26 April 2024

Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Via email: FLSregulations@ag.gov.au

# Exposure Draft: Family Law (Superannuation) Regulations 2024

As the representatives of over 300,000 professional accountants, Chartered Accountants Australia and New Zealand (CA ANZ) and CPA Australia wish to comment on this consultation, which seeks community and industry views on remaking regulations to replace sunsetting regulations. We make this submission on behalf of our members and in the public interest.

The *Family Law (Superannuation) Regulations 2001* (the existing Regulations) are due to sunset on 1 April 2025. This consultation on the Exposure Draft: Family Law (Superannuation) Regulations 2024 (the "Exposure Draft Regulations") is intended to remake these. We appreciate the opportunity to respond to these Exposure Draft Regulations consultation presently underway at the Attorney-General's Department (AGD).

We note that this consultation coincides with a concurrent consultation presently underway on Exposure Draft regulations at Treasury which ensure that defined benefit superannuation uses the notional "family law" values for determining a taxpayer's Division 296 tax liability. It is our overall view that these draft regulations demonstrate again that the Better Targeted Superannuation Concessions (BTSC) measures are poorly designed and need to be redesigned.

The *Family Law Act 1975* (FLA) empowers family law courts to address property interests during separations, including handling superannuation interests. Two key areas of the Act, Parts VIIIB and VIIIC, establish the legal framework for dealing with superannuation in this context. This includes enabling courts to issue superannuation splitting orders, dividing payments from superannuation interests, and allowing for superannuation agreements where parties can agree on how superannuation should be divided upon relationship breakdown.

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Subsection 125(1) of the FLA authorises regulations aligning with the Act's provisions, facilitating its implementation. The existing Regulations describe how Parts VIIIB and VIIIC operate. These regulations prescribe methods for valuing superannuation interests, guidelines for implementing superannuation payment splits, and requirements for trustees to furnish information to parties involved in family law property proceedings or negotiations for a superannuation agreement.

This consultation, which also includes a consultation paper (the "Consultation Paper") also proposes minor and technical amendments.

CPA Australia and CA ANZ do not plan to respond to all questions in this consultation. We have also made additional comments at points outside the consultation's formal questions.

**Our concerns with BTSC policy**

Before we address the specifics of the Exposure Draft Regulations we believe it is important to state for the benefit of AGD one of our overriding concerns with the BTSC policy: In our opinion, the consultation timeframe for this policy has been too short and should have been more open to improvements or other alternatives.

Although the majority of policy work in respect of the policy has been conducted by Treasury, we believe that this AGD consultation forms an integral part of these measures. Consequently, we do not believe that we have been able to complete this submission, in the time provided, with the more fulsome response it deserves.

**The development of Innovative retirement income stream products (IRISPs)**

IRISPs constitute a category of lifetime superannuation products established under regulation 1.06A of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations), expanding flexibility in income stream product design post-1 July 2017. IRISPs offer pension or annuity payments, with regulations capping commutable amounts to maintain tax concessions.

The Exposure Draft Regulations propose a framework aimed at consistency in treating IRISPs for family law purposes, defining them as 'innovative superannuation interests' in Section 4. They delineate valuation methods for such interests and mandate information disclosure by trustees. For 'percentage-only' interests, the regulatory approach is proposed to remain unchanged, however for the treatment of innovative superannuation interests which do not fall into this category, the Exposure Draft Regulations outline procedures for courts to determine the value of innovative superannuation interests and specify information trustees must provide upon request regarding these interests.

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Questions 1 to 4 of the consultation paper relate to IRISPs. Our responses to questions 1 to 3 are provided below.

**Types of splitting arrangements for innovative superannuation interests**

In cases where innovative superannuation interests involve benefits payable as a pension, they can undergo either a 'base amount' split or a 'percentage' split under the FLA, with the former involving an allocated amount to the non-member spouse and the latter entitling the non-member spouse to a specified percentage of each splittable amount. However, superannuation interests defined as annuities are categorised as 'percentage-only interests' and can only undergo a percentage split, precluding the possibility of a base amount split, whether by agreement or court order.

