Australian Government

Attorney-General's Department

March 2024

Family Law (Superannuation) Regulations 2024: Consultation Paper

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About this consultation paper

The *Family Law (Superannuation) Regulations 2001* (the existing Regulations) are due to sunset on 1 April 2025. The Australian Government Attorney-General's Department (the department) has been reviewing the existing Regulations with a view to remaking them prior to their sunset. The department has released an exposure draft of the *Family Law (Superannuation) Regulations 2024* (the new Regulations) for the purpose of public consultation.

The superannuation splitting framework under the new Regulations remains substantially the same as the current framework. However, as the existing Regulations were made in 2001, drafting changes are necessary to modernise the language and ensure the provisions continue to operate effectively. The new Regulations also contain a number of changes that are intended to clarify provisions and ensure that superannuation splitting arrangements keep pace with developments in superannuation products and with broader superannuation policy.

Request for submissions

The department seeks written feedback on the changes in the exposure draft of the new Regulations, and on certain aspects of the operation of the superannuation splitting framework under the existing Regulations. Written feedback can be submitted via the department's consultation webpage at: www.consultations.ag.gov.au. You can provide responses to as many or as few questions as you like. If you do not wish to respond to particular questions, please leave the response field blank (do not write "not applicable", "N/A" or "Nil").

The deadline for submissions is **26 April 2024.**

The department will only publish your submission if you advise us to do so. When making a submission through the Consultation Hub, you can indicate if you would like your submission published, or if you would like to make an anonymous submission. Submissions must not directly or indirectly identify persons, associates of persons, or witnesses involved in family law proceedings. This means that submissions should not include details like a person's name (or the name of their children), address, workplace, or school. Section 121 of the *Family Law Act 1975* (Cth) (Family Law Act) makes it an offence, except in very limited circumstances, to publish this information.

Please do not include any photographs as part of your submission. Photographs provided as part of the submission process will not be published. Further, the department will not review or publish submissions that are larger than 25MB, or are in a file type format other than PDF or Microsoft Word file (for example, Apple Pages, or locked in a password protected PDF file).

If you advise us to publish your submission, you will be required to acknowledge and agree that you have made all reasonable efforts to:

- clearly label material in your submission where the copyright is owned by a third party, and
- ensure that the third party has consented to this material being published.

Even if you advise the department to publish your submission, the department reserves the right to leave unpublished any submission or part thereof, in particular if the department considers that:

1. Publishing a submission or part of a submission would be in breach of subsection 121(1) of the Family Law Act
2. A submission or part of a submission contains copyright material, publication of which may be in breach of the Copyright Act 1968 (Cth), or
3. A submission breaches the department's submission requirements set out, in particular, if it contains photographs, has a file size larger than 25MB, or does not comply with file type requirements.

Submissions may be subject to freedom of information requests, or requests from Parliament, which the department will consider and respond to in line with regulatory requirements.

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Background

The *Family Law Act 1975* (Family Law Act) provides for the alteration of property interests between separating couples. Parts VIIIB and VIIIC of the Family Law Act give family law courts the power to deal with the superannuation interests of these parties. Parts VIIIB and VIIIC also operate to provide the framework for:

- superannuation splitting orders, which are orders made by the court to divide, or 'split', the payments arising from superannuation interests of a person, and
- superannuation agreements, which are a type of financial agreement in which parties can agree about how superannuation is to be split on relationship breakdown.

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

The *Family Law (Superannuation) Regulations 2001* (the existing Regulations) have been prescribed to give effect to the distribution of superannuation interests under Parts VIIIB and VIIIC of the Family Law Act. Specifically, the existing Regulations support the operation of Parts VIIIB and VIIIC by prescribing:

- the methods (actuarial formulas) and factors (tables of numbers based on different mortality rates, benefit entitlements, ages of retirement) for valuing superannuation interests
- the way in which superannuation payment splits are to be put into effect, and
- the information that trustees must provide to parties to family law property proceedings, and to couples seeking to negotiate a superannuation agreement.

The superannuation splitting framework, and superannuation generally, involves a high degree of technical complexity. This paper assumes a general working knowledge of family law superannuation splitting under the Family Law Act and the existing Regulations.

Minor and technical amendments

The amendments to the existing Regulations are largely minor and technical in nature, and are intended to modernise references, ensure alignment with the Family Law Act, and provide clarity. Minor amendments throughout the new Regulations include:

- ensuring there is a clearly stated link between a provision (or group of provisions) with a head of power in the Family Law Act
- reorganising groups of provisions to make clearer how they fit together, based on their subject matter
- removing outdated references to legislation and legislative instruments that have been repealed, and

- aligning the new Regulations with current Office of Parliamentary Counsel drafting practice (for example, the use of shorter provisions and better use of reader aids like subsection headings, simplified outlines and explanatory notes).

