The Parliament of the Commonwealth of Australia

REPORT ON

THE PROVISIONS OF THE FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

SENATE SELECT COMMITTEE ON
SUPERANNUATION AND FINANCIAL SERVICES

March 2001

Commonwealth of Australia

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SENATE SELECT COMMITTEE ON

SUPERANNUATION AND FINANCIAL SERVICES

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TERMS OF REFERENCE

On 10 May the Senate referred the provisions of the Family Law Legislation Amendment (Superannuation) Bill 2000 to the Select Committee on Superannuation and Financial Services for examination and report by 14 August 2000.[1]

The Committee sought and obtained from the Senate on 8 June, an extension of time in which to report to 31 October. A further extension was sought and granted on 9 October, with the time to report extended to 28 November 2000.

On 28 November 2000 the Committee tabled an Interim Report. On the same day it received an extension of time in which to present its final report to 8 February 2001.

The Committee sought and obtained on 8 February 2001 a further extension of time in which to present its final report to 8 March 2001.

1 Selection of Bills Committee Report No 7/2000.

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RECOMMENDATIONS

Recommendation 1 (para 1.24)

The Committee recommends that the Government develop amendments to the Bill which would enable, where possible, a 'clean break' between separating couples for as many funds as possible. This will involve greater differentiation in regulations applying to the two different types of funds.

Recommendation 2 (para 1.25)

The Committee recommends that the Bill be amended to include a default position and default options.

Recommendation 3 (para 1.30)

The Committee recommends that for defined benefit interests, the contradictory arguments surrounding the use of the benefit payable on retrenchment be reconciled before a decision not to use this method is taken.

Recommendation 4 (para 1.31)

The Committee also recommends that for accumulation interests, the value be ascertained in the same way as other financial assets such as bank accounts and managed funds.

Recommendation 5 (para 1.37)

The Committee recommends that the Bill be amended as necessary to ensure that appropriate privacy for the member is maintained and the duties of the trustees are clear.

Recommendation 6 (para 1.39)

The Committee recommends that the application provision of the Bill be amended to ensure a smooth transition to the new arrangements.

Recommendation 7 (para 1.42)

The Committee recommends that the date for commencement of the new regime be clearly stated.

Recommendation 8 (para 1.46)

The Committee recommends that, with respect to preservation, the non-member spouse's interest not be wholly preserved and that all components be split on a pro rata basis. This would mean that the non-member spouse's interest would consist of non-preserved, restricted non-preserved and preserved amounts in the same proportions as the member's interest.

Recommendation 9 (para 1.47)

However, if the new interest must be wholly preserved, the Committee recommends that the order proposed be reversed so that the amount is first taken from the preserved amount of the member spouse.

Recommendation 10 (para 1.52)

The Committee recommends that the Government develop appropriate amendments to overcome the unintended and/or adverse consequences of these definitional and technical deficiencies, through, if necessary, further consultation and discussion with the relevant parties.

Recommendation 11 (para 1.55)

The Committee recommends that the consultation process between the relevant parties and departments continue in order to resolve outstanding matters relating to the regulations.

Recommendation 12 (para 1.59)

The Committee recommends that the Commonwealth enter into negotiations with the States in order to achieve for separating de facto couples a regime consistent with what this legislation proposes for separating married couples.

Recommendation 13 (para 1.63)

While noting these factors, the Committee recommends that, subject to the amendments and suggestions recommended above, and further consultation, the Bill be agreed to.

REPORT ON THE PROVISIONS OF THE FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

Reference to the Committee

1.1 The Family Law Legislation Amendment (Superannuation) Bill 2000 ('the Bill') was introduced into the House of Representatives on 13 April 2000. On 10 May the Senate referred the provisions of the Bill to the Select Committee on Superannuation and Financial Services for examination and report.[1] The Bill will amend the *Family Law Act 1975* (Family Law Act) to provide for the division of superannuation interests on marriage breakdown. On 28 November 2000 the Committee tabled an Interim Report. On the same day it received an extension of time in which to present its final report to 8 February 2001.

1.2 In the Interim Report, the Committee acknowledged the tension which exists in achieving a balance between simplicity (that is having legislation, which is easy to understand and administer) and the requirement for fairness and equity. The Committee noted that the Family Court of Australia had raised a number of concerns about the complexity of the proposals and the need to ensure that it has guidance on how to deal with superannuation interests.

1.3 The Committee also noted that the Government was aware of the tensions and had acknowledged that there were a number of concerns expressed during the inquiry. Officials from the Attorney-General's Department and the Department of the Treasury indicated that, as part of their own consultation process on the exposure draft of the regulations, they would have regard to the issues raised in the Interim Report. They undertook to consult further and report back to the Committee with the outcome of those consultations, including any proposed amendments to both the Bill and the draft regulations.

1.4 In accordance with its terms of reference, the Committee has focused in this report primarily on the provisions of the Bill. However the Committee recognises that the implementation of the Bill is dependent on the detail to be included in the regulations, which are still in their draft form.

