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SUBMISSION

Submission to Attorney-General's Department—Exposure draft: Family Law (Superannuation) Regulations 2024

26 April 2024

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Attorney-General's Department

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Via email: FLSregulations@ag.gov.au

26 April 2024

Dear Sir/Madam

Exposure draft: Family Law (Superannuation) Regulations 2024

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the Department's consultation on exposure draft *Family Law (Superannuation) Regulations 2024*.

If you have any queries or comments in relation to our submission, please contact Julia Stannard, Senior Policy Advisor, on (02) 8079 0819 or by email JStannard@superannuation.asn.au.

Yours sincerely

James Koval

Head of Policy and Advocacy

General comments and executive summary

ASFA has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

ASFA has a keen focus on matters that impact the outcomes achieved by individuals through the superannuation system, their experiences with the system, and issues that impede the industry's operational effectiveness.

We welcome the review and update to the regulations supporting the family law superannuation splitting regime. The existing regulations have been in place for over 20 years – a period during which there has been considerable evolution in the superannuation environment, including the types of superannuation interests provided to fund members. It is appropriate that the Family Law Superannuation Regulations (FLS Regulations) are updated to reflect this evolution.

ASFA notes that while the Consultation Paper indicates that updated and new 'default' valuation factors and methods will be prescribed for a range of superannuation interest types, these have not been included in the draft new FLS Regulations released for consultation.

We acknowledge the concern that publishing the new and updated methods and factors so far in advance of their commencement may influence parties' behaviour, and it is possible that parties may seek to either delay or expedite their settlement depending on whether the methods and factors in the existing or new FLS Regulations provide them with a more favourable outcome. However, the absence of any detail regarding the new default factors and methods makes it extremely difficult for funds to provide meaningful feedback on their appropriateness. It also means funds are unable to assess their suitability for their particular product offerings and determine whether they can be adopted or if the fund will need to apply to the Minister for approved factors and methods. Finally, it creates a risk that there will be insufficient time to implement the changes in a measured way, if the new FLS Regulations are published close to their commencement date.

ASFA has requested that the Attorney-General's Department considers allowing impacted superannuation funds to obtain detail about the proposed new and updated methods and factors under a confidentiality agreement, and we encourage the Department to provide such access if possible.

In terms of an appropriate commencement date for the new FLS Regulations, ASFA is strongly of the view this should be no earlier than 1 April 2025, noting that the Department does not expect to publish the final version of the Regulations in the final quarter of 2024, at the earliest.

Comments addressing specific consultation questions

Innovative retirement income stream products

Valuation of innovative superannuation interests – consultation questions 1-4

ASFA notes that not all 'innovative' products are in the 'retirement phase' (that is, the draw down phase). We request clarification on whether deferred pensions and annuities and other innovative products that are not in the 'retirement phase' will be assessed in the same way.

As noted in the Consultation Paper, the draft new FLS Regulations do not contain 'default' methods and factors for innovative superannuation interest, as the variation in the design of these interests means it would be difficult to settle on 'default' methods and factors that would provide a reasonable and accurate value across a wide range of interests. Instead, the draft new FLS Regulations set out how the court is to determine the value an innovative superannuation interest when splitting orders are sought, and permit – but not require – the trustee to prepare a method or factors for the Minister's approval (except in the case of percentage-only interests).

The Consultation Paper questions whether there should be a requirement for the trustee of an innovative superannuation interest to prepare and provide a method or factors for the Minister's approval.

ASFA supports the permissive approach currently adopted in the draft new FLS Regulations. Given the degree of variation in innovative superannuation interests, flexibility is needed. It is important that fund trustees are able to assess, based on the particular product design and the member demographic for that product, whether applying for a Minister approved method and/or factors is in members' best interests.

Where there is a method and/or factors approved by the Minister that applies to a particular innovative superannuation interest, the valuation of that interest derived under that method/factors will apply to the exclusion of any value calculated under any other available method and/or factors. It is not necessarily the case that, for all innovative superannuation interests, a Minister approved method and/or factors would automatically be more beneficial for the holders of the innovative superannuation interest – trustees may need to consider how the valuation derived under a Minister approved method and/or factors for a particular innovative superannuation interest would compare to one produced under regulation 1.06B of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations).