The exposure draft Regulations have been completely renumbered, which means provision numbers in the existing Regulations do not align with those in the exposure draft Regulations. For ease of reference, a comparison table of provision numbers in the existing Regulations and the exposure draft Regulations is available for download.

Innovative retirement income stream products (IRISPs)

Innovative retirement income stream products (IRISPs) are a category of lifetime superannuation products established under regulation 1.06A of the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations). The term IRISP covers a range of lifetime products that did not meet the annuity and pension standards prior to 1 July 2017. By permitting and regulating IRISPs, the intention is to provide superannuation funds greater flexibility in the design of income stream products that are designed to ensure income is provided throughout retirement.

Benefits with respect to an IRISP may take the form of either pension or annuity payments. The SIS Regulations limit the amount that can be commuted, to ensure tax concessions continue to operate as designed with respect to IRISPs. The product provider may also contractually restrict the ability of a member to commute an IRISP further than the regulations.

The new Regulations contain amendments that form a proposed regulatory framework intended to ensure IRISPs are treated consistently with other superannuation interests for family law purposes. The new Regulations refer to a superannuation interest, or a component of a superannuation interest, that is an IRISP as an 'innovative superannuation interest'. Section 4 of the new Regulations defines an 'innovative superannuation interest' as a superannuation interest, or component of a superannuation interest, if all benefits with respect to the interest or the component of the interest are provided under:

(a) the governing rules of an eligible superannuation plan where those rules meet the standards of subregulation 1.06A(2) of the SIS Regulations; or

(b) a contract that meets the standards of subregulation 1.06A(2) of the SIS Regulations.

For an innovative superannuation interest that is not prescribed as a percentage-only interest, the new Regulations provide:

- the approach the court must take when determining the value of an innovative superannuation interest, and

- the information that trustees must provide to parties in response to a request for information under the new Regulations in relation to an innovative superannuation interest.

The regulatory approach in the new Regulations towards innovative superannuation interests that are prescribed as percentage-only interests remains the same as the existing approach to other percentage-only interests.

Types of splitting arrangements for innovative superannuation interests

Innovative superannuation interests with benefits payable as a pension

Where benefits with respect to an IRISP are payable, or are being paid, as a pension (with 'pension' defined by reference to the SIS Regulations), these can be subject to a 'base amount' split or a 'percentage' split under the Family Law Act:

- A 'base amount' split allocates an amount to the non-member spouse, and that base amount is then used to calculate the non-member spouse's entitlement in accordance with the Regulations, with a corresponding reduction in the member spouse's entitlement. Base amount splits for a superannuation interest with benefits payable as a pension may be made by agreement (sections 90XJ(1)(c)(i) or (ii) and 90YN(1)(c)(i) or (ii) of the Family Law Act) or by court order (sections 90XT(1)(a) and 90YY(1)(a) of the Family Law Act).

- A 'percentage' split entitles the non-member spouse to be paid a specified percentage of each splittable payment from the superannuation interest, with a corresponding reduction in the member spouse's entitlement. Percentage splits for superannuation interests with benefits payable as a pension may be made by agreement (sections 90XJ(1)(c)(iii) and 90YN(1)(c)(iii) of the Family Law Act) or by court order (sections 90XT(1)(b) and 90YY(1)(b) of the Family Law Act).

Innovative superannuation interests that are superannuation annuities

Some IRISPs are defined as annuities under the SIS Regulations. Superannuation annuities are prescribed as 'percentage-only interests' by section 10(1)(g) of the new Regulations (and by regulation 9A(1)(f) of the existing Regulations). A superannuation interest that is a superannuation annuity cannot be subject to a base amount split, and can only be subject to a percentage split, either by agreement (section 90XJ(1)(b) or 90YN(1)(b) of the Family Law Act) or court order (section 90XT(1)(c) or 90YY(1)(c) of the Family Law Act).

Determining the value of an innovative superannuation interest

The new Regulations do not contain 'default' methods and factors for innovative superannuation interests. This is because it would not be possible to prescribe 'default' methods and factors that could be relied upon to provide a reasonable and accurate value of a wide range of innovative superannuation interests, given the great degree of variation in the design of innovative superannuation interests.

In lieu of 'default' methods and factors, the proposed regulatory response in the new Regulations sets out how the court is to determine the value of an innovative superannuation interest where splitting orders are sought with respect to the interest.