The Exposure Draft Regulations do not provide default methods for determining the value of innovative superannuation interests due to the diverse nature of these interests' designs, instead setting out how courts are to determine the value of innovative superannuation interests.

The Exposure Draft Regulations propose to allow trustees to propose methods or factors for Ministerial approval, with the Minister having the authority to approve departures from default information requirements. However, trustees are not mandated to prepare and submit methods or factors for approval, leaving courts to determine the value in such cases, potentially requiring parties to incur costs for expert valuation if no approved method exists, as the Exposure Draft Regulations explicitly state that default methods are not applicable. Additionally, the Exposure Draft Regulations do not currently allow Ministerial approval for valuation methods or factors for percentage-only interests, including innovative superannuation interests, raising questions about their valuation within this framework.

Our response to question 3 below explains that in the interests of transparency, product providers should be required to make their approach to valuations public.

**Question 1**

Do you have concerns about the proposed approach to valuing innovative superannuation interests that are not percentage-only interests? If so, please expand on your concerns. What would you propose instead?

We presently have no concerns regarding the requirements proposed in the Exposure Draft Regulations.

**Question 2**

What barriers could prevent trustees and providers of IRISPs from preparing methods or factors for the Minister's approval for use in family law superannuation splitting?

At present IRISPs are not particularly popular. The biggest barrier to seeking Ministerial approval will be time and, more particularly, cost considerations. Under the *Superannuation Industry (Supervision) Act 1993* (SIS Act), trustees have a legislated best financial interests duty. Each expenditure must be documented and justified. Some trustees will find it difficult to justify this expenditure for the small number of members who use these types of products.

**Question 3**

Would you have any concerns about a requirement for trustees and providers of IRISPs to prepare methods or factors for the Minister's approval? (Note: the amendments in the new Regulations do not currently include such a requirement.) If so, please expand on your concerns.

The provision of relevant factors or methods by trustees or providers of IRISPs for the Minister's approval is necessary to ensure that there is transparency over valuation methods chosen. Whilst we understand that the Exposure Draft Regulations allow for a court to select the method which it deems appropriate in lieu of an approved method, such a process is likely to be provided at a cost to participants. This cost per affected member is likely to be considerably more than a method selected by a trustee or IRISP provider due to economies of scale.

Whilst we do not support compulsion, we believe that there is a public interest argument for providers of such products to publicly disclose their approach to valuations.

**Amendments to methods and factors to reflect current actuarial assumptions**

The Exposure Draft Regulations propose significant updates to default valuation methods and factors for superannuation interests, aiming to reflect contemporary retirement trends and demographic shifts. These revisions, encompassing growth (accumulation) and payment (decumulation or retirement) phase interests as well as annuities, align with current actuarial assumptions but are excluded from the draft to prevent strategic manipulation during property division disputes under family law.

Notable changes include valuing defined benefit interests for older workers and introducing default methods for pension phase interests with guarantee periods. The Exposure Draft Regulations also address valuation procedures for annuities, emphasising agreement between parties for entitlements from agreements and court determination for splitting orders. The proposed commencement date is set for April 1, 2025, contingent on Federal Executive Council approval, with consideration for potential delays to accommodate system adjustments and mitigate the impact on separating parties.

The biggest problems with defined benefits schemes are their complexity and the general lack of understanding with how they work amongst solicitors and barristers who practice in family law matters as well as accountants, financial advisers, members of defined benefit schemes and the general public.

We believe better outcomes would be achieved for both parties to a separation if a single expert witness (SEW) was appointed by the Court (or ideally, agreed by both parties) to provide unbiased information about defined benefit interests. The SEW would then provide an unbiased report to both parties, and the Court, containing the various available options and outcomes from these options and other considerations for the defined benefit scheme(s) that the parties have an interest in. The purpose must be to ensure that all parties are making informed decisions given the lack of awareness about defined benefit schemes we mentioned above.

How to accredit SEWs and maintain their professional standards are topics that would also need to be considered. We would be happy to discuss this matter further with the department.