Conduct of the inquiry

1.5 Since tabling the Interim Report the Committee has received a number of supplementary submissions. Some of these contained answers to questions taken on notice by various witnesses at the hearings. Among them was a response from the Attorney-General's Department and the Department of the Treasury. This response contained an executive summary on the issues raised by the Committee in its Interim

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1 Selection of Bills Committee Report No 7/2000.

Report. In addition to addressing the broad issues, it also analysed in detail the comments and recommendations made to the Committee in the earlier submissions and in oral testimony at the hearings. The Committee notes that, although it did not contain specific commitments to amending either the Bill or draft regulations, the response contained an indication of those areas in which the Government would consider making further amendments to the legislation.

1.6 The departmental response was circulated to all witnesses and the Committee has received further submissions in relation to that response. The 26 supplementary submissions are listed at **Appendix 1**. The preliminary response from the Attorney-General's Department is at **Appendix 2.** The full text of the detailed responses from the Attorney-General's Department and the Department of the Treasury is included at **Appendix 3.** At **Appendix 4** is an additional response by the Attorney-General's Department to two supplementary submissions which were received after the detailed response had been prepared.[2]

1.7 The Committee congratulates the Attorney-General's Department and the Department of the Treasury for their thoughtful and detailed responses and their willing cooperation in supplying material to the Committee. This has greatly facilitated the Committee in its deliberations. The Committee notes with approval the numerous matters which the Departments have indicated are to be changed and those where they will consider making changes. For example, the Committee notes that the matter of prescribing fees and the level of fees payable is still under consideration.

1.8 The Committee also notes that on the issue of the constitutional validity of the Bill, the Departments have indicated that, on the basis of advice received, they are confident that the legislation is within the constitutional power of the Commonwealth and would therefore withstand a constitutional challenge. While the Committee acknowledges that it is not possible to guarantee with absolute certainty that the legislation will withstand a High Court challenge, the advice appears to provide the degree of assurance which witnesses sought.

1.9 The Committee discusses below certain matters which the Departments have indicated will not be changed or on which their views are unclear, such as the valuation method to be used; preservation and the order of deductions; and a number of definitional and technical matters.

1.10 In order to provide an opportunity for witnesses to respond to the submission from the Attorney-General's Department and the Department of the Treasury, the Committee sought and obtained on 8 February 2001 a further extension of time in which to present its final report to 8 March 2001.

1.11 In this report, the Committee has not sought to reiterate the evidence taken during the first part of the inquiry. Rather it has focused on the key issues which it

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2 Supplementary submissions from Mr Colin Grenfell (Submission No 40) and the Family Court of Australia (Submission No 41).

considers are integral to improving the Bill by making the proposed legislation easier to understand and apply, while at the same time providing for fairness and equity.

The supplementary submissions

1.12 The Committee notes from the supplementary submissions that many of the issues raised during the inquiry in relation to both the Bill and the draft regulations have been dealt with to the satisfaction of the relevant parties. Some were content with the changes indicated in the departmental response or were satisfied that other changes were under consideration. For example, the Family Court of Australia indicated that it had no objections or concerns arising out of the comments contained in the departmental response.[3] The Institute of Chartered Accountants and the Australian Institute of Family Studies were also generally satisfied with the progress made in resolving the issues.[4]

1.13 The Committee commends the willingness both of the Departments and the other parties to consult and to work towards resolving so many items of concern.

1.14 However, the Committee notes that, although they were not of concern to all parties, certain issues still appeared to be unresolved for some. These unresolved issues included:

- the best method of valuing the superannuation interest: retrenchment benefit or actuarial tables;
- the method of increasing the value over time of a non-member spouse's interest in a defined benefit scheme;
- the 'policy' on preservation together with the related issue of the order of deductions in the event of a split; and
- discretion for the Family Court to receive other evidence on the value of the superannuation interest.

1.15 The Committee notes that the Attorney-General's Department has indicated that it will give further consideration to the possibility of including a discretion for the Family Court to depart from the valuation rules.[5] The Committee accepts the Departmental assurance that this matter will be considered further.

1.16 The Committee's views on the other unresolved issues are discussed below.

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3 Submission No 47.

4 Submission Nos 49 and 45.

5 Submission No 48, p. 3.

Improving the Bill

1.17 In its Interim Report the Committee sought to identify ways in which the objectives of the Bill could be achieved without the level of complexity which the Bill and draft regulations proposed. These included:

- examining ways of applying the clean break principle in order to keep administration costs down and limit the costs on the general membership;
- examining ways of removing the prescriptive processes and procedures for determining the value of certain superannuation interests;
- ensuring that the issue of privacy is respected, especially for those troubled by domestic violence;
- ensuring that there are smooth and orderly transitional arrangements associated with the commencement date of the proposed legislation; and
- examining the issue of the order of deductions applying in respect of preserved benefits.

1.18 Having considered the Departmental responses and the responses from witnesses to the Government's position as outlined in the Departmental submissions, the Committee's views in relation to the above issues are as follows.

Clean break principle

1.19 It appeared to some that the Bill and draft regulations did not apply the clean break principle sufficiently. The Committee notes that the Attorney-General's Department has now received constitutional advice which would enhance the application of a 'clean break' approach. This should allow a new and separate interest to be created for the non-member spouse which could be retained in the fund with the consent of the trustee or transferred out at the option of either party.

