Law Council
OF AUSTRALIA

Exposure Draft: Family Law (Superannuation) Regulations 2024

Attorney-General's Department

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- New South Wales Bar Association
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- Northern Territory Bar Association
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- Queensland Law Society
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The Law Council also acknowledges input received from the New South Wales Law Society, the Queensland Law Society, and the Superannuation Committee of the Law Council's Legal Practice Section.

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Attorney-General's Department in relation to its Consultation Paper on the exposure draft of the *Family Law (Superannuation) Regulations 2024* (**replacement Regulations**). We commend the Australian Government on continuing to advance reforms in the complex area of superannuation and family law.

2. The superannuation splitting system is one of the more complex aspects of family law for parties to navigate. It sits at the intersection of family law, superannuation, and tax law, and involves dealings with third parties who are usually not joined as parties to the proceedings.

3. These complexities were recognised by the Australian Law Reform Commission (**ALRC**) in its final report *Family Law for the Future: An Inquiry into the Family Law System (Report 135)*:

> *The second issue is the treatment of superannuation, which, given its general inaccessibility prior to the preservation age, raises complex questions as to the appropriate treatment of superannuation on separation. Given that caring responsibilities are typically, but not always, borne by women, and can have a lifelong impact on earnings, property division on or following separation can be an important mechanism for addressing deficiencies in the accumulation of superannuation.*[1]

4. Self-represented parties are at a particular disadvantage when dealing with superannuation. This was also recognised by the ALRC:

> *Notwithstanding these changes to the law, submissions confirmed that separating couples find superannuation splitting very difficult, particularly without legal assistance.*[2]

5. However, this is an area where some relatively straightforward reforms could greatly assist parties (whether represented or self-represented), their lawyers and the Courts. To this end, we note the recommendations of the ALRC as they relate to a simplified process for splitting superannuation, and the Government's response to those proposals.

Responses to consultation questions

Innovative retirement income stream products

6. Questions 1 to 4 are directed at innovative retirement income stream products (**IRIS products**). It is proposed that the types of splitting arrangements where benefits are payable as an income stream be either by way of the allocation of the base amount ('a base amount order' or agreement) or the specification of a percentage ('a percentage order' or agreement) to apply to all splittable payments.

[1] Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report 135, April 2019) at [6.39].
[2] Ibid, at [6.22].

7. We note that annuities are defined as percentage-only interests. The result of this definition is that the only order (or agreement) that can be made about annuities is an order specifying a percentage either under subsection 90XT(1)(b) or subsection 90XT(1)(c)—or the companion agreement provisions and the companion provisions in Part VIIIC—of the *Family Law Act 1975* (Cth). Given the unique contractual properties of annuities, it is appropriate that the splitting arrangements be by way of the specification of a percentage.

8. It is unclear why it is proposed the IRIS products should be open to split by way of the allocation of a base amount. A base amount payment split under the payment splitting arrangements in Part VIIIB (and Part VIIIC) of the Family Law Act is a more complex arrangement for trustees to implement.

9. Division 3 of Part 7 of the replacement Regulations applies where the superannuation interest is in the payment phase. Regulation[3] 88 of the replacement Regulations sets out the obligations on the part of the trustee where the first splittable payment after the operative time is less than the base amount. In those circumstances, the non-member spouse is entitled to the amount of the first splittable payment and unless regulation 89 of the replacement Regulations applies (which relates to an optional lump sum), the method provided in sub-regulation 88(3) of the replacement Regulations applies for all other splittable payments.

10. Subdivision C of Division 3, Part 7 of the replacement Regulations applies to the second or later payment split. In particular, regulation 93 then provides the mechanism for all other splittable payments to be calculated and then made.

11. As can be seen, the calculation of the entitlement of the non-member spouse where the order is a base amount order is a technically intricate and complex mechanism. It stands in marked contrast to splitting by way of a percentage.

12. In the event that the IRIS products were only subject to a payment split by way of the specification of a percentage (whether as a percentage-only interest or otherwise), the splitting process would be far simpler. Any splittable payment made by the IRIS product provider would then simply be the subject of the percentage split with the amount to be paid to the non-member spouse being a percentage of the splittable payment and the balance being paid to the member, throughout the lifetime of the member.

13. The guiding principle that ought to apply under the replacement Regulations in these circumstances is to provide a just and equitable means under the regulations that is simple, easy to understand, and easy to implement. A base amount split falls far short of these principles.

Valuation of IRIS products

14. The Law Council's Family Law Section has raised concerns about the proposed valuation treatment of IRIS products. It has been suggested that the Court will need to determine the value of an IRIS product interest where there is no method legislated or none used by the trustee of the product. This will result in the parties, at their own cost, seeking the valuation of the interest by an expert. While that might sound straightforward, it is opening up the valuation process of certain superannuation interests to a different and potentially significantly more expensive valuation approach

[3] We note that the AGD Consultation Paper refers to the proposed regulations by reference to 'section' numbers, rather than 'regulation' numbers. Following standard practices, this paper refers to 'regulations' of the *Family Law (Superannuation) Regulations*, and 'sections' of the *Family Law Act* and other principal legislation.

(which allows for a variety of discretionary and possibly subjective methods) than the vast majority of superannuation interests (which have a prescribed valuation pathway).

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?

15. The Law Council has a concern about the proposed approach to valuing the IRIS products because of the cost and expense for parties, as well as the uncertainty in arriving at a valuation of an IRIS product.

16. As an alternative, the IRIS product provider could prepare a valuation method for each IRIS product. This is on the basis that the IRIS product provider is in the business of innovation and part of that business is to cater for circumstances where the Court makes an order in relation to an IRIS product.

17. The proposal as it stands for IRIS products will likely result in competing valuations by adversary experts (thus increasing court time and parties' legal costs), without any input from the IRIS product provider. It should be remembered that the valuation amount is an equivalent representation of the trustee's liability in relation to the superannuation interest. It follows that the purpose of the valuation of a superannuation interest is so that the effect of an order does not increase the trustee's liability above the prescribed or approved amount.

18. In the event that the Court accepts valuations that are well in excess of what the IRIS product provider considers to be its liability in relation to the product, it would either have quite significant commercial implications in relation to the IRIS product or impose a disadvantage to the member spouse.

19. The IRIS product provider should be required to provide a valuation.

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?

20. The IRIS product provider is the appropriate entity with a clear understanding of the terms of the IRIS product and would be well-placed to prepare methods and factors, either for the Minister's approval, or for providing a valuation in the case where it is proposed that a splitting order be made.

21. Trustees of IRIS product providers may be reluctant to provide methods or factors due to the costs involved, but the Law Council considers that they are still best placed to do this work. Although this is an ever-changing landscape where the appropriate methods and factors for each product may differ over time, those methods and factors would not need to be reviewed frequently (though this will ultimately be up to the IRIS product provider).

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.)

