australian Defence Force had the option of remaining with DFRDB, or transferring to the MSB Scheme.
17. The Amendment will provide for the separate interest approach to be applied when the Chairman of the DFRDB Authority receives an agreement or order in relation to a person who is a current contributing member to the DFRDB Scheme. The 1903 Act benefit is totally unfunded and the amendment specifically provides for the reduction of (notional) members benefits according to actuarial calculations specified in Determinations pursuant to the Act. The 1903 Act separate interest portion for a non-member spouse will be transferred to the MSB Scheme and managed according to MSB Scheme Rules.

Item 1 Determination of benefit

18. **Item 1 of Schedule 1** amends Section 52 to provide for the making of a Determination to reduce the superannuation benefit of a member.

amendments to the Defence Force retirement and death benefits act 1973

19. The 1973 Act provides a superannuation scheme that applied to Defence Force members from October 1972 to September 1991. From 1 October 1991, existing DFRDB Scheme members had the option of remaining with DFRDB, or transferring to the new MSB Scheme. The DFRDB Scheme membership comprises contributors, a very small number of preserved benefit members and pensioners. Under Section 8 of the 1973 Act, the DFRDB Authority has responsibility for the general administration of the scheme.
20. The amendments will provide for the separate interest approach to be applied when the Chairman of the DFRDB Authority receives a splitting agreement or order in relation to a person who is a DFRDB contributor, preserved benefits member, retirement or invalidity pay recipient, or spouse pension recipient. With respect to contributors and preserved benefit members, the separate interest for a non-member spouse will be transferred to the MSB Scheme and managed according to MSB Scheme Rules. With respect to retirement pay, invalidity pay and spouse pension recipients, the non-member spouse separate interest benefit will be an indexed pension for life without a reversionary component. The method of reduction of the member retirement pay, accrued benefit or preserved benefit will be determined under Ministerial Orders.

Item 2 Surcharge deduction amount

2. **Item 2 of Schedule 1** provides that the Family Law splitting arrangements will not affect the surcharge deduction amount taken into account in determining a members benefit.

Item 3 Family law superannuation splitting

3. **Item 3 of Schedule 1** inserts a new Part VIA into the 1973 Act to provide for the splitting of a superannuation interest under the Act when the Chairman of the DFRDB Authority receives a splitting agreement or order in respect of a superannuation interest in the scheme.

amendments to the Defence Forces retirement benefits act 1948

4. The 1948 Act provides for a superannuation scheme that applied to Defence Force members from July 1948 to September 1972. From 1 October 1972, all DFRB contributors were compulsorily transferred to the DFRDB Scheme. Accordingly, all current DFRB Scheme benefit recipients are pensioners. The DFRDB Authority has responsibility for the general administration of the DFRB Scheme.
5. The amendments will provide for the separate interest approach to be applied when the Chairman of the DFRDB Authority receives a splitting agreement or order in relation to a person who is a DFRB pension recipient. The non-member spouse separate interest benefit will be an indexed pension for life without a reversionary component. The method of reduction of the member pension will be determined under Ministerial Orders.

Item 4 Pension on death of pensioner etc.

6. **Item 4 of Schedule 1** inserts new subsection 57(1AA) and provides that a person receiving an associate pension under new Part VIA, who is a male person, is not to be considered a male pensioner for the purposes of subsection 57(1).

Item 5 Pensions payable in respect of orphans

7. **Item 5 of Schedule 1** adds new subsection 3 and provides that a person receiving an associate pension under new Part VIA, who is an orphan, is not to be considered a pensioner for the purposes of section 58.

Item 6 Family law superannuation splitting

8. Item 6 of Schedule 1 inserts a new Part VIA into the 1948 Act to provide for the splitting of a superannuation interest under the Act when the Chairman of the DFRDB Authority receives a splitting agreement or order in respect of a superannuation interest in the scheme.