The new Regulations:

- permit trustees of innovative superannuation interests that are **not percentage-only interests** to prepare a method or factors for the Minister's approval under paragraphs 62(1)(c) and 68(b) of the

new Regulations. These would be prescribed in the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (Approval Instrument), and

- permit the Minister, under subsections 113(2) and (3) of the new Regulations, to determine that departure from the default information requirements is necessary for an innovative superannuation interest that is **not a percentage-only interest**, where a method or factors for the interest have been approved under paragraphs 62(1)(c) or 68(b).

The new Regulations do not *require* a trustee of an innovative superannuation interest to prepare and provide a method or factors for the Minister's approval. While sections 90XT and 90YY of the Family Law Act permit the regulations to provide for the determination of an amount in relation to the interest, this does not extend to requiring trustees to provide methods or factors to the Minister for approval

This means that a court will have to determine the value of the interest by such method as it considers appropriate where no method or factors have been approved for an innovative superannuation interest, or where the innovative superannuation interest is a **percentage-only interest**. In practice, this means that if there is no approved method or factors for an innovative superannuation interest, then parties, at their own cost, will need to seek valuation of the interest by an expert, with the evidence of that valuation then put before the court as expert opinion evidence.

The existing Regulations do not explicitly prescribe 'default' valuation methods or factors or permit the Minister to approve methods or factors for innovative superannuation interests. The existing Regulations are also silent on whether the 'default' valuation methods and factors are appropriate for use in valuing innovative superannuation interests that are payable as a pension. The new Regulations make it clear that the 'default' methods and factors are not to be used to determine the value of innovative superannuation interests, which means that if a method or factors have not been approved for the interest under section 62 or section 68 of the new Regulations, the court must determine the value of the interest by such method as it considers appropriate.

As currently drafted, the new Regulations do not permit the Minister to approve valuation methods or factors for percentage-only interests. This includes percentage-only interests that are innovative superannuation interests. See **page 14** for further discussion about superannuation annuities.

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?

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?

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.

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?

Provision of information for innovative superannuation interests

Subdivisions C and D, Division 3 of Part 9

Part 9 of the new Regulations (Division 7.2 of the existing Regulations) sets out the information that a trustee must provide in response to an application by an eligible person made under section 90XZB or 90ZYR of the Family Law Act.

Subdivision C, Division 3 of Part 9 of the new Regulations (and regulation 66 of the existing Regulations) sets out the information that a trustee must provide about certain percentage-only interests. This includes innovative superannuation interests that are **percentage-only interests**.

Subdivision D, Division 3 of Part 9 of the new Regulations is a new subdivision, and sets out the information that a trustee must provide about an innovative superannuation interest that is **not a percentage-only interest**. This subdivision is modelled on subregulation 64(1), paragraphs 64(2)(aa)-(d), (e), (ea) and (f), and regulation 66 of the existing Regulations.

The information requirements set out in the above subdivisions are intended to enable an eligible person to obtain information about a superannuation interest for any of the following purposes:

- To obtain a reasonable and accurate valuation of a superannuation interest
- To assist the applicant to properly negotiate a superannuation agreement, or
- To assist the applicant in connection with the operation of Part VIIIB or VIIIC of the Family Law Act in relation to the applicant.

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?

Amendments to methods and factors to reflect current actuarial assumptions

The Australian Government Actuary (AGA) has undertaken a comprehensive review of the methods and factors in the existing Regulations and has provided expert advice on whether the existing methods and factors are fit for purpose. On the basis of this advice, the new Regulations contain several new 'default' valuation methods and factors to enable the accurate valuation of a wider range of superannuation interests and benefits, and better reflect when people are choosing to retire and how people are choosing to access their benefits.

On advice from the AGA, the existing 'default' valuation factors have also been updated to reflect current demographic and economic actuarial assumptions. The default valuation factors have not been updated since 2001.

Neither the updated 'default' valuation factors nor the new 'default' valuation factors have been included in the exposure draft of the new Regulations for the purposes of this consultation. Similarly, certain methods which would indicate the updated demographic and economic assumptions have not been published at this time. It would not be appropriate to publish these methods or the factors so far in advance of their commencement as this may influence parties' behaviour in resolving disputes about family law property division. Parties may seek to either delay or expedite the process, depending on whether they will benefit from these methods or the factors in the remade Regulations which will be used to determine the family law value of relevant superannuation interests.

Updated 'default' valuation factors

The existing Regulations contain 'default' valuation factors in Schedules 1A, 2, 4, 5, and 6, which were produced in 2001 (with the exception of Schedule 1A, which was produced in 2002). The 'default' valuation factors have been updated to reflect current actuarial assumptions, and will be set out in Schedules 2, 3, 5, 6, 7, 8 and 9 when the new Regulations are remade. This will ensure the new Regulations continue to provide an accurate and reasonable estimate of the value of a superannuation interest for family law purposes. The updated factors and associated methods which indicate the updated assumptions will be included in the new Regulations when they are made.