22. As stated above it is our preference that this be the case. Subject to those comments, it is appropriate that the IRIS product provider prepare methods and factors—and, indeed, valuations—either for the Minister's approval or in a case where a splitting order/agreement is sought.

Question 4

Do you have any other concerns about the proposed regulatory approach to IRISPs or the provisions relating to IRISPs in the new Regulations? If so, please expand on your concerns. What would you propose instead?

23. The Law Council has concerns about the splitting of an IRIS product by way of a base amount given the complexity of the regulations for payment splits where a base amount is allocated in the payment phase. This may also increase costs for parties if trustees charge parties to provide the information requested and/or implement the split.

24. It would be far simpler to only allow the specification of the percentage in relation to the split of an IRIS product. In summary, it is our submission that:

    (a) the IRIS product should be valued by the product provider only; and

    (b) the mechanism for splitting be made by the specification of a percentage only and not by way of the allocation of a base amount.

Question 5

For an interest that is a **percentage-only** interest, what other information not listed in Subdivision C, Division 3 of Part 9 of the new Regulations would an eligible person require from a trustee?

Question 6

For an interest that is **not a percentage-only** interest, what other information not listed in Subdivision D, Division 3 of Part 9 of the new Regulations would an eligible person require from a trustee?

25. For superannuation interests that are or are not percentage-only interests, the information to be provided is the information in Subdivision A, Subdivision B and Subdivision C of Division 3 of Part 9 of the replacement Regulations. The general structure of these regulations provides for general information as well as specific information for a superannuation interest in the payment phase, and specific information for superannuation interests in the growth phase.

26. We are mindful of the comments made by Logan J in *Campbell v Superannuation Complaints Tribunal*[4] where he described the information provisions as 'prolix'. However, we recognise that, given the comprehensive nature of these regulations, there is a need to cover all variants of superannuation. The superannuation system itself is complex and the complexity of the information provisions is, to a large degree, unavoidable. It is clear that the drafting is seeking to compartmentalise that complexity into the different superannuation categories.

27. However, the drafting would be improved by the inclusion of a reading guide as often appears in provisions of the *Income Tax Assessment Act 1997* (Cth) (**ITAA**). If there were a reading guide at the beginning of Division 3, the reader (and the trustee) would be guided to the relevant information that is required to be provided for the superannuation in question.

28. In relation to the consultation questions, there are three additional items of information that are required. These are:

    (a) The date of birth of the member (whether the superannuation interest is still in the growth phase or payment phase). This information is necessary for the calculation of valuation amounts. It is currently provided voluntarily or provided after enquiry of the relevant practitioner or the trustee holding that information. The valuation process would be greatly assisted by the provision of the date of birth at the outset.

    (b) The two taxation components (i.e., the tax-free component and the taxable component) and the two elements of the taxable component (the element taxed in the fund and the element untaxed in the fund). Current practice is for the information to include only the tax-free and taxable components. This more detailed information is necessary for the Court to know (and submissions to be made) about the effect of an order.[5] While this information is arguably required under section 119(e), that section only applies to a superannuation interest in the growth phase by reference to Subdivision 307-C of the ITAA. A casual reading of Subdivision 307-C of the ITAA reveals that, like much of the tax law, there is complexity and intricacy in identifying information required. An experienced practitioner would argue that it is essential, when understanding the effect of an order, to understand the taxation imposed. To understand the taxation imposed, knowledge of the two taxation components and the two elements of the taxable component is necessary.

    (c) Whether the superannuation is able to be commuted, and, if so, the commutation factor or basis. This information is required for both the valuation purpose and also for the Court to understand whether commutation is an option for the member. The Court clearly has power to order a commutation, and this was settled well before the commencement of the superannuation amendments.[6] If the Court were minded to exercise the power to order a party to commute part or all of the superannuation benefit, it should be in a position to compare:

        (i) the effect of an order where the order was a payment splitting order operating according to its tenor and with no other provision applying;

[4] [2016] FCA 808 at [28].
[5] *Bulow & Bulow* [2019] FamCAFC 3 at [111].
[6] See the case stated in *Law Smith v Seinor* (1989) FLC 92-050.

(ii) the effect of an order where Division 3, Division 4 or Division 5 of Part 3 applies (payments that are not splittable in particular circumstances); and

(iii) the effect of an order where there is an *in personam* order for commutation irrespective of whether the order is a payment splitting order operating according to its tenor, or an order where Part 3 of the replacement Regulations applies.

29. The **Superannuation Committee** of the Law Council's Legal Practice Section has also suggested that, given the unique and varying nature of these products, it might be useful to have a 'catch-all' information request provision. This could say something to the effect that the non-member spouse may request any information that is reasonably necessary to understand the nature of the benefit (similar to the ability for a member to request information they may need to understand their benefit entitlement under section 1017C(2)(a) of the *Corporations Act 2001* (Cth)). This suggestion is made in case it is difficult for the non-member spouse to understand the design of the product which can be unique and complex, particularly for example if it has different phases—say, a draw-down of an accumulated benefit in the first phase of retirement and then an annuity-linked guaranteed element for the last phase of retirement.

Amendments to methods and factors to reflect current actuarial assumptions

Question 7

Do you have concerns that the new Regulations do not provide a 'default' valuation method and factors for fixed term and lifetime annuities, where the trustee satisfies a payment splitting order or agreement by establishing a new annuity, or transferring, rolling over, or paying an amount to the non-member spouse?

Question 8

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

Question 9

If the new Regulations are made (approved) and registered (published) earlier than 1 April 2025 (noting that this would not occur any earlier than the final quarter of 2024), when should they commence and why (for example, immediately, after 3 months, or on 1 April 2025)?

30. Where a payment splitting order or agreement is made and the governing rules of the fixed term lifetime annuity provide for the application of Part 3 of the replacement Regulations, there is clearly a need to establish a valuation for the application of Part 3.

31. Regulation 27(4) of the replacement Regulations applies to percentage-only interests, which under regulation 10 of the replacement Regulations includes a superannuation interest in a superannuation annuity. Regulation 27(4) of the replacement Regulations provides that the trustee is to pay the non-member spouse an amount equal to the non-member spouse's entitlement. Regulation 29 provides for the meaning of the value of the non-member spouse's entitlement. It provides that the value if a splitting order were made under either Part 2 (being an order for the base amount order) or Part 3 of Schedule 2 (being a percentage order).

32. The questions are directed to regulation 35 of the replacement Regulations where the value of the non-member spouse's entitlement at the termination time is calculated by a method agreed between the spouses. This is productive of further disputation. This is especially so in the hands of individuals not skilled in understanding the complexity of the annuities market.

33. This provision is not consistent with promoting early dispute resolution nor is it consistent with resolution in a just and equitable manner. As such, it is not supported.

34. In our submission, the answer lies with the annuity provider. The annuity provider is the entity that holds all the necessary information to understand the value of the annuity and, in our submission, if an annuity provider proposes to enter or remain in the annuities market, that provider should also have the responsibility of providing a valuation amount in circumstances where a family law event occurs in relation to the annuity.