Item 7 Interpretation

9. Item 7 of Schedule 1 provides that the interpretation of pension is not to include an associate pension payable under Part VIA.

amendments to the military Superannuation and Benefits act 1991

10. The 1991 Act provides a superannuation scheme for members of the Defence Force. The MSB Scheme applies to all new members of the Defence Force from 1 October 1991, and those former DFRDB Scheme members who elected to transfer to the MSB Scheme. From 1 October 1991 until 30 September 1992, DFRDB Scheme members could elect either to remain with the DFRDB Scheme, or transfer to the MSB Scheme. The MSB Scheme comprises contributors, a large number of preserved benefit members and a relatively small number of pensioners. The MSB Board has responsibility for the general administration of the 1991 Act.
11. The amendments will provide for the separate interest approach to be applied when the MSB Board receives a splitting agreement or order in relation to a person who is a MSB Scheme contributor, preserved benefits member or pension recipient. With respect to contributors and preserved benefit members, the separate interest for a non-member spouse will be retained in the MSB Scheme and managed according to the MSB Scheme Rules. With respect to MSB Scheme pensioners, the non-member spouse separate interest benefit will be an indexed pension for life without a reversionary component. The method of reduction of the member pension, accrued benefit and/or preserved benefit will be determined under MSB Scheme Rules.

Item 8 Interpretation

12. **Item 8 of Schedule 1** inserts a definition of associate benefit into subsection 3(1).

Item 9 Amendments of Trust Deed to implement family law interest splitting

13. Item 9 of Schedule 1 inserts new section 5A into the 1991 Act to provide for amendments to be made to the Trust Deed to provide for the splitting of a superannuation interest under the Act when the MSB Board receives a splitting agreement or order in respect of a superannuation interest in the scheme and for the superannuation interest of a non-member spouse transferred from the DFRDB Scheme.

Item 10 Payments relating to associate benefits

14. Item 10 of Schedule 1 inserts new section 16A into the 1991 Act to provide for the Commonwealth to pay associate benefits and for the MSB Board to pay to the Commonwealth any amounts that under the MSB Rules the MSB Board is required to pay to the Commonwealth.

Item 11 Member etc. bound by Rules

15. Item 11 of Schedule 1 inserts new subsection 46(1A) into the 1991 Act to provide that a person to whom an associate benefit is payable is to be bound by the MSB Scheme Rules.

amendments to the Superannuation Act 1922

16. The 1922 Act provides the rules for the superannuation scheme that applied to Commonwealth civilian employees prior to 1976. At that time, all contributors to that scheme were transferred to the CSS, the scheme provided for by the 1976 Act however, pensions continue to be payable to retired 1922 Act members and their eligible spouses. All of these pensioners are considered under the FLA to have a superannuation interest under the 1922 Act. In addition, after the commencement of the amendments to this Act proposed by **Schedule 1**, a person in receipt of associate pension will be considered to have a superannuation interest under this Act.
17. Section 17 of the 1976 Act provides that the Commissioner for Superannuation has responsibility for administration of the scheme. The amendments to the 1922 Act will provide for the separate interest approach to be applied when the Commissioner receives a splitting agreement or order in relation to an FLA member who is in receipt of a pension under the 1922 Act. The separate interest will be payable in the form of an indexed pension payable for life without a reversionary component. The method of reduction of the FLA member pension and the rate of pension payable to the FLA non-member will be determined under Ministerial Orders. It has been necessary to provide for Ministerial Orders because the matters covered by the Orders will be based on actuarial advice provided from time to time. These Orders will be disallowable instruments.
18. There are a very small number of persons who may qualify for deferred benefits under the 1922 Act at a future time. These persons would also be considered under the FLA to have a superannuation interest under the Act.
19. Deferred benefits under the 1922 Act are actuarially calculated on an individual basis. It is not proposed to amend the Act to allow for the creation of a separate interest in respect of such people if there is a marital breakdown before they qualify for benefits. If a splitting agreement or order is received in those circumstances, it will be dealt with under the default Family Law arrangements. That is, a base amount will be recorded and indexed until the benefits become payable to the FLA member. When those benefits become payable then the adjusted base amount will become payable to the FLA non-member. The actuarial calculation of the FLA member's benefits will include a calculation of the amount that will need to be deducted from that pension to pay to the FLA non-member.