Use of extended age-based factors for valuation of pensions in the growth phase with a guarantee period

Section 53 and Schedule 3, Part 4

The existing Regulations do not provide a method for valuation of growth phase defined benefit interests payable as a pension where the member spouse is aged 66 years or older and still working. In recognition of the fact that many people aged 66 years and older choose to continue working, the new Regulations provide two methods for valuation of these interests. The two methods distinguish between defined benefit interests payable as a pension *without* a guarantee period, and those payable as a pension *with* a guarantee period.

Where a growth phase defined benefit interest is payable as a pension *without a guarantee period*, and where the member spouse is aged 66 years or older, the method and factors in Part 2 of Schedule 5 of the new Regulations, that apply to payment phase superannuation interests being paid as a pension, are to be used, as if the member spouse had already retired.

Where a growth phase defined benefit interest is payable as a pension *with a guarantee period*, and where the member spouse is aged 66 years or older, the new method and factors in Part 3 of Schedule 5 of the new Regulations, that apply to payment phase superannuation interests being paid as a pension with a guarantee period remaining, are to be used as if the member spouse had already retired and the prescribed guarantee period had yet to commence. This new method and factors are covered below.

Addition of methods and factors to Schedule 4 for valuation of pensions in the payment phase with a guarantee period remaining

Section 66 and Part 3 of Schedule 5

The existing Regulations do not provide for valuation of payment phase interests being paid as a pension with a guarantee period, where the full guarantee period has not yet elapsed. The new Regulations provide a 'default' method for valuing these interests. This method calculates the sum of:

- the present value of the pension payable for the remaining guarantee period (calculated by treating the pension payable within the remaining guarantee period as if it were a fixed term pension), and
- the present value of the pension payable once the guarantee period has elapsed (calculated by treating the pension payable after the guarantee period as if it were a deferred pension commencing at the expiry of the guarantee period).

The present value of the pension payable for the remaining guarantee period, calculated as if it were a fixed term pension, uses the valuation factors for fixed term pensions. These fixed term pension valuation factors are in Schedule 5 of the existing Regulations, however they will be updated in the new Regulations and set out at Schedule 7 to reflect current actuarial assumptions. The present value of the pension payable after the guarantee period, calculated as if it were a deferred pension, uses new discount and survival factors, which will be set out in Division 3 of Part 3 of Schedule 5 of the new Regulations, together with the growth phase pension and reversion valuation factors at Schedule 3 of the new Regulations. These growth phase pension

and reversion valuation factors are in the existing Regulations, however they will also be updated to reflect current actuarial assumptions.

The addition of this method will enable a wider range of superannuation interests to be valued using the 'default' methods and factors in the new Regulations.

Updated family law interest rate methodology

Subsection 74(4)

The new Regulations contain amendments to the methods that are prescribed for calculating the rate of interest to be applied in adjusting a base amount that has been allocated to the non-member spouse. These amendments bring the methods in line with current actuarial assumptions. The specific provisions that contain the new methods have not been published in the exposure draft Regulations, for the reasons explained above.

Additional valuation tables to account for different retirement ages

Part 2 of Schedule 3

Part 2 of Schedule 3 of the new Regulations provides 'default' valuation factors for interests relating to current employment, where the benefit is payable only as a lump sum. The existing Regulations only provide valuation factors for superannuation plans with a normal retirement age of 60. The new Regulations provide valuation factors for superannuation plans with normal retirement ages of 60 and 65, in recognition of the different lump sum withdrawal rates associated with different normal retirement ages.

Updated assumptions regarding the proportion of a benefit likely to be taken as a pension versus as a lump sum

Parts 5 and 8 of Schedule 3

Parts 5 and 8 of Schedule 3 of the new Regulations provide the 'default' methods for valuation of a defined benefit interest in the growth phase where the benefit is payable as a combination of a lump sum and a pension. Part 5 is for an interest that relates to current employment, and Part 8 is for an interest that relates to former employment. The assumption on which the methods are based has changed, in line with current actuarial assumptions. The specific provisions that contain the new methods have not been published in the exposure draft Regulations, for the reasons explained above.

Valuation factors for invalidity pensions

Paragraph 66(2)(b) and Schedule 6

The new Regulations contain new valuation factors for superannuation interests in the payment phase, where benefits are being paid as a lifetime pension, when the member spouse is receiving the pension due to invalidity. These new valuation factors are intended to account for the fact that members who exit the workforce due to invalidity will experience higher than average rates of mortality, and to ensure that pensions payable upon invalidity are valued as accurately as possible. The new Regulations provide valuation factors for lifetime invalidity pensions in the payment phase with 8 different levels of indexation.