35. In other words, the annuity provider, as part of its commercial practice, should provide the valuation for family purposes, and it can be approved by the Attorney-General in the same way as the valuation methods and factors for defined benefit interests are approved.

36. Question 9 relates to the commencement of the replacement Regulations and in particular the concern about the behavioural effect in relation to the replacement methods and factors. This problem is not new.

37. In 2002, there was a period of 18 months before the commencement of Part VIIIB during which the *Family Law (Superannuation) Regulations 2001* were prepared and then promulgated. The amendments in Part 7A of the *Superannuation Industry (Supervision) Regulations 1994* were also prepared and promulgated during that period. The commencement date for Part VIIIB as well as the regulations was 28 December 2002.

38. It is, in our view, sensible administrative practice to give trustees sufficient time to make amendments to any internal systems that are required for the successful operation of the replacement Regulations. We also recognise that some trustees may not focus on the importance of making the amendments to their internal systems in a timely manner and only realise that change is required when they start to receive requests and then realise that the new regulations are in operation.

39. In *Van Essen and Van Essen* (2000) FLC 93-028, application was made for an adjournment where the Part VIIB amendments had been introduced into Parliament but not passed at the time of the hearing. The adjournment was contested by the member on the basis that it would be improper for the Court to exercise its powers for the benefit of one of the parties. The Full Court agreed. It held that the legislation was simply a Bill for an Act and there was no guarantee that it would be passed and, if it were, that it would be passed in the same form in which it was introduced. Legal proceedings could not be delayed on the basis of such uncertainty. The application for adjournment was denied.

40. Later cases distinguished *Van Essen* where the passage of statutory amendment carried a greater degree of certainty.[7]

[7] See *Versace & Armstrong* [2001] FMCAfam 231 and *Taylor & Taylor* [2001] FamCA 866.

41. It is of course part of the process of regulation making under our Parliamentary system that regulations are required to be tabled in each House of Parliament during which there is a period of disallowance. It is also accepted that any decision made under the tabled regulations is a valid decision and stands until a motion to disallowance succeeds.

42. There is a balance to be arrived at so that trustees are in possession of sufficient information, and they are able to make amendments to their internal systems in a timely manner. At the same time, there is a need to minimise the behavioural effects that parties are seeking to obtain (or believe, rightly or wrongly, that they can obtain) in relation to the replacement Regulations.

43. It is our position that the normal Parliamentary processes ought to apply with the trustees and annuity providers being given sufficient notice of the change and the usual publication requirements for commencement of the regulations should apply. It would be appropriate to provide an exposure draft of the methods and factors to the providers of the pensions and annuities for the purposes of enabling those providers and trustees to make the necessary amendments or adjustments to their internal administrative processes.

Question 10

Do you have any concerns with the new and updated methods and factors being used to calculate a non-member spouse's entitlement, where an order or agreement has been made based on the superannuation interest being valued using the existing methods and factors?

44. Where a superannuation interest is the subject of an order or agreement and the valuation requirements have been observed under the existing methods and factors but implementation would occur after commencement of the replacement methods and factors, there is a model to overcome any perceived inequity.

45. Where the order is a base amount order and the base amount is allocated by reference to the existing methods and factors, it would be possible, in our view, for the amendments to provide for transitional arrangements that provide for a proportional adjustment to the base amount having regard to the replacement methods and factors.

46. A model for this already exists under the Commonwealth schemes with its family law value and scheme value. Where a superannuation interest under a Commonwealth scheme is the subject of a splitting order or agreement and then served on the trustee, the trustee is required to calculate the scheme value and in the event that the scheme value results in a higher valuation amount a proportionate adjustment is made to the base amount.

47. This model could be followed as a transitional arrangement under the replacement Regulations.

48. The Superannuation Committee has a different view to that of the Family Law Section. It believes that it seems more logical for there to be consistency as between the initial valuation of the non-member spouse's entitlement and the ultimate calculation—that is, the one method should be used for both. This is suggested so that the result will align with the parties' expectations, which were formed when the initial valuation was based on the current methods and factors that applied when the splitting process commenced.

Clarifying and other amendments

Question 11

Do you have any concerns with the definition of 'base amount'?

49. We welcome the introduction of a definition of 'base amount' as this will assist parties to understand an important aspect of the superannuation-splitting scheme.

50. However, the Family Law Section has concerns that the proposed definition is circular. A proposed alternative definition which may be more meaningful (with tracked changes) is set out below:

> ***base amount**, for a superannuation interest, means:*
>
> *(a) if the interest is identified in a superannuation agreement or flag lifting agreement:*
>
> *(i) the ~~base amount~~ dollar figure specified in the agreement for the interest is the base amount for the purposes of Part VIIIB or VIIIC of the Act, rounded up or down to the nearest dollar (with 50 cents being rounded up); or*
>
> *(ii) the ~~base amount~~ dollar figure calculated using a method specified in the agreement, to obtain the base amount rounded up or down to the nearest dollar (with 50 cents being rounded up); and*
>
> *(b) if a splitting order applies for the interest—the ~~base amount~~ dollar figure allocated to the non member spouse by the court under subsection 90XT(4) or 90YY(5) of the Act, rounded up or down to the nearest dollar (with 50 cents being rounded up).*

51. We note that the base amount allocated to the non-member spouse is a defined term (albeit also defined circularly) in regulation 45 of the existing regulations. While there is an argument on the basis of statutory interpretation that terms are assumed to be used consistently unless the context otherwise requires,[8] it is appropriate to have a definition set out in regulation 3 of the replacement Regulations.

Question 12

Do you have any concerns with the definition of 'component of a superannuation interest'?

52. The definition of component of a superannuation interest was a live issue in *Campbell v the Superannuation Complaints Tribunal* [2016] FCA 808. In that case, a response to a Form 6 application was provided by the Commonwealth trustee. The superannuation that was in issue was superannuation paid by way of a Military Superannuation and Benefits Scheme (**MSBSB**) invalidity pension to the plaintiff. The plaintiff complained that the Form 6 response was incorrect in that it was provided in relation to a defined benefit interest when, it was argued, the superannuation interest was not a defined benefit interest.

[8] Pearce, D, *Statutory Interpretation in Australia*, 2019, p.141.

53. Logan J held that, on the basis of an interpretation of the statute and in particular the meaning of the word ‘component’, that the superannuation was not a defined benefit interest and, by reason of the drafting of the regulations, it had to be an accumulation interest.

54. The MSBS invalidity pension interest has no feature that would lead any experienced practitioner to conclude that the superannuation interest was an accumulation interest. The inherent nature and the manner in which the benefit was calculated was a defined benefit. What was not fully argued in Campbell’s case was that the word ‘component’ under the MSBS deed and rules has a particular technical meaning under that deed in that it referred to a component that is funded and a component that is unfunded.