Item 12 Definition

20. **Item 12 of Schedule 1** inserts a definition of **pension** into the 1922 Act to ensure that when that term is used in the Act it will be read as including a reference to an associate pension,

unless otherwise specified. This provision ensures, among other things, that associate pensions will be indexed twice yearly in the same way as other pensions payable under the 1922 Act.

Item 13 Reversionary pension rights

21. Section 47 of the 1922 Act provides for reversionary pensions to be paid to spouses and children on the death of a person in receipt of pension under the Act. **Item 13 of Schedule 1** amends section 47 to provide that it does not apply to an associate pension under the new Part VA that is inserted by item 15 of this Schedule. This is necessary because it is not intended that the benefit payable to the FLA non-member should have a reversionary component.

Item 14 Minimum rates of pension

22. Section 61 of the 1922 Act provides a minimum rate of pension to be payable to certain persons under the Act. **Item 14 of Schedule 1** amends section 61 to ensure that the section will not apply to a pension that has been reduced as a result of a superannuation split.

Item 15 New Part

23. **Item 15 of Schedule 1** inserts a new Part VA into the 1922 Act to provide for the splitting of a superannuation interest under the Act when the Commissioner for Superannuation receives a splitting agreement or splitting order in respect of a superannuation interest in the scheme.

Division 1 - Preliminary

Definitions

24. New section 93DA provides a number of definitions including some of the commonly defined terms described at the beginning of the notes on clauses on Schedule 1.
25. In addition, **transfer amount** is either the base amount or the amount calculated by applying the splitting percentage to the family law value. The splitting agreement or order will require that at least this amount be transferred to the FLA non-member as the basis of the separate interest.

Division 2 Benefits for non-member spouse

Associate pension for non-member spouse

26. When the Commissioner receives a splitting agreement or order in relation to an FLA member who has a superannuation interest under the 1922 Act, new section 93DB provides, subject to certain conditions, for the FLA non-member to be entitled to an associate pension from the operative time. The conditions are that:
 - **the FLA member's interest is not a pension under subsection 47(4) or section 48 which is an orphan's pension,**
 - the FLA member's interest is not a possible entitlement to deferred benefits under section 119T in the future;
 - both the FLA member and the FLA non-member are alive at the operative time; and
 - the base amount must not be more than the family law value of the interest.
27. Benefits payable directly to children or orphans are not splittable payments under the FLA and should not be subject to interest splitting.
28. Where the interest is a possible entitlement to deferred benefits in the future the FLA default arrangements will operate.
29. If either of the parties should die after an agreement or order has been made and before the operative time no separate interest will be created and the FLA default arrangements will operate.

30. The rate of the associate pension is to be calculated under Ministerial Orders by reference to the transfer amount.

Commutation of small associate pension

31. New section 93DC provides for the FLA non-member to be able to elect to commute an associate pension to a lump sum where the rate of that pension is below a level to be determined under the Ministerial Orders. The lump sum will be the transfer amount.

Division 3 Reduction of benefits for member spouse
Reduction of standard pension

32. New section 93DD provides for the reduction of the annual rate of standard pension payable to the FLA member to be calculated under the Orders. This reduction is to be disregarded for the purposes of calculating any non-standard pension that may become payable at a later date. This is necessary to ensure that, if the FLA member dies and a non-standard pension such as an orphan benefit becomes payable, the rate of the non-standard pension will be calculated as if no reduction of the FLA member pension had occurred.