1.20 The Committee notes that while the creation of a separate interest may be appropriate for a defined benefits fund, in the case of an accumulation fund, a mandatory payment to the non-member as an Eligible Termination Payments (ETP) may be preferable. This would allow the non-member 90 days to make their own decision, and take responsibility for, where the interest would be subsequently invested.

1.21 It should be noted that the Committee is still not convinced that sufficient efforts have been made to incorporate the clean break principle for accumulation interests given that membership of accumulation funds, which include all public offer funds, appears to be growing as a proportion of the market.

1.22 The legislation deals with division of an interest in a superannuation fund. The legislation has been drafted on a principle of consistent treatment across all funds. It may be that in this case, dealing with the undoubted complexities of defined benefit interests, consistency results in unnecessary complexity for accumulation interests.

The Committee is still not satisfied that the drafters of the legislation have demonstrated an understanding of the inherent differences between an interest in a defined benefits fund and an interest in an accumulation fund.

1.23 It may be that a fundamental shift in approach away from consistent treatment of both defined benefit interests on the one side and accumulation interests on the other is called for, allowing a very simple split of accumulation interests subject to the ordinary rollover regime. If this approach were adopted, the complexity of defined benefit interests could be covered in additional regulations limited in their application.

1.24 The Committee recommends that the Government develop amendments to the Bill which would enable, where possible, a 'clean break' between separating couples for as many funds as possible. This will involve greater differentiation in regulations applying to the two different types of funds.

1.25 The Committee also notes the supplementary suggestions of the Investment and Financial Services Association (IFSA) with respect to a default position and default options in order to provide trustees with certainty in respect of a splitting agreement.[6] **The Committee recommends that the Bill be amended to include a default position and default options.**

Valuation processes - determining the value of a superannuation interest

1.26 To overcome the complexity of the current valuation provisions, some submissions, including those from William M Mercer and Mr Colin Grenfell, have suggested using the benefit payable on retrenchment to determine the value of a superannuation interest, rather than actuarial tables.[7] The Committee is attracted to the simplicity of this proposal as it will greatly reduce the level of complexity in the Bill and the regulations.

1.27 However, the Attorney-General's Department and the Australian Government Actuary have advised against the proposal. In their view, while the proposal would be acceptable in some circumstances, there are many schemes in which it would not.[8]

1.28 The Committee notes that the arguments against the proposal do not directly counter the arguments for it. The Committee has not been able to reconcile these divergent views, but considers that this is too important an issue for a decision to be taken on it before the merits/demerits of the proposal have been clearly established.

1.29 In the case of accumulation interests it is hard to justify prescriptive valuations given regular information is available to members as to their account balances and withdrawal values. The Committee questions whether consistency of approach demands too high a price in unnecessary complexity for accumulation

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6 Submission No 51, pp. 1-3.

7 Submission Nos 41 and 46.

8 Submission Nos 42 and 44.

interests. The Committee considers that a prescribed valuation is not needed in the case of accumulation interests, as prescribed valuations are not required for interests in similar assets such as bank accounts and managed funds.

1.30 The Committee recommends that for defined benefit interests, the contradictory arguments surrounding the use of the benefit payable on retrenchment be reconciled before a decision not to use this method is taken.

1.31 The Committee also recommends that for accumulation interests, the value be ascertained in the same way as other financial assets such as bank accounts and managed funds.

Valuation processes - indexation of adjusted base amounts

1.32 The Committee notes that, in response to concerns expressed during the inquiry that the Treasury bond rate was not appropriate, the Departmental response now indicates that the Treasury bond rate might not be used for the indexation of adjusted base amounts.

1.33 The Committee supports the direction away from using the Treasury bond rate for the indexation but questions whether a salary related index is appropriate. The Committee has not been made aware of any policy objective that there should be parity in the growth rates of the member's and non-member's interests after they are split. It is, after all, not relevant whether the member spouse continues to be a member and thus to realise the accruing unvested component. The Committee's view is that, wherever possible, the appropriate growth rate is the growth rate of the vested component of the fund.

Privacy issues

1.34 In response to the Committee's concern about the importance of ensuring privacy, the Attorney-General's Department and the Department of the Treasury have indicated that that they will give further consideration to an amendment to the Bill to ensure that privacy considerations, such as not releasing the address of a spouse, are addressed.

1.35 The Committee commends the steps proposed to be taken to ensure privacy especially for those troubled by domestic violence. However, the Committee is concerned to note that the Departments do not appear to have consulted with the Privacy Commissioner, as they had indicated they would. The Committee considers that it is essential for such consultation to take place, before adopting the concept of entitling non-members to certain information. Under the proposed arrangements, it appears that the trustee, in responding to requests for information from a non-member is being asked to 'breach' the privacy obligations otherwise owed to the member. It is the Committee's understanding that this right of the non-member to demand information is not available in respect of other financial assets such as bank accounts. A trustee in breach is subject to criminal penalties.