No ‘default’ valuation methods or factors for fixed term and lifetime annuities

Subsection 35(3)

Section 35 of the new Regulations applies where a trustee establishes a new annuity, or transfers, rolls over or pays an amount, in satisfaction of the non-member spouse’s entitlement under a superannuation splitting agreement or order. In order to calculate the non-member spouse’s entitlement, the value of the member spouse’s annuity must be determined first. Where the non-member spouse’s entitlement arises from a *superannuation agreement*, subsection 35(3) of the new Regulations requires that the value of the member spouse’s annuity be calculated using a basis agreed upon by the parties. Where the non-member spouse’s entitlement arises from a *superannuation splitting order*, the court must determine the value of the annuity by such method as it considers appropriate.

This is a change from the existing Regulations, which prescribe ‘default’ valuation methods and factors for lifetime annuities (at existing regulation 14Q(7)(c) and Schedule 4A) and fixed term annuities (at existing regulation 14Q(7)(d) and Schedule 5A). These ‘default’ valuation methods and factors for annuities have been removed as the AGA has advised they are no longer fit for purpose, due to the increasing variation in the types of superannuation annuities available for purchase by retirees and the potential for variations in assumed mortality rates.

Commencement of the new Regulations

The new Regulations must commence on or before 1 April 2025 which is the date the existing Regulations are due to sunset. Before the new Regulations can commence, they must be made (approved by the Federal Executive Council) and then registered (published) on the Federal Register of Legislation. This can occur any time before 1 April 2025. The new Regulations can only be provided to the Federal Executive Council once they have been finalised by the department and approved by the Attorney-General. The final quarter of 2024 is the earliest that the new Regulations would be made and registered on the Federal Register of Legislation.

Once this occurs, the new and updated valuation methods and factors will be publicly available, as part of the new Regulations. As noted earlier, certain methods and all factors are not included in the exposure draft Regulations.

The new Regulations will specify when they are to commence. This could be immediately (once the new Regulations are registered on the Federal Register of Legislation), on a particular date, or after a period of time (for example, 3 months).

A commencement date has not been included in the exposure draft Regulations and the department is seeking views on any practical or administrative reasons that might necessitate a delay from when the new Regulations are registered on the Federal Register of Legislation to when they commence.

The department envisages that superannuation trustees may require time to update systems to reflect the new valuation methods and factors, once they are known. However, the amount of time provided for this purpose will need to be balanced alongside the risk that a delay in commencement may influence the

behaviour of separating parties depending on how the new valuation methods and factors might impact their particular family law property division outcomes.

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?

If so, please expand on your concerns, including what you would propose instead.

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)?

Application of the new and updated methods and factors

In circumstances where a member spouse's superannuation interest is valued using the 'default' methods and factors for the purpose of making a superannuation splitting order or agreement, the 'default' methods and factors are then used to calculate the value of a non-member spouse's entitlement once the order is given effect, or a splittable payment becomes payable.

Section 142 of the new Regulations has the effect that the new and updated 'default' methods and factors are to be used for these two purposes from the time the new Regulations commence. However, given the passage of time that may occur between the time a superannuation interest is valued and an order or agreement is made, and when it is given effect, there will be situations where an order or agreement has been made based on a valuation using the *existing* methods and factors, but the non-member's entitlement will be calculated using the *new* methods and factors (if this occurs after the commencement of the new Regulations).

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?

Please expand on your response.

Clarifying and other amendments

Definition of 'base amount'

The term 'base amount' is used throughout the existing Regulations, however the term itself is not defined. To provide greater clarity, section 3 of the new Regulations contains a definition of 'base amount' that is to be used for the purpose of the new Regulations.

The definition of 'base amount' in the new Regulations adopts the current definition of 'base amount allocated to the non-member spouse' in regulation 45 of the existing Regulations. That is, the 'base amount', in relation to a superannuation interest, means the base amount specified for the purposes of Part VIIIB or VIIIC of the Family Law Act in a superannuation agreement or flag lifting agreement (rounded up or down to the nearest dollar, with 50 cents being rounded up), or the base amount allocated to the non-member spouse by the court in a splitting order made under subsection 90XT(4) or 90YY(5) of the Family Law Act (rounded up or down to the nearest dollar, with 50 cents being rounded up).

The definition of 'base amount allocated to the non-member spouse' remains in Part 7 of the new Regulations (which substantially replicates Part 6 of the existing Regulations), as this has the effect of deeming all base amounts (even those that are 'specified' in an agreement) as being 'allocated' to the non-member spouse for the purposes of calculating their entitlement.