Division 4 Miscellaneous
Ministerial Orders

33. New section 93DE provides that the Minister may make Orders for the purposes of the new Part VA and that those Orders will be disallowable instruments and statutory rules.

amendments to the Superannuation Act 1976

34. The 1976 Act provides the rules for the CSS which took the place of the scheme under the 1922 Act in 1976 and was closed to new members in 1990 when the PSS was introduced. There are contributory members of the CSS (described in the 1976 Act as eligible employees) as well as persons who have left the scheme and may become entitled to deferred benefits in the future. There are also persons in receipt of pension under the Act, including retired contributory members and eligible spouses and orphans of deceased contributors and retired members. All of these persons are considered under the FLA to have superannuation interests in the CSS. In addition, after the commencement of the amendments to this Act proposed by **Schedule 1**, an associate member will be considered to have a superannuation interest under this Act.
35. The CSS Board administers the CSS. The amendments to the 1976 Act included in Schedule 1 will provide for the separate interest approach to be applied when the CSS Board receives an agreement or order in relation to an FLA member who has a superannuation interest in the scheme.
36. Where the relevant superannuation interest is in the growth phase, that is, the FLA member is a contributory member or a person to whom deferred benefits may become payable in the future, the separate interest will give rise to associate deferred benefits for the FLA non-member based on the transfer amount. Those benefits will be indexed in the scheme and become payable, as a lump sum and pension (without reversionary component), to the FLA non-member in one of a number of circumstances. The FLA members benefits will be reduced to reflect the transfer amount.
37. Where the relevant superannuation interest is in the payment phase, that is, the FLA member is in receipt of a pension under the 1976 Act, the separate interest will be payable in the form of an immediately payable indexed pension without a reversionary component. The method of reduction of the FLA member pension and the rate of pension payable to the FLA non-member will be determined under Ministerial Orders

Item 16 Definition

38. **Item 16 of Schedule 1** inserts a definition of **associate member** into the 1976 Act.

Items 17, 18 and 19 CSS Board and associate members

39. Section 27C of the 1976 Act provides for the functions of the CSS Board. Subparagraph 27C(1)(a)(ii) provides that the Board must manage and invest the Fund having regard to, among other things, the need for equity among contributory members. As the amount transferred to the FLA non-member under the separate interest approach will include a funded component, **item 17 of Schedule 1** amends section 27C to ensure that the Board will be required to have regard to equity in relation to associate members as well as contributory members.

40. Paragraph 27C(2)(d) requires that the Board must take reasonable steps to inform contributing members about the management and investment of the Fund. **Item 18 of Schedule 1** amends the paragraph to require that the Board similarly inform associate members.

41. Section 54JA of the 1976 Act makes a number of provisions relating to invalidity assessments under the Act. New section 146MA to be inserted by item 19 of this Schedule provides for the circumstances in which associate deferred benefits are to become payable. One of those circumstances is when the Board is satisfied that the associate member has become totally and permanently incapacitated in the terms of the 1976 Act. **Item 19 of Schedule 1** amends paragraph 54JA(1)(c) to enable the Board to use the assessment provisions of the section to make a decision on these grounds.

Item 20 Surcharge deduction amount

42. Section 80A of the 1976 Act provides for the CSS Board to determine a surcharge deduction amount. This amount is used to reduce benefits payable under the Act when a person whose surcharge debt account is in debit ceases to be a contributing member. Subsection 80A(3) ensures that the surcharge deduction amount cannot be more than 15% of the employer-financed component of that part of the benefits accrued after 20 August 1996. **Item 20 of Schedule 1** amends section 80A to ensure that, where the employer-financed component of a benefit has been reduced as a result of a splitting agreement or order, that reduction is not taken into account for the purposes of determining the employer-financed component of a benefit accrued after 20 August 1996.

Item 21 SG Top-up amount

43. Section 110SE of the 1976 Act provides for the calculation of an SG top-up amount to be payable in certain circumstances. Subsection 110SE(3) includes a definition of AEC which refers to accumulated employer contributions as defined under section 110Q of the Act. Section 110SE generally provides the payment of the greater of a contributory member's accumulated employer contributions and the amount that he or she would have been entitled to under the SG Act since 1 July 1992. Where the SG amount is greater than the accumulated employer contributions then an SG top-up becomes payable.

44. **Item 21 of Schedule 1** amends subsection 110SE to provide that for the purposes of calculating accumulated employer contributions under that section any reduction in the amount of those contributions arising from a splitting agreement or order is not to be taken into account.