1.36 The Committee also notes that the additional responsibility on trustees to provide information to the non-member, except where disclosure would be 'unreasonable' in the circumstances, imposes an ambiguous duty on trustees. This is particularly so in the context of domestic violence where information about the address or workplace of the member could be regarded as being 'unreasonable'.

1.37 The Committee recommends that the Bill be amended as necessary to ensure that appropriate privacy for the member is maintained and the duties of the trustees are clear.

Transitional arrangements and commencement date

1.38 The Committee is keen to ensure that there are smooth and orderly transitional arrangements associated with the commencement date of the proposed legislation. The Family Court originally had drawn attention to this issue, but in a supplementary submission to the Committee the Court advised that it was satisfied that the amendments now proposed by the Government would alleviate its concerns. [9]

1.39 The Committee recommends that the application provision of the Bill be amended to ensure a smooth transition to the new arrangements.

1.40 The Committee notes an ambiguity between the commencement date of Schedule 1 of the Bill (twelve months after Royal Assent) and a commencement date which is described as twelve months after the regulations are proclaimed. It is uncertain whether these dates will coincide.

1.41 The Committee considers it imperative that the ambiguity surrounding the commencement date be resolved, especially as oral testimony before the Committee from the Department of the Treasury suggests that the relevant taxation legislation may not be drafted before Royal Assent.

1.42 The Committee recommends that the date for commencement of the new regime be clearly stated.

Preservation and the order of deductions

1.43 Two issues in relation to preservation and the order of deductions remain unresolved: whether the new interest of the non-member spouse should be wholly subject to preservation; and, if this should be the ultimate decision, whether the amount should be deducted first from the preserved benefit of the member spouse.

1.44 The Committee is not persuaded by the 'policy' reasons put forward in the Departmental response that the recent changes to preservation rules in respect of new contributions and earnings demand that the non-member spouse's interest be fully preserved. As pointed out by the Institute of Actuaries of Australia and others, the

9 Submission No 41, pp. 9-10 and Submission No 48, p. 2.

non-member spouse's entitlement is neither new contributions nor explicitly fund earnings.[10]

1.45 The Committee is of the view that, in negotiations for a property settlement, the availability of non-preserved amounts gives greater flexibility to the parties. As the rationale of the present Bill is to provide flexibility in property settlements by enabling splitting arrangements, the Committee cannot see why that flexibility should be inhibited.

1.46 The Committee recommends that, with respect to preservation, the non-member spouse's interest not be wholly preserved and that all components be split on a pro rata basis. This would mean that the non-member spouse's interest would consist of non-preserved, restricted non-preserved and preserved amounts in the same proportions as the member's interest. The Committee notes the advice of the Institute of Actuaries of Australia that this is administratively feasible and that the Association of Superannuation Funds of Australia supports a pro rata deduction.[11]

1.47 However, if the new interest must be wholly preserved, the Committee recommends that the order proposed be reversed so that the amount is first taken from the preserved amount of the member spouse.

Other definitional and technical deficiencies in the Bill

1.48 A number of definitional and technical deficiencies in both the Bill and the draft regulations were identified in the Committee's Interim Report. The Committee notes that a number of supplementary submissions still draw attention to such deficiencies in definitions (such as unintended consequences) and to other technical drafting matters, which could have adverse consequences in practice.

1.49 Deficiencies in definitions identified by groups such as Jacques Martin Industry Funds Administration, include the definition of terms such as 'member', member spouse', and 'splittable payment'.[12] For example, the definition of 'member' to include contingent or prospective beneficiary could have the unintended consequence of including more people, such as subsequent spouses, under the related definition of 'eligible person' than were perhaps envisaged.

1.50 In the view of many groups like William M Mercer, the Law Council of Australia, the Institute of Actuaries of Australia and others, technical drafting matters requiring further attention include:

- binding death benefit nominations;
- time constraints;

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10 Submission No 53.

11 Submission No 53, p. 3. and Submission No 55, p. 4.

12 Submission No 54.

- vested benefit maximum; and
- mandated information to and from the trustee. [13]

1.51 The Committee finds it surprising that so many issues of this nature remain unresolved, despite the extensive consultations which have been undertaken. However, the Committee recognises that concerns may appear unresolved from differences in interpreting the legislation.

1.52 The Committee recommends that the Government develop appropriate amendments to overcome the unintended and/or adverse consequences of these definitional and technical deficiencies, through, if necessary, further consultation and discussion with the relevant parties.

The draft regulations

1.53 Although it was technically beyond the scope of the Committee's inquiry into the provisions of the Bill, the close relationship between the Bill and the draft regulations could not be overlooked. As identified in its Interim Report, the Committee noted the numerous issues that were drawn to its attention with respect to the draft regulations. Further concerns were also identified in some supplementary submissions.

1.54 The Committee commends the progress that has so far been made by the consultation process which the Attorney-General's Department and the Department of the Treasury have carried out with interested parties. The Departmental response and the supplementary submissions, however, indicate that there are still many unresolved issues in relation to the draft regulations. Many of these relate to the respective treatments of defined benefit interests and accumulation interests.

1.55 The Committee recommends that the consultation process between the relevant parties and departments continue in order to resolve outstanding matters relating to the regulations.