Question 11

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

If so, please expand on your concerns, including what you would propose instead.

Definition of 'component of a superannuation interest'

Section 4

The term 'component of a superannuation interest' is used throughout the existing Regulations, however the term itself is not defined. To provide greater clarity, section 4 contains a definition of 'component of a superannuation interest' that is to be used for the purpose of the new Regulations. This definition is intended to make clear that a component of a superannuation interest is a part of a superannuation interest, with distinct features and characteristics, which does not make up the entire superannuation interest, and from which a benefit is, or may become, payable. This definition will make clear that the way in which the benefit itself is paid, for example via a pension, is not a component of a superannuation interest.

Question 12

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

If so, please expand on your concerns, including what you would propose instead.

Conditions of release and releasing events

Sections 6 and 7

Regulations 6 and 7 of the existing Regulations outline when a superannuation interest is in the growth phase for the purpose of the Regulations. A superannuation interest is in the payment phase at a particular date for the purpose of the Regulations if it is not in the growth phase at that date.

A superannuation interest is in the growth phase if, at a particular date, the member spouse has not satisfied a 'relevant condition of release' or 'releasing event' or, if they have satisfied a relevant 'condition of release' or 'releasing event', the member has not taken particular action with respect to the benefits payable.

The relevant conditions of release in regulation 6 are defined by reference to certain items in Schedule 1 of the SIS Regulations and Schedule 2 of the *Retirement Savings Accounts Regulations 1997* (depending on the type of superannuation interest). These are:

- retirement
- death
- permanent incapacity
- attaining age 65, and
- termination of gainful employment.

The releasing events in regulation 7 reflect the relevant conditions of release in regulation 6.

Sections 6 and 7 of the new Regulations add 'terminal medical condition' to the definition of 'relevant condition of release' and 'releasing event', with the effect that if a member spouse could be granted access to their superannuation benefits by reason of them having a terminal medical condition, and has taken particular action with respect to the benefits payable on the basis of having that condition, the superannuation interest will no longer be considered to be in the growth phase.

'Terminal medical condition' is a condition of release listed in items 102A and 202A of Schedule 1 of the SIS Regulations and item 102A of the *Retirement Savings Accounts Regulations 1997,* and has a nil cashing restriction.

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?

Clarifying that a document containing information about a superannuation interest is *prima facie* evidence

Section 137 - Evidentiary Certificates

The existing Regulations contain an evidentiary certificate provision at subregulation 68B(2). This provision prescribes that a document providing information about a superannuation interest is evidence of the information it contains and of the fact that it was provided to the person to whom it is addressed. This provision is consistent with subsection 59(3) of the *Evidence Act 1995* (Cth), which provides an exception to the hearsay rule. The exception states that where regulations made under an Act provide that a document has evidentiary effect, then that document may be relied upon as evidence of the representation contained in the document. This provision (section 137) has been amended in the new Regulations to state that this evidence is *prima facie evidence* rather than conclusive evidence. This amendment is in line with Commonwealth drafting guidelines and ensures that there is an opportunity for evidence of contrary matters to be adduced.

Enabling alternative methods of communication, including via email and via an intermediary, between a trustee and a non-member spouse

Section 141

Where a superannuation interest is subject to a payment split or payment flag and payment splitting or flagging orders have been made, regulation 72 of the existing Regulations requires the non-member spouse to provide a written notice to the trustee of the superannuation plan in which the interest is held, advising of the following in relation to the non-member spouse:

- full name and postal address
- date of birth if the interest is subject to a payment split, and
- if they are a member of the same fund, their membership number.

The new Regulations (at section 141) contain amendments that are intended to facilitate safer communication between non-member spouses and superannuation trustees after a payment splitting or flagging order or agreement has been made.

The amendments:

- allow a non-member spouse to provide the trustee with either an email address or a postal address, instead of only a postal address
- allow a non-member spouse to provide a ‘care of’ postal address or email address of an intermediary (for example, a legal representative, support worker or other person), rather than their own personal email or postal address, and

- remove the requirement for the non-member spouse to provide their membership number, where they are a member of the same fund. Where the non-member spouse is a member of the same fund, the fund should be able to obtain the non-member spouse's membership number internally.

Allowing non-member spouses to designate an independent third party to serve as an intermediary for the non-member spouse will help mitigate the risk of systems abuse, protect the safety of non-member spouses, and limit the perpetuation of family violence via inappropriate access to personal details, particularly where the member spouse is both a party to the splitting agreement or orders and also the trustee of the fund that must give effect to the splitting agreement or orders (as is the case for self-managed superannuation funds).

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.