Item 22 Insertion of new Part

45. **Item 22 of Schedule 1** inserts a new Part IXB into the 1976 Act to provide for splitting of a superannuation interest under the Act when the CSS Board receives a splitting agreement or splitting order in respect of a superannuation interest in the CSS.

Division 1 - Preliminary

Definitions

46. New section 146MA provides a number of definitions including the commonly defined terms described at the beginning of the notes on clauses in Schedule 1.
47. The definition of **transfer amount** varies according to certain conditions. The transfer amount forms the basis of associate deferred benefits which comprise the separate interest created for the FLA non-member. The splitting agreement or order will specify a base amount to be transferred to the FLA non-member or a splitting percentage that will be used to calculate a base amount.
48. Where a base amount is specified, the FLA value and the scheme value of the superannuation interest will be calculated. If the FLA value is equal to or more than the scheme value then the base amount will be the transfer amount. Where the scheme value is higher than the FLA value then the transfer amount will be calculated by applying the proportion that the base amount is to the FLA value to the scheme value. This method of calculating the transfer amount ensures that the FLA non-member 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 FLA member benefit that will become payable in the future.

49. Further definitions are:

- additional pension** means additional pension payable under a number of provisions of the 1976 Act as well as **associate additional pension** separately defined by reference to new section 146MB;
 - associate standard pension** is defined by reference to new section 146MB;
 - basic contributions amount, employer contributions amount, scheme value, section 110SL* amount, section 130B* amount** and **supplementary contributions amount** are all amounts to be determined by Ministerial Orders under new section 146MH;
 - basic contributions component, employer contributions component, section 110SL* component, section 130B* component** and **supplementary contributions component** are all defined to be the amounts calculated by multiplying the relevant amounts by the transfer factor;
 - funded component** means the total of the previous components;
 - transfer factor** is arrived at by dividing the transfer amount by the scheme value; and
 - unfunded component** represents the transfer amount less the funded component.
- Section 110SL and section 130B are proposed to be inserted into the 1976 Act by the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002 which is currently under consideration by the Senate and may achieve passage either before or after this Bill.

Division 2 Benefits for non-member spouse

Associate pension or deferred benefits for non-member spouse

2. When the CSS Board receives a splitting agreement or order in relation to an FLA member who has a superannuation interest under the 1976 Act, new section 146MB provides, subject to certain conditions, for the FLA non-member to be entitled to an associate pension from the operative time or associate deferred benefits. The conditions are that:
- **the FLA member's interest is not an orphan's pension;**
 - both the FLA member and the FLA non-member are alive at the time; and
 - the base amount must not be more than the family law value of the interest.

3. If, at the operative time, the FLA member is in receipt of a standard pension then the FLA non-member is to be entitled to an associate standard additional pension. If at the time the FLA member is in receipt of an additional pension then the FLA non-member is to be entitled to an associate additional pension. The rate of the associate standard or additional pension is to be calculated under Ministerial Orders by reference to the transfer amount.
4. If, at the operative time the FLA member is in the growth phase, that is, no pension is payable, the FLA non-member is entitled to associate deferred benefits.

Associate deferred benefits

5. New section 146MC provides for the calculation of, and payment rules for, an associate deferred benefits.
6. The benefit will have both a funded and unfunded component. The funded component will accumulate interest in the same way as other funded amounts under the 1976 Act, that is, as determined under section 154A. It will become payable as a lump sum when associate deferred benefits become payable to the FLA non-member.
7. Ministerial Orders which will provide for indexation of the unfunded component of the transfer amount until it becomes payable. Those Orders will then provide for the calculation of the annual rate of the pension.
8. The new section provides that benefits will become payable either:
 - on request after age 55 (subject to SIS allowing the payment of a pension to the person at that time);
 - at a time when the CSS Board is satisfied that the FLA non-member has become totally and permanently incapacitated in terms of the 1976 Act;
 - at age 65.
9. The FLA non-member must request that the benefits be paid and provide any necessary information to the CSS Board.
10. If the FLA non-member dies before the benefits have become payable, the benefits will become payable to the legal personal representative or, if none can be found, such other person as determined by the CSS Board. The Ministerial Orders will provide a method of calculating a lump sum to represent the associate deferred pension.
11. Under section 112 of the 1976 Act, all benefits, funded and unfunded, are payable from Consolidated Revenue after the funded components are paid from the CSS Fund to Consolidated Revenue. New subsection 146MC(6) ensures that the funded components of associate deferred benefits are also paid into Consolidated Revenue when benefits become payable to, or in respect of, an FLA non-member. Subsection 112(2) of the 1976 Act provides that, except where otherwise provided by the Act, any payment of benefits shall be made out of the Consolidated Revenue Fund, which is appropriated accordingly. This provision will apply to associate deferred benefits.