De facto relationships and same sex couples

1.56 In its Interim Report, the Committee noted that the proposed legislation did not deal with de facto and same sex couples and that further advice on these issues would be sought. The Committee has obtained further advice to the effect that the consensus of opinion appears to be that the Commonwealth power to legislate with respect to marriage does not extend to de facto and same sex relationships. [14]

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13 See Submission No 46, (William M Mercer); Submission Nos 50 and 56, (Law Council of Australia); Submission No 53, (Institute of Actuaries of Australia); Submission No 54, (Jacques Martin Industry Funds Administration); Submission No 55, (Association of Superannuation Funds of Australia).

14 Department of the Parliamentary Library, Information and Research Services, *Commonwealth power in relation to the superannuation interests of de facto and same sex couple*s, January 2001.

1.57 As noted in its *Report on the provisions of the Superannuation (Entitlements of Same Sex Couples) Bill 2000,* the Committee considers it essential to review all Commonwealth legislation with respect to discrimination.

1.58 The Committee recognises the Commonwealth's lack of constitutional power to legislate in this area. This means that extending to de facto couples the regime proposed by this Bill is a matter for the States.

1.59 The Committee recommends that the Commonwealth enter into negotiations with the States in order to achieve for separating de facto couples a regime consistent with what this legislation proposes for separating married couples.

Conclusion

1.60 As stated in its Interim Report, the Committee has noted that there is strong support for the objectives of the Bill in providing a mechanism to assist people whose marriage has broken down to deal equitably with the division of superannuation as property. The Committee is also aware of the complexity of the issues that the proposed legislation addresses, dealing as it does with both family law and superannuation matters.

1.61 To avoid unnecessary complexity of approach, the Committee suggests that simplicity be pursued for accumulation interests wherever possible with an acknowledged separate regime for defined benefit interests.

1.62 The Committee also notes that the proposed legislation needs to be seen in the broader context of further consequential legislation and regulation especially in the areas of social security and taxation which await development.

1.63 While noting these factors, the Committee recommends that, subject to the amendments and suggestions recommended above, and further consultation, the Bill be agreed to.

Senator John Watson

Committee Chair

APPENDIX 1

LIST OF SUBMISSIONS RECEIVED AFTER INTERIM REPORT

Submission Number

31. Institute of Actuaries of Australia (Supplementary to Submission Nos. 9 & 22)

32. Institute of Chartered Accountants in Australia (Supplementary to Submission Nos. 8 & 27)

33. Attorney-General's Department

34. Lone Fathers Association (Australia) Incorporated (Supplementary to Submission No. 17)

35. Law Council of Australia, General Practice Section

36. Australian Institute of Family Studies (Supplementary to Submission No. 5)

37. Confidential

38. Attorney-General's Department (Supplementary to Submission No. 33)

39. Lone Fathers Association (Australia) Incorporated (Supplementary to Submission Nos. 17 & 34)

40. C R Grenfell (Supplementary to Submission No. 2)

41. Family Court of Australia (Supplementary to Submission No. 30)

42. Attorney-General's Department (Supplementary to Submission Nos. 33 & 38)

43. Law Council of Australia, Family Law Section (Supplementary to Submission No. 21)

44. Australian Government Actuary

45. Australian Institute of Family Studies (Supplementary to Submission Nos. 5 & 36)

46. William M Mercer Pty Ltd (Supplementary to Submission Nos. 12 & 25)

47. Family Court of Australia

48. Attorney-General's Department (Supplementary to Submission Nos. 33, 38 & 42)

49. Institute of Chartered Accountants in Australia (Supplementary to Submission Nos. 8, 27 & 32)

50. Law Council of Australia, General Practice Section (Supplementary to Submission No. 35)

51. Investment & Financial Services Association Ltd (IFSA) (Supplementary to Submission No. 29)

52. Mr Colin Grenfell (Supplementary to Submission Nos. 2 & 40)

53. Institute of Actuaries of Australia (Supplementary to Submission Nos. 9, 22 & 31)

54. Jacques Martin Industry Funds Administration Pty Ltd (JMIFA) (Supplementary to Submission No. 3)

55. Association of Superannuation Funds of Australia (ASFA) (Supplementary to Submission No. 19)

56. Law Council of Australia, Family Law Section (Supplementary to Submission Nos. 21 & 43)

APPENDIX 2

ATTORNEY-GENERAL'S DEPARTMENT PRELIMINARY RESPONSE TO SOME OF THE SUBMISSIONS AND TESTIMONY (SUBMISSION NO. 38)

00/10281:pm

22 December 2000

Ms Sue Morton
Secretary
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Ms Morton

FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

I refer to:

the Committee's hearings on its reference on the above-mentioned Bill on 13 and 14 November 2000;

my letter of 23 November 2000 providing additional information following those hearings; and

discussions Ms Tracey Noble had with Mr Peter Meibusch last week about the provision of information relating to matters that were to be taken up further with the Attorney-General's Department or that I indicated to the Committee I would take on notice or further consider.