In addition, we believe that defined benefit superannuation funds should have to provide details of the assumptions and a thorough explanation to the SEW that the scheme has used to calculate values under these proposed regulations. Defined benefit schemes should also be under an obligation to provide information and assistance to the SEW in a timely manner.

**Question 8**

What other comments do you have about any of the new methods or factors that have been described?

We wish to raise concerns regarding the intended application of valuations obtained through family law valuations for the purposes of the Better Targeted Superannuation Concessions measure. Due to the actuarial nature of these valuations, we believe that there may be a policy mismatch between the use of life expectancy in arriving at

valuations for either family law settlements, as opposed to the proposed Division 296 tax on earnings in superannuation.

Specifically, we note that life expectancy for women is nearly always longer than for men. While this is not generally considered a problem in respect of family law settlements, it is likely to result in women being subject to an uplift in tax relative to men for the purposes of the proposed tax.

We recommend that life expectancy be prescribed at par (with respect to gender) for the purposes of valuations being undertaken for the purposes of Division 296 so that neither gender is discriminated against in relation to this proposed tax measure.

We also note that under the existing regulations for Self Managed Superannuation Fund defined benefits are not catered for and this should change. We note however that the incidence these types of benefits in SMSFs is small.

**Conditions of release and releasing events**

Regulations 6 and 7 of the existing Regulations define when a superannuation interest transitions between growth and payment phases, with growth phase criteria including the member spouse's compliance with specific 'relevant conditions of release' or 'releasing events,' such as retirement or permanent incapacity. The Exposure Draft Regulations, in sections 6 and 7, incorporate 'terminal medical condition' as a condition of release, enabling access to superannuation benefits, thereby altering the phase status if particular actions are taken based on this condition, aligning with items listed in Schedule 1 of the SIS Regulations and item 102A of the *Retirement Savings Accounts Regulations 1997*.

**Question 13**

Do you have any concerns with ‘terminal medical condition’ being included as a ‘condition of release’ or ‘releasing event’ in sections 6 and 7 of the new Regulations? If so, please expand on your concerns.

**Question 14**

Are there are other conditions of release that should be added to sections 6 and 7 of the new Regulations?

We agree that terminal medical condition should be included as a releasing event.

We also consider that “transition to retirement income streams” should be added.

**Clarifying that a document containing information about a superannuation interest is *prima facie* evidence and enabling alternative methods of communication, including via email and via an intermediary, between a trustee and a non-member spouse**

Section 137 of the existing Regulations contains an evidentiary certificate provision, stating that a document providing information about a superannuation interest serves as conclusive evidence of its contents and delivery, with the new Regulations amending this to make such evidence *prima facie*, aligning with Commonwealth drafting guidelines and allowing for the presentation of contrary evidence.

The Exposure Draft contains new regulations at Section 141 introducing amendments aimed at enhancing communication between non-member spouses and superannuation trustees post-payment splitting or flagging orders, permitting non-member spouses to provide email addresses or intermediary contact details instead of solely postal addresses, thereby improving safety and reducing the risk of system abuse or perpetuation of family violence, especially pertinent in cases where the member spouse serves as both party and trustee.

**Question 15**

Do you have any concerns with the proposed amendments to section 141? If so, please expand on your concerns, including what you would propose instead.

We support these proposed changes.

**Other matters for consultation: Superannuation annuities – valuation and payment splitting**

The Family Law Act designates certain superannuation interests as 'percentage-only interests,' including superannuation annuities and select state judicial pension schemes, requiring their division based solely on a percentage of future payments. However, neither the existing nor the Exposure Draft Regulations offer default valuation methods or Ministerial approval powers for such interests. The preference conveyed in the Consultation Paper is for actuarial valuation of superannuation interests and providing parties the choice of percentage or base amount splits. The department is soliciting stakeholder input on how to handle superannuation annuities in the Exposure Draft Regulations, particularly regarding valuation methods and the potential inclusion of base amount splits alongside percentage splits.