55. Nonetheless, the outcome then emboldened the plaintiff to make a further application that the invalidity pension was therefore not splittable (see *Campbell v the Superannuation Complaints Tribunal* [2017] FCA 1509 at [36]). This was rejected by Logan J. While the purpose of these proceedings may have been an attempt to secure an outcome that these pensions were not splittable superannuation interests, it failed.

56. However, the case illustrates that technical terms such as ‘component’ can be troublesome and great care needs to be taken in the drafting of these terms in the statute.

57. The definition of component in regulation 4 of the replacement Regulations, where it is seen as ‘a part’ of a superannuation interest is a meaningful addition. The Oxford English Dictionary defines component to be a ‘constituent element or part of the whole.[9] We now turn our attention to the four paragraphs of the proposed definition:

    (a) Part of the superannuation interest is a component of the superannuation interest if it has distinctive features and characteristics. This could be assisted by way of example that a distinct feature is the part of the superannuation interest that has the feature where benefits are paid by reason of invalidity in accordance with the governing rules.

    (b) This paragraph points to the requirements that must be met before the benefit becomes payable. Again, an illustration would assist because this clearly captures pensions paid by reason of invalidity that are incorporated into the governing rules of superannuation plans.

    (c) This paragraph may prove troublesome. There is a line of authority where the trial judge is required to ensure there is evidence of the nature, the form and characteristics of the superannuation benefit and evidence about the effect of any order so that the obligations under regulation 79 can be observed. The form of a superannuation interest is either a payment in lump sum form, a payment in pension form or while it still in the accrual phase, the superannuation is said to be in an inchoate form.[10] This paragraph being cast in the negative may not assist in the technical interpretation of this term.

    (d) The final paragraph is a sensible addition because the invalidity pension is not the entire superannuation benefit. It is a subset or part of the superannuation benefit under the governing rules in circumstances where the requirements for its payment are established. We also note that, in the event that the invalidity requirements are no longer satisfied, the superannuation interest may then

[9] *Oxford English Dictionary* (online at 29 April 2024) ‘component’.
[10] See *Macoun v The Commissioner of Taxation* [2015] HCA 44.

transfer to a different inchoate form where it is treated as a superannuation interest in its accrual or growth phase where the member may not be contributing, in which case it is either preserved or not preserved.

58. The Superannuation Committee has raised a further concern that the definition is drafted so broadly that it may capture unintended things: for example, it could capture the component of a member's accumulation interest that is invested in one particular investment option. For accumulation products, at least, the Superannuation Committee suggests that there may be some utility in linking it, or explaining it, by reference to an accumulation account or product.

59. The Superannuation Committee also notes that the inclusion of a new concept can create unnecessary complexity in the law, as the issue of components is addressed in a different way in the *Superannuation Industry (Supervision) Act 1993* (Cth) and Chapter 7 of the Corporations Act. It suggests that the relevant concepts of interests and products already in these legislative schemes be reviewed, with a view to adopting those concepts and, accordingly, to ensure that the use of the new term 'component' does not cause unnecessary proliferation of new concepts. Another approach may be to retain the complexity arising from the new concept of component and to include some specific examples in the Explanatory Statement to aid in the construction of what is intended to be caught within, or not caught by, the definition.

60. The Superannuation Committee's comments raise the important issue of consistency and use of statutory language across different statutory regimes.[11] While the term 'component' is used in different contexts in the Corporations Act and in the *Superannuation Industry (Supervision) Act 1993*, an area that is deserving of closer attention is the use of the term "defined benefit component" in regulation 6.31 of the SIS Regulations.

61. Regulation 6.31 provides a definition of a "defined benefit component" of a superannuation interest. By contrast, regulation 5 of the replacement regulations provides for the meaning of a "defined benefit interest". In other words, one definition is a definition of a component of a superannuation interest and the other is the definition of an interest which may have a part or component that brings the superannuation interest within the definition of defined benefit interest.

62. The first point to note is that the amounts and factors listed in regulation 5(3) of the replacement regulations (and the current regulations) are identical to the amounts and factors listed in regulation 6.31(1) of the SIS Regulations. That is as it should be.

63. However, there is a difference between regulation 5(2) of the replacement regulations and regulation 6.31(2) of the SIS regulations. The exclusion of the text in paragraph (b) of regulation 5(2) of the replacement regulations from the definition in regulation 6.31(2) of the SIS Regulations would have the result that occurred in Campbell's case (discussed above). That may be the intended result in the context of regulation 6.31, which is directed to compulsory rollover and transfer of superannuation benefits in regulated superannuation funds and approved deposit funds.

64. The inclusion of paragraph (b) of regulation 5(2) in the replacement regulations has the effect of reversing Campbell's case, thus bringing invalidity pensions within the definition of defined benefit interest for the purposes of valuation of these interests and the provision of information, which was the live issue in *Campbell's* case.

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11 *Harrison v Melham* (2008) NSWCA 67.

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?

Question 14

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

65. A 'terminal medical condition' should be included as a condition of release or releasing event in regulations 6 and 7 of the replacement Regulations.

66. More generally, the Law Council queries whether the new regulation could be drafted more flexibly in case new conditions of release are made law in due course. As it is presently drafted, uncertainty (or at least perceived unfairness) may be created if new conditions of release are approved under the SIS Regulations, but replacement Regulations are not updated for some time after that.

Question 15

Do you have any concerns with the proposed amendments to section 141?

67. Regulation 141 of the replacement Regulations is an update of regulation 72 of the existing Regulations. We support the additions proposed: an email address or postal address as well as an email, postal address of an intermediary. We also support the removal of the requirement for a non-member spouse to provide a membership number.

68. An additional matter that is raised for consideration relates to self-managed superannuation. Regulation 141 of the replacement Regulations is (like regulation 72 of the existing Regulations) a mandatory requirement for the non-member spouse to ensure that the trustee of the superannuation plan is given a written notice of the information set out in sub-regulation (2).

69. In the context of a self-managed superannuation fund, where both parties are also members of the self-managed superannuation fund, they both have trusteeship obligations (either in their individual capacities or in the capacity as a director of the trustee corporation). The obligation to provide information in these circumstances does not assist in the efficient management of the splitting order or agreement. The information would be known to the trustee and both parties.

70. We would therefore recommend that there be an exception to regulation 141 of the replacement Regulations that the information not be provided in circumstances where the superannuation fund is not a single member self-managed superannuation fund and both parties have membership of the self-managed superannuation fund.

Other matters for consultation

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?

71. Superannuation annuities have developed in the context of our ever-evolving superannuation system to cater to a sector of the community that are attracted to the certainty of the annuity payment. The annuity is of course contractual. There is a purchase price for the purchase of the annuity whether it is fixed term life annuity.

72. The designation of annuities as percentage-only superannuation interest avoids the complexity of base amount proportioning where the splitting order or agreement is by way of the allocation of a base amount.

73. For the reasons set out above, annuities should not be the subject of a base amount allocation as it simply adds a layer of complexity which in the end does little to assist in the efficient administration of the splitting order or agreement.

