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No. 115 2002–03

Superannuation Legislation Amendment (Family Law) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 115 2002–03

Superannuation Legislation Amendment (Family Law) Bill
2002

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Economics, Commerce & Industrial Relations and the Law & Bills
Digest Groups
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Contents

Purpose	1
Background	2
The Military Schemes	2
The Civilian Schemes	3
Main Provisions	4
The <i>Defence Act 1903</i>	5
The <i>Defence Force Retirement and Death Benefits Act 1973</i>	5
The <i>Defence Force Retirement Benefits Act 1948</i>	7
The <i>Military Superannuation and Benefits Act 1991</i>	8
<i>Superannuation Act 1922</i>	9
<i>Superannuation Act 1976</i>	10
<i>Superannuation Act 1990</i>	14
Concluding Comments	15
Endnotes	16

Superannuation Legislation Amendment (Family Law) Bill 2002

Date Introduced: 12 December 2002

House: House of Representatives

Portfolio: Finance and Administration

Commencement: Clauses 1 to 4 commence on Royal Assent while the amendments in Schedule 1 commence on the 14th day after Royal Assent.

Purpose

The purpose of the Superannuation Legislation Amendment (Family Law) Bill 2002 (the SLA(FL) Bill) is to make amendments to seven Acts governing the superannuation schemes provided by the Commonwealth for the benefit of its civilian employees and military personnel. The proposed amendments to these Acts are a consequence of the changes made by the *Family Law Legislation Amendment (Superannuation) Act 2001* (the FLA(S)A) to the *Family Law Act 1975* (the FLA). The acts to be amended by the SLA(FL) Bill are:

- the *Defence Act 1903* (the Defence Act)
- the *Defence Force Retirement and Death Benefits Act 1973* (the DFRDB Act)
- the *Defence Forces Retirement Benefits Act 1948* (the DFRB Act)
- the *Military Superannuation and Benefits Act 1991* (the MSB Act)
- the *Superannuation Act 1922* (the 1922 Act)
- the *Superannuation Act 1976* (the 1976 Act), and
- the *Superannuation Act 1990* (the 1990 Act).

The amendments made by the FLA(S)A to the FLA, along with the regulations made under the FLA, which relate to the FLA(S)A amendments, provide the mechanisms under which the Family Court can split a person's superannuation benefit as part of a divorce settlement between a member and their spouse. The proposed amendments in the SLA(FL) Bill provide:

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a framework within the relevant scheme for dealing with an agreement made by separating parties or a Family Court order that provides in the context of an overall property settlement for an amount of the member's superannuation to be allocated and paid to the member's former spouse.¹

Background

Prior to the amendments made by the FLA(S)A to the FLA the issue of allocating superannuation interests as a part of divorce settlements had been cumbersome and often resulted in the unequitable distribution of current assets and long term assets. This was due to the superannuation benefit being treated as a financial resource and not property. It usually left one person, usually the husband, with the superannuation benefit and no house and the other person, usually the wife, with the house and no superannuation benefit.

The enactment of the FLA(S)A allows the Family Court to make orders that split a superannuation benefit or flag a benefit for future distribution to an ex-spouse of a member. The amendments by the FLA(S)A to the FLA along with the Family Law (Superannuation) Regulations 2001 (the FL(S)R) commenced on 28 December 2002. On Friday, 7 February 2003 the Australian Financial Review reported that, what it believed was the first Family Court case involving a splitting arrangement under the amendments to the FLA, occurred in Sydney earlier in that week.²

Section 90MB of the FLA states that the provisions in Part VIIIIB of the FLA override any other Commonwealth, State or Territory law and superannuation fund trust deeds where there is a conflict between them and Part VIIIIB of the FLA. To protect trustees from lawsuits for a breach of a superannuation fund's governing rules and to ensure there is no conflict between the governing rules and the provisions in Part VIIIIB of the FLA, trustees generally amend a superannuation fund's governing rules to reflect the changes to legislation such as those implemented by the FLA(S)A. For most superannuation funds the governing rules are their trust deed. However, in the case of superannuation funds or schemes established under legislation the governing rules of the superannuation fund or scheme are the Act and, if a trust deed also exists, the associated trust deed.

In this context the Federal Government needs to make amendments to various Acts that relate to the superannuation schemes it runs for its civilian employees and military personnel to meet the requirements imposed by the amendments to the FLA and the FL(S)R. Hence the need for this Bill.