A value derived for family law purposes may also have taxation implications. Treasury is currently consulting on amendments to the *Income Tax Assessment (1997 Act) Regulations 2021*, to support the proposed Better Targeted Superannuation Concessions reforms (draft BTSC regulations). Under the draft BTSC Regulations, for retirement phase interests the 'family law value' will be the value reported at financial year end for a range of measures. For innovative superannuation interests that are not in the retirement phase, the family law value would also be the value used for the purposes of an individual's total superannuation balance. If the interest does not have a 'family law value', the valuation adopted for tax purposes will be the maximum commutation amount determined under paragraph 1.06B(1)(c) of the SIS Regulations.

We note that many trustees have, under the existing regulations, obtained Minister's approval of methods or factors where those trustees have assessed that to be appropriate given the nature of the particular type of superannuation interest.

In the event that a requirement to prepare methods or factors for the Minister's approval is included in the final version of the new FLS Regulations, we request that a clear and documented process is put in place.

Amendments to methods and factors to reflect current actuarial assumptions

The new methods and factors – consultation question 8

ASFA's overriding concern relates to the lack of substantial detail included in the draft new FLS Regulations in relation to the proposed new methods or factors. The language of the Consultation Paper suggests the differences between the existing and updated methods and factors may be significant, however the absence of detail makes it difficult to comment meaningfully on whether they are appropriate.

Further, without the ability to consider the proposed new methods and factors, it is not possible for funds to assess whether they are suitable for their particular product or whether the fund will need to apply to the Minister for an approved method and factors.

If it is proposed that the new and updated factors are more granular in detail than those in the existing FLS Regulations, this will clearly have operational implications for funds. In particular, we note that the explanatory material to the draft BTSC Regulations makes it clear that some valuations for the purposes of determining total superannuation balance values will adopt the 'family law method' prescribed in the FLS Regulations, noting that these are currently under review by the Attorney-General's Department. If the factors outlined in the draft BTSC Regulations are indicative of the level of granularity that might be included in the new FLS Regulations, this will represent a substantial change to current practices for defined benefit funds and will require significant modification to the administration systems of those funds.

Commencement of the new Regulations – consultation question 9

ASFA is strongly of the view that once finalised, the new FLS Regulations should commence no earlier than 1 April 2025.

Considerable lead-time will be needed for funds and their administrators to update systems and processes, and this cannot commence until there is some certainty as to the final content of the Regulations – a matter that is particularly relevant given the exposure draft omits significant detail around new and updated default methods and factors.

We note that the industry would typically require 12 months to implement changes of this magnitude in a measured manner allowing for completion of implementation and testing. Instead, the industry may – depending on when in the final quarter of 2024 the Regulations are finalised – have only three to six months to implement these changes.

Transition issues – consultation question 10

Where a member and non-member spouse have executed a splitting agreement or obtained a splitting order, they will, understandably, presume those agreements or orders to be final.

Whatever date is set for commencement of the new FLS Regulations, it is inevitable that trustees will receive, after commencement, splitting orders or agreements where the superannuation interest has been valued using the existing methods and factors.

It is, in ASFA's view, imperative that the FLS Regulations clearly sets out what is to occur in these cases – that is, that the trustee is *required* to recalculate the non-member spouse's entitlement using the new methods and factors. Regrettably, if there any variance in the valuations under the existing and new factors and methods – even a small variance – the revaluation by the trustee will likely be subject to challenge by the parties. It is important to ensure that fund trustees are not drawn into disputes as a result of complying with the new regulatory requirements.

In addition, we strongly recommend that the Attorney-General's Department develops and publishes a factsheet or similar explanatory material to help the member and non-member spouse understand why the entitlement of the non-member spouse has been recalculated using the new methods or factors.

Clarifying and other amendments

Enabling alternative communication methods – consultation question 15

The proposed amendments in section 141 would allow a non-member spouse to provide the trustee with *either* an email address or a postal address, instead of only a postal address. While we understand that in some cases a non-member spouse may have reservations about providing their address, this is data that the trustee may be required to obtain and provide under other regulatory requirements – for example, on ATO prescribed forms and/or reporting, such as the Rollover Benefit Statement.