74. Where the splitting order or agreement applies to an annuity and there has been no amendment to the governing rules also to satisfy Part 3 of the replacement Regulations, the specified percentage simply applies to whatever splittable payment is made from the annuity. The non-member spouse of course does need information to understand that the effect of a splitting order may be that it would terminate when the annuity recipient dies and there is no termination payment under the annuity contract. That is simply part of the bargain in settling an application under section 79 for the determination of property or under the bargain of a superannuation agreement.

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.

75. In 2001, regulation 11(1A)(b) of the *Family Law (Superannuation) Regulations* set the minimum superannuation interest which could be split as $5,000. This means that if parties have a superannuation interest of say $4,900, it is included in the property interests available to be adjusted between the parties, but the court cannot split it, so that it must remain with the member. If the property of the parties is to be divided equally between the parties, the non-member will either receive a split from another fund with a higher balance or more of the non-superannuation property.

76. Regulation 14(3)(b) of the replacement Regulations adopts the same minimum and defines an "unsplittable interest" to include an interest with a withdrawal benefit in relation to the member spouse of less than $5,000.

77. It is over 20 years since the $5,000 minimum was set in the *Family Law (Superannuation) Regulations 2001*, and FLS submits that this figure should either be indexed or adjusted. The reason for the setting of a minimum for a splittable interest was the *de minimus* rule. The objective was that parties did not incur legal costs which were disproportionate to the value of the superannuation interest. In this context, the *de minimus* rule also has a positive impact on the use of court resources and the work required to be done by superannuation trustees to implement superannuation splits.

78. If $5,000 was a fair figure in 2001, it is likely that the equivalent figure in 2024 is much higher. A comparison can be obtained by looking at the Reserve Bank of Australia's inflation calculator.[12] This indicates that the costs of a basket of goods and services valued at $5,000 in the 2001 calendar year was valued at $9,006.70 in the 2023 calendar year. Using average weekly ordinary time earnings produces an amount of $12,000 (rounded). There will be other ways to calculate the updated figure.

79. The figure in the proposed regulation 14(3)(a) could be adjusted regularly in line with on a similar basis in the future or could be adjusted in a manner similar to the proposed sub-regulation 74(4) with the amount updated determined by the Australian Government Actuary under legislative instrument.

80. Of course, increasing the minimum superannuation to be split could be detrimental to a non-member spouse where there is little or no non-superannuation property. FLS recognises that in these families an increase in the $5,000 limit may be detrimental to a non-member spouse who may end up with no superannuation or property whilst the other party may retain interests in several funds with balances of less than $10,000. One option is to provide in the *Family Law (Superannuation) Regulations* that in certain circumstances a superannuation interest of between $5,000 and $10,000 is splittable. These circumstances may include where there is more than one unsplittable interest and where the non-superannuation property is less than a certain amount - say $50,000.

Question 20

If you are a superannuation trustee, do you offer a product that falls under paragraph 12(1)(c)(i) of the existing Regulations?

If you answered 'yes' to the above question, please provide an example of a product that falls under paragraph 12(1)(c)(i) of the existing Regulations.

Question 21

Do you have any concerns about the 2-year time limit in paragraph 12(1)(c)(i) of the existing Regulations, which has been replicated in paragraph 16(2)(c)(i) of the new Regulations?

Question 22

Does paragraph 16(2)(c)(i) need to be amended to better reflect current practice regarding temporary incapacity payments?

[12] See, <https://www.rba.gov.au/calculator/>.

Question 23

Do you think section 16 of the new Regulations covers all categories of payments to a member spouse which are not splittable payments?

If not, what other categories of payments to a member spouse should be covered in section 16?

81. Question 21 relates to concerns about the 2-year time limit in paragraph 12(1)(c)(i) of the existing Regulations. The apparent philosophy behind the 2-year time limit is that payments being made by way of temporary incapacity do not have the durability of permanence and therefore a splitting order or agreement in relation to such payments would be of limited value in the determination of an application.

82. If the payments by way of temporary incapacity exceed the 2-year time limit, then those payments become splittable payments.

83. If a splitting order is made in relation to a superannuation interest where temporary incapacity payments were being made and the trustee had made provision in its governing rules to satisfy Part 3 of the replacement Regulations, then the new interest or rollover would apply despite the replacement regulation 16.

84. With respect to question 22, the Law Council considers that paragraph 16(2)(c)(i) does not need to be amended to better reflect current practice regarding temporary incapacity payments.

85. Current practice in relation to temporary incapacity payments does not affect the policy behind this regulation. It is a question of balance as to whether the 2-year period is sufficient or whether it is too long or too short. That is a policy judgement for the policymakers to determine.

86. In practice there has not been any reported case where it has caused concerns for the settlement or determination of an application under section 79 or settlement by way of superannuation agreement.

87. With respect to question 23, the other categories in relation to payments that are not splittable payments relate to compassionate payments, payments on the grounds of severe financial hardship, payments under the CSS and PSS where assessment is being made, or the transfer to a small superannuation account.

88. These payments are payments of a nature where a splitting order would be of limited value in the settlement of an overall section 79 application or a superannuation agreement.

89. A payment under the *Superannuation (State Public Sector) Act 1990* (Qld) was also prescribed as an unsplittable payment. These payments are income protection benefits paid by reason of incapacity and as noted with these provisions continue in force under the governing rules of the Australian Retirement Trust. We have no knowledge that the provisions have caused any difficulty in relation to the operation of the overall scheme and the Queensland trustee may have some views which impact on the inclusion of this particular provision in the list of un-splittable payments.

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?

90. We note that the discussion sets out the three ways in which a superannuation interest can be valued. It also noted that the Court has provided little guidance in relation to the third method, with one of the few references being in *Coghlan & Coghlan* (2005) FLC 93–220.

91. It is also noted that methods and factors were made prior to 2005 and none have been substantively updated since approval. The sunsetting practice in the office of the Australian Government Actuary is that these factors be reviewed on a 10-year cycle to ascertain whether the assumptions underpinning the approved method continue to be appropriate in the changed economic circumstances.

92. We support this.

Question 26

The splitting of superannuation interests, the benefits of which are being paid as an allocated pension, an account-based pension, or a market linked pension, are dealt with by Part 7A of the *Superannuation (Industry) Supervision Regulations 1994*.

Should the new Regulations continue to provide for the calculation of the non-member spouse's entitlement?

Please expand on why, or why not.

Question 27

If the answer to the previous question is yes, does section 94 as drafted in the new Regulations accurately reflect how the non-member spouse's entitlement is calculated where the payment split is a second or later payment split with respect to the interest?

If your answer is no, please expand on why, including what you would propose instead.

93. The current regulations 58A and 58E can provide for a clash of methods where the splitting order or agreement is implemented. Where the Court makes an order in relation to an allocated or market linked pension, the trustee is also obliged to observe the payment standards under Part 7A of the *Superannuation Industry (Supervision) Regulations 1994*.