The Military Schemes

Superannuation benefits for current and former military personnel are covered by:

- the Defence Act (provides the conditions of service for Australia's Defence Forces)

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- the DFRB Act (established the Defence Force Retirement Benefit Scheme (the DFRB Scheme))
- the DFRDB Act (established the Defence Force Retirement and Death Benefits Scheme (the DFRDB Scheme)), and
- the MSB Act (established the Military Superannuation and Benefits Scheme (the MSB Scheme)).

The DFRB Act established the DFRB Scheme in 1948. The DFRB Scheme was closed to new contributors on 30 September 1972. However, it still provides benefits to members who had ceased contributing to the scheme before 1 October 1972 and reversionary benefits to their spouses.³

For Australia's military personnel there are two superannuation schemes which can accept contributions on their behalf. They are:

- the DFRDB Scheme, and
- the MSB Scheme

The DFRDB Act established the DFRDB Scheme with effect from 1 October 1972 and replaced the DFRB Scheme as the superannuation scheme to which military personnel were required to contribute. Those personnel still contributing to the DFRB Scheme on 30 September 1972 were compulsorily transferred to the DFRDB Scheme.⁴ In 1988 the Defence Act was amended to allow contributions that satisfied the *Superannuation (Productivity Benefit) Act 1988* to be made to the DFRDB Scheme.

The MSB Act established the MSB Scheme on 1 October 1991. The DFRDB Scheme was closed to new members following the establishment of the MSB Scheme. Since 1 October 1991, all new members of the Australian Defence Forces are required to contribute to the MSB Scheme. Unlike in 1972 members of the DFRDB scheme were not compulsorily transferred to the MSB Scheme. DFRDB Scheme members had until 1 October 1992 to decide if they wanted to transfer to the MSB Scheme or remain in the DFRDB Scheme.⁵

The Civilian Schemes

Superannuation benefits for most current and former employees of the Federal Government are covered by:

- the 1922 Act (established the 1922 Superannuation Scheme (the 1922 Scheme))
- the 1976 Act (established Commonwealth Superannuation Scheme (the CSS)), and
- the 1990 Act (established the Public Sector Superannuation Scheme (the PSS)).

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The 1922 Act established the 1922 Scheme. It was closed to new contributors on 1 July 1976.⁶ However, it still provides for the payment of benefits that were payable on 1 July 1976, deferred benefit entitlements and any reversionary benefits that become payable.⁷

For most employees of the Federal Government there are two superannuation schemes which can accept contributions on their behalf. They are:

- the CSS, and
- the PSS.

The 1976 Act established the CSS, which came into operation on 1 July 1976. From 1 July 1976 the CSS replaced the 1922 Scheme as the superannuation scheme to which Federal Government employees were required to contribute. Those employees still contributing to the 1922 Fund on 30 June 1976 were compulsorily transferred to the CSS.⁸

The 1990 Act established the PSS, which came into operation on 1 July 1990. The CSS was closed to new members following the establishment of the PSS. Since 1 July 1990, most new employees of the Federal Government are required to contribute to the PSS. Unlike in 1976 members of the CSS were not compulsorily transferred to the PSS.⁹

Main Provisions

Clause 4 limits the application of the proposed amendments to splitting orders or arrangements made under the FLA until after the commencement of Schedule 1, or where a splitting order or arrangement was made under the FLA prior to the commencement of Schedule 1 but no benefit was payable before commencement.

Schedule 1 of the SLA(FL) Bill proposes amendments to seven Acts. They are:

- the Defence Act
- the DFRDB Act
- the DFRB Act
- the MSB Act
- the 1922 Act
- the 1976 Act, and
- the 1990 Act.

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The Defence Act 1903

Item 1 inserts into section 52 of the Defence Act provisions that allow for the making of determinations to reduce a member's benefit to meet the requirements in the FLA. **Proposed subsection 52(5)** permits the Minister to make a determination to reduce a person's superannuation benefit where that person is entitled to a benefit under the MSB Act and they meet the circumstances in **proposed subparagraph 5A(1)(b)(i)** of the MSB Act. **Proposed subparagraph 5A(1)(b)(i)** will be inserted into the MSB Act by **item 9** of this Bill. It will allow the Minister to make amendments to the trust deed so that a separate benefit can be provided to a non-member spouse by the MSB Scheme, as a result of a splitting arrangement or order received in respect of a DFRDB Scheme member. (The rest of the proposed amendment in **item 9** will be discussed in the section 'The *Military Superannuation and Benefits Act 1991*'.)