Other matters for consultation

Superannuation annuities - valuation and payment splitting

The Family Law Act provides that certain types of superannuation interests can only be split by reference to a percentage of future payments. These types of superannuation interests are called 'percentage-only interests'. Regulations 9A and 9B of the existing Regulations (and sections 10 and 11 of the new Regulations) prescribe superannuation annuities and a number of state judicial pension schemes as percentage-only interests.

The existing Regulations do not provide 'default' valuation methods and factors for percentage-only interests, including superannuation annuities (except for fixed term and lifetime annuities in certain circumstances under existing regulation 14(Q), which have been removed from the new Regulations). Nor do they provide a power for the Minister to approve valuation methods and factors for percentage-only interests. There are no changes to this approach in the new Regulations.

The preferred policy outcome is for superannuation interests to be actuarially valued for the purpose of family law property division, and for parties to have the option of either a percentage split or a base amount split, wherever possible. The department therefore seeks stakeholder views about how superannuation annuities should be treated in the new Regulations, specifically how they should be valued and whether they should continue to be split only by reference to a percentage of future payments (or whether they should also be capable of being subject to base amount 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.

Unsplittable interests

Section 14

Existing regulation 11 prescribes certain types of superannuation interests as 'unsplittable interests' for the purpose of sections 90XD and 90YD of the Family Law Act. These are interests which cannot be split by an agreement or court order. Currently, the Regulations exempts a superannuation interest in the scheme provided under the *Judges' Pensions Act 1968*, the *Judges' Pensions Act 1971* (SA), and the *Parliamentary Contributory Superannuation Act 1948,* from being considered an unsplittable interest. The only substantive change between section 14 in the new Regulations and regulation 11 in the existing Regulations is that a superannuation interest in the Judges' Pensions Act Scheme is no longer exempted from being an unsplittable interest.

Subsection 14(2) of the new Regulations provides that a superannuation interest of a member spouse is an unsplittable interest if the whole or remaining part of the benefits are being paid to the member spouse as a lifetime pension or fixed-term pension that the member is no longer entitled to commute, or a lifetime annuity or fixed-term annuity, and the amount of the annual benefit payable to the member is less than $2,000. Subsection 14(3) provides that, a superannuation interest of a member spouse is an unsplittable interest if the superannuation is not an interest with respect to which the whole or remaining part of the benefits are being paid to the member spouse as a lifetime pension or fixed-term pension that the member is no longer entitled to commute, or a lifetime annuity or fixed-term annuity, and the withdrawal benefit in relation to the member spouse is less than $5,000. This recognises that splitting superannuation of little or no value is not cost effective for the parties and may be administratively burdensome for superannuation trustees to implement.

Noting the increasing variety of retirement income products being offered, for example innovative retirement income stream products, the department seeks stakeholders' views on whether existing regulation 11 remains fit for purpose.

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.

Payments of a particular character that are not splittable payments

Section 16

Not all payments to a member spouse with respect to their superannuation interest are 'splittable payments'. A payment is not a 'splittable payment' if it meets any of the requirements prescribed in the Regulations for the purposes of subsections 90XE(2) or 90YG(2) of the Family Law Act. Existing regulation 12 sets out the types of payments to a member spouse that are not 'splittable payments'. These categories are located in subsection 16(2) of the new Regulations.

Paragraph 16(2)(c)

Paragraph 16(2)(c) reflects paragraph 12(1)(c) of the existing Regulations. Paragraph 16(2)(c) provides that a pension payment to the member spouse that is paid on the basis of temporary incapacity (within the meaning of regulation 6.01 of the SIS Regulations) is not a splittable payment unless:

- it has been paid for more than 2 years
- it is a particular pension payment with respect to a superannuation interest in the superannuation scheme continued in existence by the *Superannuation (State Public Sector) Act 1990* (Qld), also known as the Australian Retirement Trust; or
- it is a payment from a lifetime pension.

The policy rationale for paragraph 16(2)(c) is that temporary payments for illness or incapacity that are paid from a pension (within the meaning of section 10 of the SIS Act) should not be regarded as superannuation available to be split with a former spouse unless those payments have been made for at least two years, whereas long-term pension payments should be splittable immediately.

The department seeks to better understand the current application of this provision to superannuation products and whether the two-year period for such payments to not be splittable payments remains appropriate.

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?

If so, please expand on what your concerns are.

Question 22

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

If so, please expand on what your concerns are.

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?

Ensuring approved methods and factors are based on current actuarial assumptions

Under the Family Law Act and the existing Regulations, there are three ways a superannuation interest can be valued:

- using default methods and factors prescribed in the existing Regulations (see Part 5, Family Law (Superannuation) Regulations 2001)
- using methods or factors approved by the Minister specifically for certain superannuation interests (contained in the *Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003* (the Approval Instrument)), or
- by such method as the court considers appropriate (per paragraphs 90XT(2)(b) and 90YY(2)(b) of the Family Law Act) (this occurs where the Regulations do not provide for valuation of a particular interest, and where no methods or factors have been approved for the interest by the Minister).