Commutation of small associate pension

12. New section 146MD provides for the FLA non-member to be able to elect to commute an associate pension to a lump sum where the rate of that pension is below a level to be determined under the Ministerial Orders. Commutation is available when either the total rate of an associate standard and additional pension or the rate of an associate deferred pension, whichever is relevant, is below that level.

Division 3 Reduction of benefits for member spouse

13. New Division 3 provides for the reduction of the benefit payable to the FLA member in relation to the different nature of his or her interest. At the operative time for the creation of the separate interest, the FLA member can be in the growth phase or the payment phase. In the payment phase he or she may be receiving standard and additional retirement benefits, invalidity benefits, or reversionary standard and additional benefits arising from the death of a contributory member or a pensioner. The FLA member may also be entitled to an associate deferred benefits or be in receipt of an associate pension arising from a marital breakdown.
14. It is intended that that part of the benefit that becomes payable to, or in respect of, the FLA member that had accrued up to the operative time should be reduced to take account of the transfer amount.

Operative time during growth phase - reduction of benefits

15. Under the 1976 Act a superannuation interest has a number of different components both funded and unfunded. New section 146ME provides a method of reduction for an interest in the growth phase other than an entitlement to associate deferred benefits. It provides for the reduction of all the possible components of that interest. The section does not apply where the FLA member is in the payment phase, that is, in receipt of standard pension. .

Reduction of funded components

16. The funded components of benefits payable to a contributory member are not calculated under the 1976 Act until the benefit becomes payable to that member. Where a separate interest has been created in respect of an FLA non-member during the period of the CSS membership it is necessary to provide that the final calculation of the funded components of the FLA member benefit is reduced to reflect the amount transferred to the FLA non-member at the operative time.
17. Subsection 146ME(2) ensures that the funded components of the FLA member's benefit will be reduced when that benefit becomes payable by the equivalent funded component of the transfer amount and the interest that would have accrued on that component if it had continued to be part of the FLA member benefit until it became payable.
18. The subsection refers to benefits under sections 110SN and 130D. Those sections along with sections 110SL and 130B are proposed to be inserted into the 1976 Act by the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002 which is currently under consideration by the Senate and may achieve passage either before or after this Bill.

Reduction of later salary-based pension (unfunded component)

19. There are two ways of calculating the unfunded component of a CSS benefit depending on the circumstances of cessation of membership. Where a contributory member becomes entitled to age or early age retirement pension or invalidity pension immediately on cessation of membership, the unfunded component is payable as an indexed pension which is a percentage of the member's final annual rate of salary. The relevant percentage is based on a combination of factors that may include years and days of contributory membership, age at retirement and prospective service.
20. Where a contributory member is involuntarily retired one of the options available is to roll all benefits out of the scheme as a lump sum, which is required to be preserved under SIS. The unfunded component of that lump sum is calculated as 2.5 times accumulated basic contributions less any amount for the member's surcharge debt.
21. Where a contributory member has elected for deferred benefits on cessation of membership the unfunded component of the benefit that becomes payable is a pension calculated by application of an age-based factor to a lump sum calculated in the same way as the unfunded component of the lump sum available on involuntary retirement. If deferred benefits become

payable as a reversionary benefit to an eligible spouse where the contributory member dies after ceasing membership but before the deferred benefits become payable the reversionary benefit is a percentage of the pension that would have been paid to the former member ranging from 67% to 100% depending on the number of eligible children.