Subsection 52(3A) of the Defence Act does not allow the Minister to make a determination where it would result in the Commonwealth being left with an individual superannuation guarantee shortfall under the *Superannuation Guarantee (Administration) Act 1992* (the SGAA). **Proposed subsection 52(6)** requires that any reduction made under **proposed subsection 52(5)** be disregarded when applying subsection 52(3A). When determining if an individual superannuation guarantee shortfall exists the amount that a member's benefit is reduced by under subsection 52(5) is effectively added back for the purpose of determining compliance with the SGAA.

The Defence Force Retirement and Death Benefits Act 1973

Item 2 inserts into section 6C of the DFRDB Act a provision to prevent a member's superannuation surcharge amount from being reduced as a result of a splitting order or arrangement received by the Board. **Proposed subsection 6C(4)** requires that any reduction made under **proposed Part VIA** of the DFRDB Act be disregarded when applying subsection 6C(3). Therefore, the amount of superannuation surcharge deduction that will apply to a member's benefit will not be reduced as a result of a splitting order or arrangement.

Item 3 inserts a new part into the DFRDB Act, Part VIA—Family law superannuation splitting. The **proposed Part VIA** of the DFRDB Act provides a mechanism for the splitting of a member's superannuation benefit in accordance with an order or arrangement under Part VIII B of the FLA. The **proposed Division 1** of the new Part includes only one section, **proposed section 49A**, which provides preliminary information on the operation of the **proposed Part VIA** of the DFRDB Act. **Proposed section 49A** inserts a number of definitions that are relevant to provisions included in the **proposed Part VIA** of the DFRDB Act. Most of the definitions either cross reference to other sections in the **proposed Part VIA** of the DFRDB Act, to Part VIII B of the FLA or regulations made in accordance with the FLA.

Proposed Division 2 inserts two new sections that relate to the provision of benefits for a non-member spouse. **Proposed section 49B** creates an associate pension when the Board

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receives a splitting order or arrangement in relation to a member receiving a standard pension benefit under the DFRDB Act. If the benefit being split meets the conditions in **proposed subsection 49B(1)** the Board creates an associate pension for the non-member spouse. The associate pension is then paid to the non-member spouse under the rules of the DFRDB Scheme. However, if the benefit being split is a child or orphan pension under the DFRDB Act **proposed section 49B** does not allow the creation of an associate pension for the non-member spouse.

For the purpose of the **proposed Part VIA** of the DFRDB Act a standard pension in the DFRDB Scheme is:

- retirement pay
- an invalidity benefit
- a spouse pension, or
- an associate pension.

A note to the **proposed section 49B** highlights that if a standard pension is not payable to a member at the time the splitting order or arrangement becomes operative then the non-member spouse will be entitled to benefits under the MSB Act.

Proposed section 49C permits a non-member spouse to have an associate pension commuted into a lump sum amount provided the annual rate of the associate pension is less than an amount determined under an Order by the Minister in accordance with **proposed section 49F**. Where a non-member spouse is eligible to commute their associate pension they have three months from the time they become eligible to receive the associate pension to elect to have the amount commuted into a lump sum amount. The election is made to the Chairman of the Defence Forces Retirement and Death Benefits Authority (the Chairman of the DFRDB Authority).

The **proposed Division 3** inserts two new sections that relate to the reduction of a member's benefit. **Proposed section 49D** requires that if the splitting order or arrangement is in operation before the standard pension is payable to the member, i.e. the member's benefit is still in the growth phase, then the annual rate of the pension will be reduced when the pension becomes payable by the amount calculated under an Order made by the Minister in accordance with **proposed section 49F**. The proposed amendment also requires that the reduction in the annual rate of the pension is to be disregarded when calculating the amount of a pension that is not a standard pension that may later become payable. An example provided is a where a pension under section 42 of the DFRDB Act becomes payable to a child following the death of the member.

If the standard pension is already payable at the time that the splitting order or arrangement comes into operation then **proposed section 49E** requires that the annual rate of the pension will be reduced by the amount calculated under an Order by the Minister in

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accordance with **proposed section 49F**. The proposed amendment also requires that the reduction in the annual rate of the pension is to be disregarded when calculating the amount of a pension that is not a standard pension that may later become payable. An example provided is a where a pension under section 42 of the DFRDB Act becomes payable to a child following the death of the member.

Proposed Division 4 inserts one section **proposed section 49F**, which allows the Minister to make Orders in relation to the application of **proposed Part VIA** of the DFRDB Act. Orders made under **proposed section 49F** are disallowable instruments under section 46A of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) and are taken to be statutory rules for the purposes of the *Statutory Rules Publications Act 1903* (the Statutory Rules Publication Act).