**Question 16**

Superannuation annuities prescribed as percentage-only interests can only be split by reference to a percentage of future payments, and there is no power for the Minister to approve valuation methods or factors with respect to superannuation annuities. Should superannuation annuities continue to be prescribed as percentage-only interests? Please expand on your response.

We support providing parties with the choice between percentage or base amount splits so that the solution that best suits the parties can be used.

**Unsplittable interests**

The existing Regulation 11 designates certain superannuation interests as 'unsplittable interests' under the Family Law Act, exempting them from division by agreement or court order. While the Exposure Draft Regulations retain this framework, a notable change is the removal of the exemption for the Judges' Pensions Act Scheme. Additionally, the new Regulations introduce criteria for determining unsplittable interests based on the amount of benefits being paid, with thresholds set at $2,000 for pensions and $5,000 for other superannuation interests. These thresholds aim to streamline the process by excluding low-value superannuation interests, acknowledging the potential burden on parties and trustees.

**Question 17**

Are there other superannuation plans or annuities which should be prescribed as 'unsplittable interests' under section 14? Which other plans or annuities, and why?

**Question 18**

Are there other superannuation plans or annuities which should be exempted from the operation of section 14? Which other plans or annuities, and why?

**Question 19**

Please provide any other comments or concerns about the operation of section 14.

It is our view that benefits provided under the *Parliamentary Contributory Superannuation Act 1948* should also be splittable benefits.

**Ensuring approved methods and factors are based on current actuarial assumptions**

Under the existing framework of the Family Law Act and Regulations, superannuation interests can be valued through three methods: utilising default methods and factors outlined in the current Regulations, employing methods or factors approved by the Minister for specific interests, or determining valuation at the court's discretion where no specific methods exist.

Currently, there are 38 superannuation plans with Minister-approved methods and factors. In the process of remaking the Regulations, the department has updated the default methods and factors, which had remained unchanged since 2001, intending to review them every 10 years thereafter to align with the sunsetting framework. Unlike the default methods, there is no established mechanism for regularly reviewing approved methods and factors, with most being established prior to 2005 and remaining unchanged since. The government emphasises the importance of ensuring that approved methods and factors reflect current actuarial assumptions to maintain accuracy in valuation estimates.

**Question 24**

What barriers would prevent trustees from reviewing and updating their approved methods and factors and information determinations?

**Question 25**

How much notice would trustees need to update their approved methods and factors, if a requirement to review was imposed in legislation?

The biggest barrier will be cost to develop revised factors.  Every 10 years would be acceptable.

**Reviewing the current information requirements under the Regulations**

Part 7 of the existing Regulations, mirrored in the new Regulations as Part 9 with slight technical enhancements for clarity, outlines the requisite information and declaration needed when an eligible individual applies for details about a superannuation interest under sections 90XZB and 90YZR of the Family Law Act, primarily for facilitating negotiations of a superannuation agreement or in connection with the Family Law Act's operational aspects, including provisions related to innovative retirement income stream products.

**Question 29**

What other information about a superannuation interest, not listed in Part 9 of the new Regulations (which replicates Part 7 of the existing Regulations), would an eligible person require from a trustee?

We believe that information in relation to Self Managed Superannuation Funds should be provided impartially. To that end, we believe an impartial observer should be agreed between the parties (or failing agreement, be appointed by the Court) whose task will be to ensure that the correct information is provided in accordance with the required statutory requirements.

We believe the impartial observer should not be an existing, or a recently former, service provider to either party involved in separation proceedings. It should also not be a service provider to the Self Managed Superannuation Fund in question or to any other entity that the parties control or are deemed by the SIS Act to control.

How to accredit such impartial observers and maintain their professional standards are topics that would also need to be considered. We would be happy to discuss this matter further with the department.

For further information in relation to our submission, please contact Richard Webb, Superannuation Lead at CPA Australia at richard.webb@cpaaustralia.com.au or Tony Negline, Superannuation and Financial Services Leader at CA ANZ at Tony.Negline@charteredaccountantsanz.com .

Yours sincerely,

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