I mention that we have, since the Committee's hearings, been meeting with the organisations and bodies from the superannuation industry and legal profession which put in major submissions to the Committee. We propose to report back to the Committee, hopefully by mid-January, with a position on the matters raised in the submissions and evidence to the Committee. However, I am able now to provide a report on the matters raised with us by Ms Noble.

Australian Council of Public Service Retiree Organisations/ Regular Defence Force Welfare Association

We will address each of the comments made by the Australian Council of Public Service Retiree Organisations (the Council) and the Regular Defence Force Welfare Association (the Association) in our report back to the Committee next month.

I mention, however, that the central points made by the Council in its submission to the Committee (which was fully supported by the Association) - that payment of a (separated or divorced) non-member spouse's share of superannuation should be in the form of pension payments only, and should be re-instated to the member spouse on the death or re-marriage of the member spouse - overlooks the fact that the proposals in the Bill and draft regulations provide, essentially, for a means of payment of what the parties have agreed or the Court has ordered would be a just and equitable split of matrimonial assets, including future superannuation entitlements either of them may have.

Prescribed fees

The Bill provides that the regulations may prescribe the fees that are payable in respect of a payment split and the person or persons liable to pay those fees. Regulation 115 of the consultation draft of the Family Law Amendment Regulations prescribes a fee of $100 in relation to a payment split, and similar fees for payment flags, agreements and orders lifting or terminating payment flags and for an application to a trustee for information about a superannuation interest.

I mentioned to the Committee on the first day of its hearings on the Bill that the fee of $100 was a proposal we put to industry in consultations with them, and now that trustees have had time to reflect on it we are happy to listen to better information.

There would appear to be three options in relation to fees.

The first option, as proposed in the Bill and regulations, is to set the fees that are to be payable. If this option is favoured, some further work would be needed to specify exactly what work would be covered by the fee that is set.

The second option is to set a ceiling on the fees that are payable - with trustees being able to charge up to the ceiling for the work that is done.

The third option is to have no prescription of fees, leaving it to the market to set the fee or fees that funds may impose for splitting a superannuation interest.

In our discussions with industry since the Committee hearings the preponderance of opinion has been to leave the fees that may be charged to the market, with the caveat that the issue can be dealt with by Government regulation if the fees that are imposed are too high. Also, if a fee (either a set one or a ceiling) is set, a one-off fee of $100 is generally considered by industry to be too low.

Compliance with splitting orders or agreements as a condition of being a complying regulated superannuation fund under the Superannuation Industry (Supervision) Act

Mr Noel Davis, of Clayton Utz, put to the Committee that the constitutional validity of the amendments in the Bill could be tightened if an amendment were made to the *Superannuation Industry (Supervision) Act 1993* to require trustees of regulated superannuation funds to give effect to any order or agreement to split a superannuation interest made under the *Family Law Act 1975*.

We have sought advice from the Chief General Counsel of the Australian Government Solicitor about Mr Davis's proposal. Subject to there being no Constitutional or other difficulty with what Mr Davis proposes, we propose to put the matter to the Government for its consideration.

Position of non-member spouse

Mr Davis also raised with the Committee the issue of the interest that a non-member spouse will have in a fund under the proposals.

Mr Davis correctly stated the position when he informed the Committee that the intention was that a non-member spouse will not become a member of the fund but will have limited

rights. The duty that will be owed by the trustee to the non-member spouse in these circumstances will be statutory, with requirements to do things at different points arising under the Bill, and under various provisions of the consultation drafts of the Family Law Amendment Regulations (the FL Regulations) and the Superannuation Industry (Supervision) Amendment Regulations (the SIS Amendment Regulations).

For example, if a payment split is in force, the non-member spouse will be entitled, whenever a splittable payment is made, to be paid an amount in accordance with the regulations (s.90MJ(3) and 90MT(1) of the Bill). The trustee will be under a statutory duty to ensure that such a payment is made. Likewise, if a payment flag is operating on an interest, the trustee must not make a splittable payment to any person in respect of the interest and must give written notice to non-member spouse within 14 days of the splittable payment becoming payable (s.90ML of the Bill).

Other examples where the duty that the trustee will owe to the non-member spouse will arise from the legislative scheme include the duty to periodically adjust the base amount allocated to the non-member spouse in the order or agreement (r.103(2) of the FL Regulations), the extension of the information and reporting requirements to non-member spouses by Division 7A.2 of the SIS Amendment Regulations and the duty owed by a trustee in an accumulation fund, on request by a non-member spouse, to create a new interest for him or her in the fund (r.7A.10 of the SIS Amendment Regulations).

Mr Davis informed the Committee that the trust deeds or governing rules of many superannuation funds have a provision to the effect that if a person has an entitlement to a benefit from the fund he or she becomes a member of the fund. He said that the situation where the legislation is saying one thing (that the non-member spouse does not become a member) and the governing rules of the fund another (that the person does become a member of the fund) will cause confusion for trustees particularly when they have to comply with legislative requirements on matters such as the obtaining of the consent of members to the amendment of trust rules and the possible entitlement to surpluses. He added in his testimony to the Committee whether the situation of the non-member spouse could be better covered by some more specific provision in the legislation as what is to be the case.