The Defence Force Retirement Benefits Act 1948

Item 4 inserts a new subsection into section 57 of the DFRB Act. Section 57 of the DFRB Act prescribes the circumstances of where and how a widow or child of a male pensioner receives a pension on the death of the male pensioner, i.e. the application of a reversionary benefit. **Proposed subsection 57(1AA)** excludes from the definition of a male pensioner for section 57 a male who is in receipt of an associate pension under the **proposed Part VIA** for the DRRB Act.

Item 5 inserts **proposed subsection 58(3)** into the DFRB Act. It excludes the recipient of an associate pension under the **proposed Part VIA** for the DFRB Act as meeting the definition of a pensioner for the purpose of paying a pension benefit to an orphan under section 58 of the DFRB Act.

Item 6 inserts a new part into the DFRB Act, Part VIA—Family law superannuation splitting. The **proposed Part VIA** of the DFRB Act provides a mechanism for the splitting of a member's superannuation benefit in accordance with an order or arrangement under Part VIIIB of the FLA. The **proposed Division 1** of the new part includes only one section, **proposed section 80A**, which provides preliminary information on the operation of the **proposed Part VIA** of the DFRB Act. **Proposed section 80A** inserts a number of definitions that are relevant to provisions included in the **proposed Part VIA** of the DFRB Act. Most of the definitions either cross reference to other sections in the **proposed Part VIA** of the DFRB Act, to Part VIIIB of the FLA or regulations made in accordance with the FLA.

Proposed Division 2 inserts two new sections that relate to the provision of benefits for a non-member spouse. **Proposed section 80B** permits the establishment of an associate pension for a non-member spouse when the Chairman of the DFRDB Authority receives a splitting order or arrangement in relation to a member's superannuation interest under the DFRB Act. However, under the proposed amendment an associate pension cannot be created if the superannuation interest is a child or orphan pension under the DFRB Act.

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Proposed section 80C permits a non-member spouse to have an associate pension commuted into a lump sum amount provided the annual rate of the associate pension is less than an amount determined under an Order by the Minister in accordance with **proposed section 80E**. Where a non-member spouse is eligible to commute their associate pension they have three months from the time they become eligible to receive the associate pension to elect to have the amount commuted into a lump sum amount. The election is made to the Chairman of the DFRDB Authority.

The **proposed Division 3** inserts one new section that relates to the reduction of a member's benefit. **Proposed section 80D** requires that the annual rate of a standard pension will be reduced by the amount calculated under an Order by the Minister in accordance with **proposed section 80E**. The proposed amendment also requires that the reduction in the annual rate is to be disregarded when calculating the amount of a pension that is not a standard pension that may later become payable. An example provided is a where a pension under paragraph 57(1)(b) of the DFRB Act becomes payable to a child following the death of the member.

Proposed Division 4 inserts one new section, **proposed section 80E** which allows the Minister to make Orders in relation to the application of **proposed Part VIA** of the DFRB Act. Orders made under **proposed section 80E** are disallowable instruments under section 46A of the Acts Interpretation Act and are taken to be statutory rules for the purposes of the Statutory Rules Publication Act.

Part VID of the DFRB Act prescribes the rules for the annual indexation of pensions provided under the DFRB Act. **Item 7** amends the definition of pension in section 83 of the DFRB Act. The proposed amendment specifically excludes an associate pension defined in the **proposed Part VIA** of the DFRB Act from being a pension. Therefore, an associate pension will not be subject to the provisions in Part VID that provide for the annual indexation of pensions provided under the DFRB Act.

The Military Superannuation and Benefits Act 1991

Item 8 inserts into subsection 3(1) of the MSB Act a definition for associate benefit. The proposed definition of associate benefit refers to a benefit payable under the Trust Deed as authorised by the **proposed section 5A** of the MSB Act.

Item 9 inserts at the end of Part 2 of the MSB Act a new section that implements the splitting of a member's superannuation interests as part of a divorce. Subsection 5(1) of the MSB Act permits the Minister to amend the MSB Scheme Trust Deed through a signed instrument. The **proposed section 5A** of the MSB Act authorises the amendment of the Trust Deed so as to make provision for the splitting of superannuation benefits in the event of the scheme trustees receiving a splitting order or arrangement.

Item 10 inserts after section 16 of the MSB Act **proposed section 16A** that requires the Commonwealth, in accordance with the MSB Scheme's Rules, to pay the associate benefit and for the Board to reimburse the Commonwealth under the MSB Scheme's Rules.