There are currently 38 superannuation plans with methods and factors that have been approved by the Minister.

As part of the process for remaking the existing Regulations, the department has reviewed and updated the 'default' methods and factors (see page 11 for more information). These methods and factors have not been updated since 2001. Once the Regulations are remade, the 'default' methods and factors will be reviewed every 10 years in line with the Australian Government's sunsetting framework, which provides for the automatic repeal of legislative instruments after a 10 year period. This will ensure the 'default' methods and factors are regularly reviewed and kept up to date as needed.

Under the existing Regulations, there is no framework for regularly reviewing approved methods and factors in the Approval Instrument, or the information determinations made under regulations 63, 64 or 64A. Most approved methods and factors were made prior to 2005, and none of these have been substantively updated since they were approved. The Australian Government's position is that the approved methods and factors should be based on current actuarial assumptions, in order to produce accurate and reasonable estimates of value.

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?

Treatment of allocated pensions and market linked pensions

Sections 90 and 94

Sections 90 and 94 of the new Regulations (and regulations 58A and 58E of the existing Regulations) set out how the non-member spouse's entitlement is to be calculated where a superannuation interest is in the payment phase at the date of service of an agreement or the date of the splitting order, and the benefits payable with respect to the superannuation interest are being paid as an allocated pension or a market linked pension. Section 90 applies where the payment split is the *first payment split* for that superannuation interest. Section 94 applies if the payment split is a *second or later payment split* for a splittable payment for the superannuation interest.

Part 7A of the *Superannuation (Industry) Supervision Regulations 1994* (SIS Regulations) requires trustees to take certain steps where benefits with respect to a superannuation interest are being paid as an allocated pension, an account-based pension, or a market linked pension, and where payment splitting arrangements apply to that interest. The steps set out in Part 7A require a trustee to create a new interest for the non-member spouse, or pay the non-member spouse an amount (where they have already reached a condition of release) in satisfaction of a payment splitting order or agreement.

The department seeks views on whether existing regulations 58A and 58E are currently being used to calculate the value of a non-member spouse's interest where the benefits are being paid as an allocated or market linked pension, or whether the SIS Regulations are more commonly relied upon for this purpose.

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.

Calculating the non-member spouse's entitlement for certain superannuation interests

Part 7

Part 6 of the existing Regulations provides for the calculation of the non-member spouse's entitlement when a splittable payment becomes payable with respect to certain types of superannuation interests. Part 6 is replicated in the new Regulations (at Part 7) with only minor technical changes made to increase clarity. The department seeks views on whether Part 7of the new Regulations is fit for purpose.

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).

Reviewing the current information requirements under the Regulations

Part 9

Provisions under Part 7 of the existing Regulations mandate specific information that must be provided when an eligible person makes an application for information about a superannuation interest under sections 90XZB and 90YZR of the Family Law Act. The application must be accompanied by a declaration that the applicant requires the information to assist them for either of both of the following purposes:

- in order to properly negotiate a superannuation agreement,

- in connection with the operation of Part VIIIB or Part VIIIC of the Family Law Act.

- Part 7 is replicated in the new Regulations (at Part 9) with only minor technical changes made to increase clarity, and with amendments that relate to innovative retirement income stream products (see page 26 of this consultation paper).

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?

Reviewing the current penalty framework in the Regulations

Sections 139 and 140

The Family Law Act delegates the power for the existing Regulations to include penalty provisions in relation to two provisions as follows:

- Regulation 70 – requires certain trustees to provide specific information to a non-member spouse after the trustee has been served with an agreement or order to split a superannuation interest.

- Regulation 71 – requires certain trustees to provide specific information to a non-member spouse at the end of each financial year.

There are similar provisions requiring trustees of regulated superannuation schemes to provide specific information to a non-member spouse following a superannuation split within the *Superannuation Industry (Supervision) Regulations 1994*.

Currently, there is no penalty provision associated with Regulation 70. However, non-compliance with Regulation 71 within a 6-month period after the end of a financial year attracts 1 penalty unit.

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.

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

The valuation factors in both the existing and new Regulations are based on a person being 'male' or 'female'. Neither the existing Regulations, nor the new Regulations, provide guidance or prescribe approaches for 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.

The department is seeking views on this.

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?

If so, what should the new Regulations provide or prescribe?

Please provide any other relevant comments or observations.

Other issues not covered in this consultation paper

Question 35

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