22. There are also certain circumstances where an invalidity benefit is payable as a lump sum and the unfunded component is calculated similarly to the unfunded component of the benefit on involuntary retirement
23. In all these cases, because accumulated basic contributions will be reduced by paragraph 146ME(2)(a) it will not be necessary to take any further actions in relation to unfunded components that are based on those contributions.
24. Where the CSS benefit that becomes payable to an FLA member is a pension based on a percentage of salary at retirement, (defined as **salary-based pension** in new subsection 146ME(6)), new subsection 146ME(3) provides a formula for the reduction of that pension to reflect the unfunded component of the transfer amount. If the FLA member dies before ceasing membership and a benefit becomes payable to an eligible spouse the formula will flow through to reduce the spouse's benefit through the normal operation of the Act.
25. The formula uses a number of terms that are defined in new subsection 146ME(6) for the purposes of the section. Paragraphs (a) and (b) of the definition of **reduction factor** and the definition of **age factor** are used to establish the level of benefit accrued to the operative time. Paragraph (c) of the definition of **reduction factor** calculates the reduction necessary to reflect the unfunded component of the transfer amount. **Original pension amount** means the dollar value of the pension before reduction and **final salary amount** means the amount of salary on which that pension was based.

Multiple interest splits for same original interest

26. It is possible under the FLA that, after a separate interest has been created in relation to a contributory member, the CSS Board may receive an agreement or order in relation to a property settlement arising from a later marriage breakdown.
27. New subsection 146ME(4) varies the formula under subsection 146ME(3) to allow it to apply where more than one agreement or order has been received while the FLA member is still in the growth phase.
28. The subsection allows the formula used in subsection 146ME(3) to be used on more than one occasion by replacing the reduction factor with an interim factor or a series of interim factors.

Reduction not to affect later non-standard pension

29. New subsection 146ME(5) provides that a reduction under subsection 146ME(3) should be disregarded for the purposes of calculating any non-standard pension that may become payable at a later date. This is necessary to ensure that, if the FLA member dies and a non-standard pension calculated as a percentage of the FLA pension, such as an orphan benefit, becomes payable, the rate of the non-standard pension will be calculated as if no reduction of the FLA member pension had occurred.

Operative time during the growth phase reduction where original interest is entitlement to associate deferred benefits

30. New section 146MF provides that, where the interest of the FLA member is only to associate deferred benefits then the deferred benefits when they become payable will be reduced in accordance with Ministerial Orders. These Orders will be disallowable instruments.

Operative time during payment phase reduction of pension

31. New subsection 146MG provides for the reduction of the annual rate of standard and additional pension payable to the FLA member to be calculated under the Orders. This

reduction is to be disregarded for the purposes of calculating any non-standard pension that may become payable at a later date. This is necessary to ensure that, if the FLA member dies and a non-standard pension such as an orphan benefit becomes payable, the rate of the non-standard pension will be calculated as if no reduction of the FLA member pension had occurred.

Division 4 Miscellaneous Ministerial Orders

32. New section 146MH provides that the Minister may make Orders for the purposes of the new Part and that those Orders will be disallowable instruments and statutory rules.

Item 23 Pension indexation

33. Part X of the 1976 Act provides for twice-yearly indexation of pensions payable under the Act. The definition of **pension to which this Part applies** includes any pension payable under the Act with a number of exclusions. Pensions that are excluded are additional pensions payable under a number of provisions. **Item 23 of Schedule 1** amends the definition to ensure that associate additional pension payable under new Part IXB is excluded from that definition and therefore is not indexed under Part X.

Item 24 Regulations relating to the operation of the SIS Act and certain other laws

34. Section 155C of the 1976 Act allows regulations to be made to modify the provisions of the Act to ensure that the CSS continues to comply with a number of Acts that constitute regulatory law for superannuation schemes. **Item 24 of Schedule 1** includes the FLA in the definition of eligible regulatory law for the purposes of the section.