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Item 11 inserts a new subsection into section 46 of the MSB Act. Section 46 of the MSB Act binds members and the Commonwealth to the MSB Scheme Rules. **Proposed subsection 46(1A)** extends this to include people who receive an associate benefit in the scheme.

Superannuation Act 1922

Item 12 inserts a new definition into subsection 4(1) of the 1922 Act. The proposed definition of pension extends the common law definition of pension for the purposes of the 1922 Act to include an associate pension defined in **proposed section 93DB**.

Section 47 of the 1922 Act makes provision for the payment of a pension to the surviving spouse and children of the member in the event of the death of a member (a reversionary pension). **Item 13** inserts **proposed subsection 47(1A)** into section 47 to exclude an associate pension from the application of section 47. Specifically, it excludes the payment of reversionary pension in the event of the death of a person receiving an associate pension under **proposed Part VA** in the 1922 Act.

Section 61 of the 1922 Act prescribes the minimum amount of a pension that is payable for a pension and a reversionary pension. **Item 14** inserts into section 61 a provision that relates to a pension reduced by **proposed section 93DD**. **Proposed subsection 61(3)** excludes a pension that has been reduced, as a result of a Ministerial Order made under **proposed section 93DE**, from the minimum pension provisions in section 61.

Item 15 inserts a new part into the 1922 Act, Part VA—Family law superannuation splitting. The **proposed Part VA** provides a mechanism for the splitting of a member's superannuation benefit in accordance with an order or arrangement under Part VIIIIB of the FLA. The **proposed Division 1** of the new part includes only one section, **proposed section 93DA**, which inserts a number of definitions that are relevant to provisions included in the **proposed Part VA**. Most of the definitions either cross reference to other sections in the **proposed Part VA**, to Part VIIIIB of the FLA or regulations made in accordance with the FLA.

Proposed Division 2 inserts two new sections that relate to the provision of benefits for a non-member spouse. **Proposed section 93DB** permits the establishment of an associate pension for a non-member spouse when the Commissioner of Superannuation receives a splitting order or arrangement in relation to a member's superannuation interest under the 1922 Act. However, under the proposed amendments an associate pension cannot be created if the superannuation interest is a child or orphan pension under the 1922 Act.

Proposed section 93DC permits a non-member spouse to have an associate pension commuted into a lump sum amount provided the annual rate of the associate pension is less than an amount determined under an Order by the Minister in accordance with **proposed section 93DE**. Where a non-member spouse is eligible to commute their associate pension they have three months from the time they become eligible to receive

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the associate pension to elect to have the amount commuted into a lump sum amount. The election is made to the Commissioner of Superannuation.

The **proposed Division 3** inserts one new section that relates to the reduction of a member's benefit. **Proposed section 93DD** requires that the annual rate of a standard pension will be reduced by the amount calculated under an Order by the Minister in accordance with **proposed section 93DE**. The proposed amendment also requires that the reduction in the annual rate is to be disregarded when calculating the amount of a pension that is not a standard pension that may later become payable. An example provided is a where a pension under section 48 of the 1922 Act becomes payable to a child following the death of the member.

Proposed Division 4 inserts one new section, **proposed section 93DE** which allows the Minister to make Orders in relation to the application of **proposed Part VA**. Orders made under **proposed section 93DE** are disallowable instruments under section 46A of the Acts Interpretation Act and are taken to be statutory rules for the purposes of the Statutory Rules Publication Act.

Superannuation Act 1976

Item 16 inserts a new definition into subsection 3(1) of the 1976 Act. The proposed definition of associate member defines a new type of member of the Commonwealth Superannuation Scheme (CSS) for the purpose of **proposed sections 146MB and 146MC**.

Division 1 of Part IIA of the 1976 Act prescribes the establishment, functions and powers of the CSS Board. Section 27C, which is in Division 1 of Part IIA, prescribes the functions of the CSS. **Item 17** amends subparagraph 27C(1)(a)(ii) of the 1976 Act to include associate members in the coverage of paragraph 27C(1)(a). By adding associate members to subparagraph 27C(1)(a)(ii) the CSS Board will be required to manage the CSS Fund to maximise the returns having regard for, amongst other things, equity among eligible employees and associate members. This is to ensure that any decisions made by the Board consider the interests of all members in the CSS.

Item 18 amends paragraph 27(2)(d) of the 1976 Act to include associate members in the coverage of paragraph 27C(2)(d). By adding associate members to paragraph 27C(2)(d) the CSS Board will be required to take reasonable steps to inform associate members about the management and investment of the CSS Fund.