Another aspect to the proposed amendments would remove the requirement for the non-member spouse to provide their membership number, where they are a member of the same fund. The Consultation Paper notes that in such cases, the trustee should be able to obtain the non-member spouse's membership number internally.

While this proposal may be unproblematic for smaller funds, such as self-managed superannuation funds (SMSFs), ASFA considers this amendment is not without risk for larger funds. Given the very large membership of many superannuation funds, there may be more than one member with the same name as the non-member spouse, or a very similar name. For example, the fund may have as members a Susan Smith, a Susan J Smith, a Sue Smith and a Sue J Smith. In practice, ASFA members have encountered situations where they have had members with identical names and even identical dates of birth.

Where the non-member spouse's membership number is provided, this is a simple crosscheck that enables the fund to easily and quickly match the non-member spouse to the correct account. Without the membership number, it may be necessary for the fund to seek further information in order to verify they have identified the correct account for the non-member spouse. ASFA recommends the requirement for the non-member spouse to provide their membership number in the fund is retained, or that its removal is limited to cases where the superannuation interest is held in an SMSF.

Other matters for consultation

Payments of a particular character that are not splittable payments – consultation questions 20-23

It is our understanding that some funds do offer products that fall under paragraph 12(1)(c)(i) of the existing Regulations – for example, benefits payable for five years and benefits payable through to age 65.

We note that subparagraph 16(2)(c)(ii) in the proposed new regulations refers to 'subsection (ea)'. While the comparable provision in the existing regulations, sub-regulation 12(1), did contain a subsection (ea), it appears the correct cross-reference for the new regulations is to subsection (g).

Ensuring approved methods and factors are based on current actuarial assumptions – consultation questions 24-25

ASFA members have advised that there is currently no clear process to apply for or update approved methods and factors. This represents a practical – and easily resolved – barrier to maintaining the approvals but may help to explain why the existing approved methods and factors have not been substantively updated since their initial approval.

Approvals may need updating for a range of reasons – for example, because a fund's name has changed, a set of factors has ceased to be relevant and can be removed, or a fund has closed or merged into another.

Member funds have reported significant difficulty locating an appropriate contact point within the Attorney-General's Department to discuss updating of existing approvals.

We recommend that the approvals are reviewed on a regular basis. We suggest this could be conducted as part of the wider review of the Regulations as each sunset date approaches – that is, every 10 years. To supplement this, the Department should publish on its website a clear contact point funds can use to advise when an update to an approval is required during this 10-year cycle.

We note that funds will typically need substantial actuarial support to prepare updated methods and factors and, once finalised, these need to be programmed into administration systems. Depending on the scope of the changes, this process may require up to 12 months.

Treatment of allocated pensions and market linked pensions – consultation questions 26-27

The Consultation Paper queries whether the provisions in Part 7A of the SIS Regulations, or existing regulations 58A and 58E are more commonly relied upon to calculate the value of the non-member spouse's interest where the benefits are being paid as an allocated or market linked pension.

It is ASFA's understanding that the provisions in the SIS Regulations are more commonly relied upon in practice, and we recommend that these provisions are retained.

Issues in relation to changes of sex or gender – consultation question 34

ASFA members indicate that issues in relation to changes of sex and/or gender are not frequently encountered in practice.

While guidance on these matters would be beneficial, we do not consider it necessary for this to be reflected in the Regulations. Further, we note that it important that any guidance that might be published by the Attorney-General's Department does not conflict with existing guidance issued by other government agencies.

For example, Services Australia has previously provided guidance for superannuation funds seeking to determine the 'relevant number' for a superannuation income stream for social security for an individual who identifies as non-binary or where the individual's sex assigned at birth is indeterminate. We understand that Services Australia may be intending to include additional detail on these matters when it next updates its Social Security Guide (https://guides.dss.gov.au/social-security-guide).

We suggest that the Attorney-General's Department liaises with Services Australia to assess whether existing or proposed Services Australia guidance in relation to issues of sex and gender is appropriate for family law superannuation splitting purposes and could be adopted rather than replicated by the Department. This would streamline the process for funds and also avoid the risk that inconsistencies may be inadvertently introduced.