Items 25 and 26 Exercise of certain powers by the Minister

35. Section 167AB of the 1976 Act provides that the Minister may only make determinations and declarations under the Act without the consent of the CSS Board in certain circumstances. **Items 25 and 26 of Schedule 1** ensure that Orders made for the purposes of new Part IXB are covered by section 167AB.

Item 27 Regulations

36. Section 168 of the 1976 Act makes a number of provisions in relation to regulations that can be made under various provisions of the Act. Some of the regulations made under the Act modify the provisions of the Act in relation to certain classes of persons. **Item 27 of Schedule 1** allows the making of regulations that are necessary because of the amendments to the Act by this Bill to be made with retrospective effect for up to one year after the commencement of this Bill.

amendments to the Superannuation Act 1990

37. The 1990 Act provides the rules for the PSS that became the scheme for new Commonwealth employees from 1 July 1990. As with the CSS, there are contributory members of the PSS and persons who have left the scheme and will have an entitlement to a preserved benefit in the future. There are also persons in receipt of pension under the Act, including retired contributory members and eligible spouses and orphans of deceased contributors and retired members. All of these persons are considered under the FLA to have superannuation interests in the PSS.
38. The majority of the rules of the PSS are contained in the Trust Deed under the Act, which may be amended by the Minister by disallowable instrument. However in order to allow an amending deed to provide for the creation of a separate interest in the PSS some amendments to the 1990 Act are required.

Item 28 Interpretation

39. **Item 28 of Schedule 1** inserts a definition of **associate benefit** into section 3 of the 1990 Act.

Item 29 Amendments of Trust Deed to implement family law interest splitting

40. Section 5 of the 1990 Act provides that the Minister may amend the Trust Deed. **Item 29 of Schedule 1** inserts section 5A into the 1990 to provide 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 FLA non-member and for the reduction of benefits for the FLA member under the Deed and for other provisions relating to or consequential upon such amendments.
41. Subsection 48(2) of the *Acts Interpretation Act 1901*, which deals with the circumstances in which instruments can be made with retrospective effect, is not to apply to those amendments. The Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002 currently before the Senate includes an amendment to provide that the subsection does not apply in relation to an Amending Deed. Members' rights and benefits will be protected in accordance with SIS which prescribes the circumstances in which retrospective amendments can be made to the rules of a superannuation scheme.

Items 30 and 31 Payments relating to associate benefits

42. Section 16 of the 1990 Act provides, among other things, that where benefits become payable under the Rules, the Commonwealth must pay the benefit and any relevant amount in the PSS Fund must be paid by the PSS Board to the Commonwealth.
43. **Item 30 of Schedule 1** inserts section 16A into the 1990 Act to make similar provisions in relation to the payment of an associate benefit under the Rules.
44. **Item 31 of Schedule 1** makes a consequential amendment to the appropriation power included in section 18 of the 1990 Act to reflect the inclusion of section 16A in the Act.

Item 32 Costs

45. Section 37 of the 1990 Act provides for the payment of costs from the Consolidated Revenue Fund arising from the engagement of a panel of persons to assist the PSS Board to arrive at certain decisions under the Rules. **Item 32 of Schedule 1** provides for a decision relating to the payment of associate benefits to be covered by section 37.

Item 33 Persons bound by Rules

46. Section 42 of the 1990 Act provides for certain persons, employers and the Commonwealth to be subject to the Rules to the extent that they are applicable.
47. **Item 33 of Schedule 1** amends section 42 to ensure that a person who is, or has ceased to be, an associate is similarly subject to the Rules. An **associate** is defined to mean a person to whom an associate benefit is payable.

Item 34 - Regulations relating to the operation of the SIS Act and certain other laws

48. Section 49 of the 1990 Act allows regulations to be made to modify the provisions of the Act to ensure that the PSS continues to comply with a number of Acts that constitute regulatory law for superannuation schemes. **Item 34 of Schedule 1** includes the FLA in the definition of eligible regulatory law for the purposes of the section.