Having reflected on Mr Davis's testimony, we think that the difficulty is that there is no express provision in the Bill clearly stating that the non-member spouse does not become a member of the fund by the making of an order or an agreement. If there were an express provision in the Bill, it would clearly prevail over the provisions in trust deeds (section 90MB of the Bill provides that the provisions of new Part VIIIB of the Family Law Act will have effect despite anything to the contrary in a trust deed or other instrument). We will put to the Government for consideration an amendment to the Bill to expressly provide that, notwithstanding anything in the trust deed or the governing rules of a superannuation fund, a non-member spouse does not become a member of the fund by the making of an order or an agreement, under the relevant provisions of the Bill, to split an interest in a superannuation fund. Subject to the Government's agreement, we will provide Mr Davis, and the Superannuation Committee of the Law Council of Australia, with an opportunity to comment on a draft of the provision once one is prepared.

William M Mercer Pty Ltd

On the second day of Committee's hearings on the Bill, Senator Watson informed Mr Ray Stevens and Ms Marie Sullivan, of William M Mercer Pty Ltd, that the Committee would refer the submission from Mercers to the Attorney-General's Department and the Australian Taxation Office for response, rather than going through it in detail.

We have, with officers from Treasury in meetings earlier this month, discussed the detail of the submission from Mercers with Mr Stevens and Ms Sullivan. In addition, the comments Mercers have made on tax issues have been referred to the Australian Taxation Office. We will address each of the comments made in the Mercers submission in our report back to the Committee next month.

Privacy considerations

Ms Angela Lynch, of the National Network of Women's Legal Services, while supporting the inclusion of section 90MZB in the Bill enabling a non-member spouse to obtain information from a trustee about the interest his or her spouse has in a superannuation fund, informed the Committee that it was extremely important that the information provided under the provision not include the address of the other spouse.

The information that the trustee will have to provide to a person who has made a request under section 90MZB will be set out in regulation 119 of the Family Law Regulations. Ms Lynch put to the Committee that, to prevent a trustee giving that spouse a pro forma or a copy of some other document (for example, the most recent member statement) including the address of the other spouse, privacy protocols should be developed by the superannuation industry so that no more information is given to the spouse than is absolutely necessary to negotiate an agreement.

I agreed, at the suggestion of Senator Watson, to take this issue up with the Privacy Commissioner.

Because the matter is a question of policy, we have discussed the issue of privacy protocols with the Information Law Branch of the Attorney-General's Department, which has policy responsibility for the *Privacy Act 1988*.

The Privacy Amendment (Private Sector) Bill 2000, recently passed by Parliament and now awaiting Royal Assent, will provide National Privacy Principles setting out standards for the handling of personal information by the private sector and enable industry groups, such as the superannuation industry, to develop privacy codes for approval by the Privacy Commissioner.

However, the codes, being general in nature, could not be expected to go into sufficient detail to give specific guidance to trustees when documents are received under particular statutory provisions (for example, on what they should do or not do when a request for information has been received under proposed section 90MZB).

Also, while upon commencement of the Privacy Act amendments (12 months after Royal Assent), it will be a breach of the Act for a private sector organisation such as a

superannuation fund to disclose personal information about an individual unless, relevantly, disclosure is authorised by law (National Privacy Principle 2.1(g)), greater guidance may be provided for trustees if it were clear on the face of the family law legislation that an address of a spouse must not be disclosed when a request is made to a trustee for information. This is a matter we will put to the Government.

Proposed section 90MZB provides that, when a trustee receives a request for information, the trustee must, in accordance with the regulations, provide information about the superannuation interest to the applicant. As I mentioned, the information that will need to be provided by the trustee will be set out in regulation 119 of the Family Law Regulations. We propose to raise with the drafter whether it is necessary to amend section 90MZB to ensure there is also power to set out in the Regulations the information that the trustee must not disclose when a request is made under the provision.

Yours sincerely

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APPENDIX 3

ATTORNEY-GENERAL'S DEPARTMENT AND TREASURY'S RESPONSE TO THE SUBMISSIONS AND TESTIMONY (SUBMISSION NO. 42)

ATTORNEY-GENERAL'S DEPARTMENT AND TREASURY'S RESPONSE TO THE SUBMISSIONS AND TESTIMONY to the SENATE SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES on the FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

EXECUTIVE SUMMARY

The attached document is a comprehensive summary of the comments and recommendations made to the Senate Select Committee on Superannuation and Financial Services ('the Committee'), both in written submissions and in oral testimony during the public hearings on 13 November 2000 and 14 November 2000, on the Family Law Legislation Amendment (Superannuation) Bill 2000 ('the Bill'). The document also contains a response to the comments and recommendations by the Attorney-General's Department and the Treasury.

2. This Executive Summary deals, briefly, with the main issues raised before the Committee, as identified in the Committee's Interim Report.

Valuation of a superannuation interest

Legislative provisions

3. Several of the submissions commented that the valuation provisions, contained in the draft Family Law Amendment Regulations 2000 ('the FL Regulations'), are unnecessarily complex.