Section 54JA is part of Division 3 of Part IVA of the 1976 Act that prescribes the assessment process for determining if a member is eligible to receive an invalidity payment under the 1976 Act. Section 54JA prescribes provisions that relate to the invalidity assessment. **Item 19** amends paragraph 54JA(1)(c) to allow the CSS Board to consider whether a person, who is eligible for an associate deferred benefit as prescribed in **proposed section 146MC**, is, under the provisions in section 54JA, totally and permanently incapacitated, therefore, being eligible for an invalidity benefit.

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Item 20 inserts at the end of section 80A of the 1976 Act a provision to prevent a member's superannuation surcharge amount being reduced as a result of a splitting order or arrangement received by the Board. **Proposed subsection 80A(4)** requires that any reduction made under **proposed Part IXB** for the 1976 Act is to be disregarded when applying subsection 80A(3). Therefore, the amount of superannuation surcharge deduction that will apply to a member's benefit will not be reduced as a result of a splitting order or arrangement.

Item 21 inserts a new subsection into section 110SE of the 1976 Act. Section 110SE is part of Part VIAA in the 1976 Act. Part VIAA makes provision for a Superannuation Guarantee top-up benefit (the top-up benefit). The purpose of the top-up benefit is so that an employer does not have an individual superannuation guarantee shortfall within the meaning of the SGAA in relation to a person who ceases to be an eligible employee.¹⁰ **Proposed subsection 110SE(3A)** requires that any reduction made under **proposed Division 3 of the proposed Part IXB** be disregarded when applying subsection 110SE(3). Therefore, when determining if an individual superannuation guarantee shortfall exists the amount a member's benefit is reduced by as a result of **proposed Division 3 of the proposed Part IXB** is effectively added back for the purpose of determining compliance with the SGAA.

Item 22 inserts a new part into the 1976 Act, Part IXB—Family law superannuation splitting. The **proposed Part IXB** provides a mechanism for the splitting of a member's superannuation benefit in accordance with an order or arrangement under Part VIIIIB of the FLA. The **proposed Division 1** of the new part includes only one section, **proposed section 146MA**, which provides preliminary information on the operation of the **proposed Part IXB**. **Proposed section 146MA** inserts a number of definitions that are relevant to provisions included in the **proposed Part IXB**. Most of the definitions either cross reference to other sections in the **proposed Part IXB**, to Part VIIIIB of the FLA, or regulations made in accordance with the FLA.

Proposed Division 2 inserts two new sections that relate to the provision of benefits for a non-member spouse. **Proposed section 146MB** applies to the situation of splitting a standard pension or additional pension when the CSS Board receives a splitting order or arrangement in relation to a member receiving a benefit under the 1976 Act. For the purpose of the **proposed Part IXB** a standard pension paid by the CSS is:

- an age retirement pension
- an early retirement pension
- an invalidity benefit
- a spouse's pension
- an extra spouse's pension

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- an associate standard pension, or
- an associate deferred pension.

However, **proposed section 146MB** does not allow the creation of an associate pension if the superannuation interest is an orphan pension under the 1976 Act. **Proposed subsection 146MB(4)** requires that where a standard pension is not payable at the time the CSS Board receives a splitting order or arrangement then the non-spouse member shall be entitled to an associate deferred benefit in accordance with **proposed section 146MC**.

Proposed section 146MC prescribes the conditions for the establishment and payment of an associate deferred benefit. **Proposed section 146MC** allows the payment of the associate deferred benefit when the non-member spouse:

- is totally and permanently incapacitated, or
- has reached their preservation age and met a condition of release as specified under the *Superannuation Industry (Supervision) Act 1993*, or
- when the non-member spouse turns 65 years of age.

Proposed subsection 146MC(5) allows, in the event of the non-member spouse's death, the payment of the associate deferred benefit to either the non-member spouse's legal personal representative or other individuals as determined by the CSS Board.

Proposed section 146MD permits a non-member spouse who is entitled to either an associate standard pension or an associate deferred pension to have the relevant pension commuted into a lump sum amount provided the annual rate is less than an amount determined under an Order by the Minister in accordance with **proposed section 49F**. Where a non-member spouse is eligible to commute their associate pension they have three months from the time they become eligible to receive the associate pension to elect to have the amount commuted into a lump sum amount. The election is made to the CSS Board.