94. The effect of Part 7A is to bring forward the clean financial break to a point that is contemporaneous with the making of the splitting order or agreement. This is an integral part of the success of the splitting arrangements in the context of the complex superannuation regulatory environment in which the splitting laws operate.

95. However, there is a timing issue in relation to obligations under Part 7A. The trustee that is required to observe the standards under Part 7A and has 28 days in which to give a payment split notice, with a further 28 days in which the non-member spouse must make an election. There is then a further 30-day period in which the trustee is

required to implement the requested election made by the non-member spouse. That is a total period of 86 days.

96. During that time payments may be made from an allocated pension account or a market linked pension account. These payments would be splittable payments and caught by regulations 58A and 58E of the existing regulations. This is a troublesome duplication and ought to be avoided.

97. One mechanism to avoid the duplication would be that superannuation plans paying a market linked or allocated pension and are not required to observe the obligations under regulation 58A and 58E because they have observed the obligations under Part 7A.

98. The other exception might be those plans that are required to observe the obligations under Part 7A but do not do so within the time limits prescribed under Part 7A. In other words, where a trustee exceeds the payment standards under Part 7A being the giving of a payment split notice followed by the request. Any splittable payment made by way of an allocated pension or market linked pension after that time would then be subject to regulation 58A and regulation 58E.

Question 28

Please provide any comments or concerns about the methods for calculating the non-member spouse's entitlement under Part 7 of the new Regulations (which replicates Part 6 of the existing Regulations).

99. The method of calculating the entitlement of the non-member spouse under Part 7 of the replacement Regulations, which as noted replicates Part 6 of the existing regulations, is necessarily complex and intricate. It is an example of the complexity of the superannuation system that operates in Australia today but given the operation of Part 7A of the SIS regulations, as well as the ability of trustees to provide for a payment to satisfy Part 3 of the replacement Regulations, the application of these rules is now limited to very few superannuation plans. Given the limited nature of the application the replacement Regulations are appropriate.

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?

100. Our submission has provided suggestions for inclusion of the provision of the date of birth of the member as well as the detailed elements of both taxation components and both elements of the taxable component being the element taxed in the fund and the element untaxed in the fund.

101. We have no further suggestions for inclusion.

Question 30

What are your experiences with compliance with regulations 70 and 71 of the existing Regulations?

Question 31

Should a penalty provision be introduced for non-compliance with section 139 of the new Regulations (which replicates regulation 70 of the existing Regulations)?

Please expand on your response.

Question 32

If a penalty provision should be introduced for non-compliance with section 139 of the new Regulations, what should the penalty be?

Question 33

Should the penalty be increased for non-compliance with section 140 of the new Regulations (which replicates regulation 71 of the existing Regulations)?

If so, what should the penalty be increased to? Please expand on why the penalty should or should not be increased.

102. We know of no instances where there have been any prosecutions in relation to the penalties.

Question 34

Should the new Regulations provide guidance, or prescribe an approach, in relation to superannuation interests of members who have variations of sex characteristics or who are intersex, whose sex has changed from their sex recorded at birth, whose gender has changed from the gender they were assigned at birth, and/or who do not identify as either male or female?

103. The Law Council supports measures that respect the preferences and needs of persons with innate variations in sex characteristics and transgender people. We appreciate that difficulties may arise from an approach to valuation factors that rely on a binary male / female categorisation of life expectancy.

104. It is well established that the determinants of life expectancy include gender as well as socio-economic and cultural factors, such as levels of infant mortality, a safe living environment, a good health care system, sufficient food, cultural behaviours and the use of preventative health measures.[13] Any prescribed approach to superannuation splitting of members with innate variations in sex characteristics and transgender people should be based on robust statistical or actuarial data as to the determinants of life expectancy of people in those cohorts. Ideally, it should also be consistent with approaches in other contexts, such as life and health insurance.

105. To the extent that gender affects valuation factors, and given that changed gender is now more recognised, this should be taken into account somehow in the Regulations so as to create certainty for superannuation trustees and parties to superannuation splitting agreements and orders. However, if the regulations provided such guidance, this must be based on gender information known to the trustee rather than their actual

[13] Australian Bureau of Statistics, Australian Social Trends March 2011: Life Expectancy Trends Australia, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Mar+2011>.

gender. For example, some trustees may ask information both about gender at birth and identified gender while others do not.

106. However, we note that standard population life tables and health adjusted life tables are used for the purpose of valuing invalidity related interests, and these presently follow the traditional gender terms of 'male' and 'female'. The factors which are currently included under the *Family Law (Superannuation) Regulations 2001* also follow the traditional gender terms of 'male' and 'female'.

107. It is suggested that until such time as there are statistical tables published by the Australian Government Actuary which are based on more diverse gender identities, the Regulations should provide that for the purpose of valuing superannuation interests, 'gender' should mean the gender assigned at birth. This is not meant to undermine a person's gender identity, but rather reflect the availability of current data available to ensure that a superannuation interest is valued in an objective and practical manner.

Question 35

Please provide comments about other aspects of the new or existing Regulations that have not been addressed elsewhere.

108. The ALRC in its final report made two recommendations with respect to superannuation:

> ***Recommendation 16*** *The Family Law Act 1975 (Cth) should be amended to provide a presumption that the value of superannuation assets accumulated during a relationship are to be split evenly between the parties.*
>
> ***Recommendation 17*** *The Family Law Act 1975 (Cth) should be amended to simplify the process for splitting superannuation including:*
>
> - *By developing template superannuation splitting orders for commonly made superannuation splits; and*
> - *When the applicant is suffering economic hardship, requiring superannuation trustees to limit the fees they charge members and their former spouse for services provided in connection with property settlement under Pt VIII to the actual cost of providing those services."*

109. We refer to the Government's response to the ALRC report dated March 2021 and the opposition to Recommendation 16 expressed there.[14] Support for Recommendation 17 in principle (by Government and the Law Council) is noted.

110. The first of these recommendations involves a consideration of the substantive law with respect to property settlements and if implemented would require amendments to the Family Law Act. The Law Council does not propose to embark on a detailed consideration of this recommendation here (and refers to the matters addressed in our previous submission about these matters). However, the proposed updating of the *Family Law (Superannuation) Regulations* is an opportunity to consider Recommendation 17, which recommends a simplification of the process for splitting superannuation and therefore seems less controversial. The Law Council remains

[14] See, <https://www.alrc.gov.au/wp-content/uploads/2021/03/alrc-government-response-2021.pdf>.

ready to assist government in that process, including in the development of templates and related amendments to the Family Law Act.

Template orders

111. The ALRC recommended the introduction of a requirement for template orders for reasons explained at [7.71]–[7.73]:

> *Recommendation 17 is designed to provide procedural simplification by including template splitting orders that would form a schedule to the superannuation regulations. The template orders would address common scenarios including splitting superannuation on a lump sum or percentage basis, deal with superannuation interests that are in the growth phase or the payment phase, and deal with accumulation funds as well as defined benefit funds. The template orders would be implementable by agreement between the parties or by court order. The use of the template orders would be covered by a deeming provision with the effect that procedural fairness requirements are deemed to have been met if the template orders have been utilised.*
>
> *The complexity of superannuation splitting is partly occasioned by the use of trust structures, and partly by the different requirements of individual superannuation trustees in terms of the drafting of splitting orders. While most superannuation funds provide guidance and instructions on how to prepare a splitting order, few provide illustrative examples. Complexity is also brought about by the requirements to provide superannuation trustees with procedural fairness in circumstances where they do not have a substantive interest in whether a member's superannuation interest is split; unlike a creditor who may have a genuine concern if a debt is reapportioned.*
>
> *Before applying for a court order to split a superannuation interest, the party seeking the order must provide 'procedural fairness' to the superannuation trustees. That is, they must provide trustees with the draft orders so the trustees can indicate any objections or foreshadow any problems they might have with complying with the orders. If there are errors in the draft order provided to the fund, it must be amended and sent to the fund again for checking, which can cause delay in already lengthy processes.*

112. Template orders may be more difficult to implement for defined benefit interests and self-managed superannuation funds (**SMSFs**). Defined benefit funds raise complex issues with valuation, assessment of contributions and the splitting process. According to the Australian Taxation Office (ATO), as at 30 June 2022 there were over 610,000 SMSFs. These contain 6 members or less and are regulated by the ATO rather than the Australian Prudential Regulation Authority (**APRA**).

113. According to APRA's latest report,[15] as at December 2023 there were a total of 125 superannuation funds in Australia with more than six members (i.e. excluding SMSFs). Some of these will be defined benefit funds or have members with defined benefit interests) but the bulk of them will be accumulation funds. The prospect of a template order for use by all accumulation funds seems to be pragmatic and achievable.

[15] *Quarterly Superannuation Performance Statistics* (December 2023) Downloaded at <https://www.apra.gov.au/quarterly-superannuation-statistics>.

Templates for defined benefit interests should also be considered but may take more time and may not be able to be the same for all defined benefit funds.

114. At the moment, the lack of uniformly accepted template orders, or even publicly available templates for individual funds, slows down the superannuation-splitting process and the making of property settlement orders even though agreement has been reached. It also increases parties' costs, increases the risk that the "deal" will fall through and creates a barrier for self-represented parties to submit consent orders to the court without the assistance of lawyers.

115. A significant contributing factor to this difficulty is section 90ZD(1) of the Family Law Act which confirms the right of trustees of superannuation funds (as third parties affected by orders between the parties to the proceedings) to be given procedural fairness. Neither section 90ZD(1) nor the general principle of procedural fairness gives trustees the right to veto the making of orders, but this appears to be the way that many funds treat requests for approval of orders. The main objective of procedural fairness is to ensure that the fund is able to implement the proposed orders. It is common for funds to require minor and pedantic changes to the wording of the proposed order, despite the fact that the proposed order could have been implemented by the fund without the wording being changed. This unnecessarily increases costs for parties and delays the making of property settlement orders. Some funds even insist that they see the re-worded order in full before it is submitted to the court, thus having a second round of procedural fairness.

116. The process that parties are required to follow in giving procedural fairness to a trustee of a superannuation fund is set out in the *Federal Circuit and Family Court of Australia (Family Law) Rules 2001*, specifically, rule 1.12:

> *(5) If, in an application for final orders or a response or reply to such an application, a person seeks a flagging order or splitting order in relation to a superannuation interest under Part VIIIB of the Family Law Act, or applies under section 79A or 90SN of that Act for an order to set aside an earlier order made in relation to a superannuation interest:*
>
> *(a) the person must, immediately after filing the application, response or reply, serve a sealed copy of that document on the trustee of the eligible superannuation plan in which the interest is held; and*
>
> *(b) if the court makes a flagging order or splitting order or any other order in relation to the superannuation interest--the party in favour of whom the order is made must serve a copy of it on the trustee of the eligible superannuation plan in which the interest is held.*
>
> *(6) If, in a property proceeding, a party seeks an order to bind the trustee of an eligible superannuation plan and the proceeding has been listed for trial:*
>
> *(a) the party must, not less than 28 days before the first day of the trial, notify the trustee of the eligible superannuation plan in writing of:*
>
> *(i) the terms of the order that will be sought at the trial to bind the trustee; and*
>
> *(ii) the date of the trial; and*

(b) if the court makes an order binding the trustee of an eligible superannuation plan--the party in favour of whom the order is made must serve a copy of the order on the trustee of the eligible superannuation plan in which the interest is held.

117. This is similar to the requirements in the former *Family Law Rules 1984* and *Family Law Rules 2004*.

118. Due to changes in technology since 2001 when superannuation splitting commenced, the 28-day period of procedural fairness to the fund is probably no longer required. The superannuation-splitting scheme is now very familiar to trustees (excluding SMSFs). Even without templates, a 7- or 14-day period is sufficient for funds (excluding SMSFs) to check whether they can implement the base amount or percentage split requested. If the fund has its preferred template orders on its website and these are used, then the proposed orders should be even simpler and faster for trustees to review. Whilst 28 days was reasonable when the legislation was implemented, it is not now. A reduction from 28 days would, however, require that the Federal Circuit Court of Australia (**FCFCoA**) change its Rules, not changes to the Family Law Act or the *Family Law (Superannuation) Regulations*.

119. The FCFCoA could be asked to implement a change to rule 1.12 so that parties using a template order and providing evidence that the split being sought was able to be split would be deemed to have given procedural fairness. This would accord with Recommendation 17. However, we do not believe this to be workable. The ALRC recommendation is too simplistic, given the complexities which may be associated with:

    (a) a superannuation interest may already be subject to a splitting order and the court could make orders that were unable to be implemented;

    (b) SMSFs;

    (c) defined benefit interests (these have complex valuation issues and there is a risk that the split sought could be greater than the fund can implement);

    (d) splitting multiple funds in the same percentage; and

    (e) achieving a 50/50 split by way of a 100 percent split in favour of party B from fund A and then a 50 percent split back from fund A to fund B for the benefit of party B.

120. A preferable course is using a template approved by the fund will reduce the time required for procedural fairness to be deemed to be given to 7 days. In other cases:

    (a) where the fund is an APRA regulated fund, but the template is not used, the time could be 14 days; and

    (b) where the fund is regulated by the ATO (a SMSF), the 28-day period would remain.

121. The introduction of template orders and the placement of these on fund websites could be part of the prudential standards for APRA regulated funds (non-SMSFs) under the *Superannuation Industry (Supervision) Act 1993*.

122. Template orders which have been approved by all or a majority of the APRA regulated funds should be the objective and the superannuation industry should be encouraged

to develop them. They may want more than one template to deal with accumulation interests and defined benefit interests:

(a) simple splits—base amounts;

(b) simple splits—percentage amounts; and

(c) 100 percent to 50 percent splits.