The **proposed Division 3** inserts three new sections that relate to the reduction of a member's benefit. **Proposed section 146ME** prescribes the methods for reducing a member's benefit where a superannuation interest, which is not a standard pension benefit, is still in the growth phase of its operation, i.e. the member is still making contributions to the CSS, and is not an entitlement to an associate deferred benefit. **Proposed subsection 146ME(2)** specifies that the types of contributions that are to be reduced in relation to a superannuation interest are:

- accumulated basic contributions
- accumulated supplementary contributions
- accumulated employer contributions.

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The **proposed subsection 146ME(2)** also specifies that benefits created under sections 110SN and 130D are to be reduced for the purpose of fulfilling the requirements of a splitting order or arrangement. The 1976 Act, as it currently stands, does not have a section 110SN or a section 130D. They are both provisions that will be inserted into the 1976 Act if the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002 (the SL(CE)RA Bill) receives Royal Assent.¹¹ At the time this Bill Digest was being prepared the SL(CE)RA Bill, which is part of the package of choice of superannuation funds bills, was awaiting debate in the Senate.

Proposed subsection 146ME(3) prescribes the formula for calculating the reduced annual rate of a pension when it becomes payable following the receipt of a splitting order or arrangement by the CSS Board.

When an original superannuation interest is the subject of more than one splitting order or arrangement additional steps prescribed in **proposed subsection 146ME(4)** are followed to determine the reduced annual rate of a pension. Once the reduction factor has been calculated following the steps in the definition of reduction factor in **proposed subsection 146ME(6)** the steps in **proposed subsection 146ME(4)** proportion the reduction factor across the multiple splits. The steps in **proposed subsection 146ME(4)** result in a new factor that replaces the reduction factor in the formula in **proposed subsection 146ME(3)**.

Proposed subsection 146ME(5) requires that the reduction in the annual rate under **proposed subsection 146ME(3)** is to be disregarded when calculating the amount of a pension that is not a standard pension that may later become payable. **Proposed subsection 146ME(6)** includes a number of definitions that relate to the calculations in **proposed section 146ME**.

Proposed section 146MF prescribes that where a superannuation interest is still in the growth phase and it is an associate deferred benefit, then the interest, when it becomes payable, is to be reduced by an amount in accordance with an Order made by the Minister under **proposed section 146MH**.

If a standard pension or additional pension is already payable at the time that the splitting order or arrangement comes into operation then **proposed section 146MG** requires that the annual rate of the pension will be reduced by the amount calculated under an Order by the Minister in accordance with **proposed section 146MH**. **Proposed subsection 146MG(3)** requires that the reduction in the annual rate determined under either **proposed subsection 146MG(1)** or **proposed subsection 146MG(2)** is to be disregarded when calculating the amount of a pension that is not a standard pension that may later become payable. An example provided is a where an orphan pension becomes payable to a child following the death of the member.

Proposed section 146MH allows the Minister to make Orders in relation to the application of **proposed Part IXB**. Orders made under **proposed section 146MH** are disallowable instruments under section 46A of the Acts Interpretation Act and are taken to be statutory rules for the purposes of the Statutory Rules Publication Act.

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Item 23 inserts an additional type of pension into the definition of pension in subsection 147(1) of the 1976 Act for the purpose of Part X of the 1976 Act. Part X of the 1976 Act makes provision for the increase of CSS pensions on and after 1 January 2002. Under Part X of the 1976 Act, CSS pensions are increased by the consumer price index (CPI) every six months. **Proposed paragraph 147(1)(ea)** inserts an associate additional pension created under **proposed Part IXB** as a pension that will be eligible for the six monthly CPI increase in CSS pensions under Part X of the 1976 Act.

Section 155C of the 1976 Act permits the drafting of regulations to ensure that the CSS is able to meet the conditions imposed on it in relation to a number of eligible regulatory laws. **Item 24** inserts a new paragraph into the definition of eligible regulatory law. **Proposed paragraph 155C(3)(cb)** adds the *Family Law Act 1975* to the list of legislation that meets the definition of eligible regulatory law for the purpose of section 155C of the 1976 Act.

Items 25 and 26 make minor amendments to section 167AB. Section 167AB prescribes the exercise of certain powers by the Minister in relation to the operation of the CSS through the 1976 Act. **Items 25 and 26** amend section 167AB so that the provision relating to the exercising of powers by the Minister under section 167AB include Orders made by the Minister under **proposed section 146MH**.

Item 27 inserts a new subsection into section 168 of the 1976 Act. Section 168 permits the making of Regulations in relation to the operation of the 1976 Act. **Proposed subsection 168(20)** will allow the making of Regulations, which arise from amendments made to the 1976 Act by the SLA(FL) Bill, within one year from the commencement of **proposed subsection 168(20)**.

Superannuation Act 1990

Item 28 inserts into section 3 of the 1990 Act a new definition for associate benefit. The proposed definition of associate benefit refers to a benefit payable under the Trust Deed as authorised by the **proposed subsection 5A(1)** of the 1990 Act.

Item 29 inserts after section 5 of the 1990 Act a new section that implements the splitting of a member's superannuation interests as part of a divorce. Subsection 5(1) of the 1990 Act permits the Minister to amend the PSS Scheme Trust Deed through a signed instrument. The **proposed section 5A** of the 1990 Act authorises the amendment of the Trust Deed so as to make provision for the splitting of superannuation benefits in the event of the scheme trustees receiving a splitting order or arrangement.

Item 30 inserts after section 16 of the 1990 Act **proposed section 16A** that requires the Commonwealth, in accordance with the PSS Rules, to pay the associate benefit and for the Board to reimburse the Commonwealth under the PSS Rules.

Item 31 amends section 18 of the 1990 Act to include payments made under **proposed section 16A** as a payment to be made out of the Consolidated Revenue Fund.

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Item 32 inserts a new paragraph into subsection 37(1) of the 1990 Act. Section 37 of the 1990 Act prescribes rules for the payment of costs incurred by the PSS Board that relates to the engagement of a panel of persons to assist the PSS Board in reaching a decision on an issue. **Proposed paragraph 37(1)(ba)** will allow the PSS Board to appropriate money from the Consolidated Revenue Fund to pay the cost of engaging a panel of persons to assist the PSS board in reaching a decision in relation to the payment of an associate benefit.

Item 33 inserts a new subsection into section 42 of the 1990 Act. Section 42 of the 1990 Act binds members and the Commonwealth to the PSS Rules. **Proposed subsection 42(1A)** extends this to include people who receive an associate benefit in the scheme.

Section 49 of the 1990 Act permits the drafting of regulations to ensure that the PSS is able to meet the conditions imposed on it in relation to a number of eligible regulatory laws. **Item 34** inserts a new paragraph into the definition of eligible regulatory law. **Proposed paragraph 49(3)(cb)** adds the *Family Law Act 1975* to the list of legislation that meets the definition of eligible regulatory law for the purpose of section 49 of the 1990 Act.

Concluding Comments

The purpose of the SLA(FL) Bill is to make amendments to seven Acts governing the operation superannuation schemes provided by the Commonwealth for the benefit of its civilian employees and military personnel as a consequence of amendments to the FLA. The amendments made to the seven Acts by the SLA(FL) Bill will allow the boards and authorities that run the various superannuation schemes to split the superannuation interest of members when they receive a splitting order or arrangement. This will bring the operation of the superannuation schemes covered by the amendments in the SLA(FL) Bill into line with the wider community.

The amendments made to the FLA by the FLA(S)A along with the FL(S)R commenced on 28 December 2002. The delay in the introduction and passage of the SLA(FL) Bill along with the limits placed on the application of the amendments in Schedule 1 of the SLA(FL) Bill by clause 4 of the SLA(FL) Bill may cause delays in the execution of a splitting order or arrangement. The delay may even affect the finalisation of a divorce settlement that involves a member of one of the superannuation schemes amended by this Bill.

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Endnotes

- 1 Superannuation Legislation Amendment (Family Law) Bill 2002, Second reading speech, Ms P. Worth, House of Representatives, *Debates*, 12 December 2002, p. 10271.
- 2 John Wasiliev 'Family Court orders split super', *Australian Financial Review*, 7 February 2003, p. 14.
- 3 Defence Force Retirement and Death Benefits Scheme, *Annual Report of the DFRDB Authority 2001-2002*, p. 1.
- 4 *ibid.*, p.1.
- 5 Military Superannuation and Benefits Scheme, *Annual Report of the MSB Board 2001-2002*, p. 1.
- 6 *Reform of Commonwealth Superannuation: Policy Statement* issued by Senator the Hon Peter Walsh, Dept of Fiance, Canberra, 15 September 1989, p. 6.
- 7 Comsuper website [<http://www.comsuper.gov.au/pages/1922.htm>] (10 February 2003).
- 8 *Op. Cit.* Senator the Hon Peter Walsh, p. 6.
- 9 Commissioner for Superannuation, *Annual Report 2001-2002*, p. 2.
- 10 *Superannuation Act 1976*, section 110SA.
- 11 Superannuation Legislation Amendment (Family Law) Bill 2002, *Explanatory memorandum*, p. 21.

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