123. In the meantime, the requirement for APRA regulated funds to have their own template orders should be swiftly introduced.

Fees for implementing superannuation splits

124. The ALRC also recommended (at [7.75]) in relation to fees charged by trustees in relation to super splitting:

> *At a time of significant financial stress, and for lower income households, these fees may impose hardship. These fees appear disproportionate to the cost to the trustee of implementing a superannuation split given the minimal resources that would be required to administer the split. Accordingly, the ALRC recommends that the Family Law Act be amended to require superannuation fund trustees to offer those suffering economic hardship a reduced fee for providing information and putting a superannuation split into effect. That reduced fee should be no more than the actual cost of providing the service.*

125. The Law Council agrees that in cases of hardship there should be a mechanism for fee-waiver and recommends the introduction of forms similar to those available for fee waiver in the FCFCoA. It would be easier for parties to complete the new forms if they are similar. In the case of many APRA-regulated funds the ability of those funds to absorb these costs is high as the assets held by them are entirely disproportionate to the parties undergoing hardship.

Names of trustees and funds

126. Many superannuation funds lack transparency with respect to the names of funds and trustees.

127. The precise names of superannuation funds and their trustees can be very difficult for a member to ascertain and even more difficult for a non-member. Neither the member statement nor the website may have accurate information. This lack of transparency creates delays for parties and extra legal costs with respect to:

(a) applications for information from funds by submitting Superannuation Information Forms, colloquially known as SIFs—as these are rejected if the name of the fund or the trustee is incorrect; and

(b) the sending of proposed orders to a trustee to provide procedural fairness under section 90XZD(1) of the *Family Law Act*—again, these may be rejected.

128. The Family Law Section is aware of large funds which are inconsistent with the naming of the trustee or the fund or their referred orders. This means that orders which were approved in one matter may be knocked back a short time later in another matter.

129. Again, this problem could be addressed through the prudential standards for APRA regulated funds (non-SMSFs) under the Superannuation Industry (Supervision) Act 1993.

Other information

130. Other information which should be accessible on the websites of APRA regulated superannuation funds include:

    (a) reasons why the values of defined benefit interests may be different under the *Family Law (Superannuation) Regulations 2001* or an approved scheme specific method or value than the value on the member's statement. This could also be made available in an explanatory statement to the regulations.

    (b) up-to-date family law information. For example, one of the largest funds, Australian Super, on its website refers to "superannuation arrangements" (a term not used in the Family Law Act) rather than "superannuation agreements"; "certificate" (a term not used in the Family Law Act since before 4 January 2010 when the *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* (Cth) commenced) rather than "statement" and "decree absolute" rather than "divorce order" (which term has been used since the commencement of the relevant part of the *Family Law Amendment Act 2005* (Cth) on 3 August 2005). No context is given for the term "separation declaration". These types of errors are common across other funds, and are confusing to parties at a stressful time of their lives dealing with a complex area.

131. Again, these issues could be addressed through the prudential standards for APRA regulated funds (non-SMSFs) under the *Superannuation Industry (Supervision) Act 1993.*

Section 90XZA waiver provision

132. Section 90XZA of the Family Law Act is a provision that has utility in circumstances where a trustee of a superannuation fund wishes to bring an ongoing payment split to an end. Part of that process may be to provide a lump sum payment representing future payment splits to the non-member spouse. In these circumstances, there is no mechanism to terminate the obligation on the part of the trustee under the terms of an order to split each and every splittable payment when such a payment is made.

133. The mechanism provided under section 90XZA of the *Family Law Act 1975* is a waiver of rights to receive any future amounts as a result of a payment split.

134. It has to be recognised that given the operation of Part 7A of the *Superannuation Industry (Supervision) Regulations 1994* as well as other trustee-initiated mechanisms where the payments splitting obligations are terminated under the current Division 2.2 (to become Division 3 of Part 3 of the replacement Regulations), the utility of waiver notice is quite limited.

135. Nonetheless, section 90XZA should be retained for those rare circumstances where a trustee is not required to observe the obligations under Part 7A of the *Superannuation Industry (Supervision) Regulations 1994* and has not amended its governing rules to bring forward the clean financial break. If there is a desire on the part of the trustee to terminate the payment split and obligations by the provision of a lump sum payment to the non-member spouse, then a waiver notice would be appropriate protection for the trustee's future obligations.

Regulations 70 and 71

136. Regulations 70 and 71 do not apply to the overwhelming majority of superannuation funds. The obligations apply to any superannuation fund that has elected not to be regulated and therefore would not be eligible for taxation concessions.

137. Nonetheless, for reasons of ensuring a comprehensive reach of the splitting laws these regulations should be retained.

Successor fund transfers—methods/factors naming specific funds

138. In the current *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (made under regulations 38 and 43A of the current *Family Law (Superannuation) Regulations 2001*), particular funds may have particular methods and factors approved. This can create issues if those named funds are part of a successor fund transfer and the members are transferred to another fund. A tedious process is involved to seek approval to 'lift' those previously agreed methods and factors and have them apply to the division of the successor fund into which the affected members have been transferred. This can be a barrier to successor fund transfers and, at best, can delay the entire transaction and accordingly the benefits to be provided to the transferring members upon a successor fund transfer.

139. The Law Council submits that this issue could be dealt with either in the remade version of the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (assuming this will need to be remade under the new *Family Law (Superannuation) Regulations 2024*), or it could be dealt with under proposed sections 62 and 68 of the *Family Law (Superannuation) Regulations 2024*. It is suggested that this could be a deeming provision to allow the continued effect of a previously-approved method or factor if the fund has been transferred into another fund in a manner which has not involved altering the original benefits.

Successor fund transfers—splitting orders/agreements naming specific funds

140. Similarly in relation to successor fund transfers, the Law Council notes that Part VIIIB of the Family Law Act makes good provision for the continuation of a payment flagging order or agreement notwithstanding a successor fund transfer (refer to sections 90XUA, 90YZ, 90YZA and 90XLA), but there is silence about splitting orders or agreements which name a specific fund and the fund then effects a successor fund transfer. While this may be covered by existing section 90XZD(2), it could be made clearer.

141. Although usually a splitting order or agreement will be given effect not long after the order or agreement is made (for example by creating a separate interest for the non-member spouse or a transfer out of the base amount at the non-member spouse's direction), the Law Council points out that there are some cases where the splitting order has not been able to be effected by way of an immediate split prior to the successor fund transfer. There are a variety of circumstances in which this occurs. Parties tend to work around the issue in a practical way, but particular technical issues can arise where a defined benefit interest has not been able to be split in the predecessor fund (i.e. splitting is deferred to a future date) and the successor fund transfer causes a 'splittable payment' to be made.

142. In light of this, the Law Council suggests that it would be timely to add something into these proposed new regulations to ensure the smooth transition of splitting agreements and orders into a successor fund, perhaps utilising the language already employed in relation to flagging orders and agreements.