4. The Committee will be aware that there are two broad categories of superannuation interests - accumulation interests and defined benefit interests. The overwhelming majority of superannuation interests are accumulation interests - approximately 87% of memberships in the September Quarter 2000, according to recently released data from the Australian Prudential Regulation Authority ('APRA'). Defined benefit memberships comprise 2% of the overall memberships and hybrid memberships, which have both an accumulation component and a defined benefit component, comprise the remaining 11% of memberships. However, according to the APRA data only 53% of the value of superannuation assets are held in fully vested accumulation memberships. This means that the remaining 46% of the value of superannuation assets is held in either defined benefit memberships or hybrid memberships.

5. As the Committee will be aware, it is a relatively straightforward matter to value a fully vested accumulation interest, as the value will be easy to calculate at any given time. A number of submissions have made this point (see for example, the submission by the Institute of Actuaries of Australia). However, for those accumulation interests that are not fully vested, and have a component of the benefit dependent on, for example, years of service, the valuation becomes more complex. These interests, which APRA terms hybrid memberships, will need to be valued in a similar manner to defined benefit interests.

6. As the Committee will also be aware, a defined benefit interest is one in which the final benefit that the member will receive depends on future events, such as length of service and final average salary on meeting a condition of release. The value of such an interest is not easily ascertainable as it is dependent on the probability of future events. It is, therefore, proposed to actuarially value a defined benefit in order that a more equitable value can be obtained.

7. Some submissions suggested that the actuarial valuation method should not be used and that these interests should be valued in the same manner as fully vested accumulation interests. However, a approach which relies on resignation benefits or similar as the method of valuation of a defined benefit interest or a partially vested interest will lead to inequitable family law divisions of property.

8. The Family Court suggested that it would be simpler if, rather than providing for a detailed method of calculating the valuation of a defined benefit interest, superannuation interests were valued by the court in accordance with the ordinary valuation principles on the basis of the giving of expert evidence.

9. While this would simplify the legislation, it has two disadvantages. First, the inclusion of the actuarial method of valuation has an educative effect. It is particularly important for those people who choose to make an agreement about the division of a superannuation interest, as they will need guidance about how such an interest should be valued. The inclusion of a valuation method in the legislation package will have an important educative role. This is strongly supported by ASFA in its submission.

10. Second, if an actuarial method is not included in the legislation package, the possibility of the parties obtaining widely differing actuarial calculations of the valuation of a superannuation interest would be opened up. This presents the possibility of "duelling actuaries", with the court having to make a difficult decision as to which of the actuarial assumptions on which each valuation is based is more appropriate.

11. We have taken the view that it is preferable to provide in the legislation for the method of valuation of a defined benefit interest and a partially vested accumulation interest. However, we are continuing to work, with both the superannuation industry and actuaries, to ensure that the legislative provisions dealing with the valuation of partially vested accumulation interests and defined benefit interests are as simple as possible.

Valuation factors

12. Some submitted that the valuation factors contained in the FL Regulations need further refinement and that superannuation funds should be able to develop their own valuation factors.

13. We have continued, with the assistance of the Australian Government Actuary, to further refine the valuation factors that will be included in the FL Regulations. An updated version of the factors is included with the attached summary document.

14. The policy intention is that superannuation funds will be able to have fund specific valuation factors approved if the funds consider this necessary and that, once approved, be able to use those alternate factors for actuarially valuing defined benefit interests and partially

vested accumulation interests. We will consider the most appropriate way to implement this policy intention.

Constitutional issues

Constitutional basis for the proposals

15. Concern was expressed that the proposals may be beyond the constitutional power of the Commonwealth and that there may be challenges to the legislative package.

16. The Committee will, of course, be aware that it is not possible to guarantee with absolute certainty, as suggested by one submission, that the legislation will weather a High Court challenge. However, we have sought, and received, extensive and comprehensive constitutional advice on the wide variety of issues raised by the proposals and are confident that they are within the constitutional power of the Commonwealth and would, therefore, withstand a constitutional challenge.

The "clean break" principle

17. Under the *Family Law Act 1975* ('the Act'), the court is required to, as far as possible, ensure that the property settlement order that it makes effects a "clean break" between the parties. Some submissions suggested that the proposals do not ensure that this clean break principle is followed.

18. The Bill and the FL Regulations set up a payment splitting regime, under which a superannuation interest will be split (in accordance with either an agreement between the parties or a court order) when a splittable payment becomes payable. The draft Superannuation Industry (Superannuation) Amendment Regulations 2000 ('SIS Regulations') enable a separate superannuation interest to be created for the non-member spouse, at his/her election, in certain prescribed circumstances.

19. There were submissions that recommended that the superannuation trustees should also have the ability to elect to create a new interest for the non-member spouse. We have received constitutional advice that this is possible and we will consider amending the legislation accordingly.

Jurisdictional Issues

20. The Bill provides that an order about a superannuation interest will be made under section 79 of the Act, in accordance with the Part VIIIB provisions in the Bill.

21. Some submissions suggested that the Bill needs to be clarified in this respect, and we will discuss this issue with the drafting office.

Extent of jurisdiction

22. Some submissions suggested that the Bill is unclear about which courts may deal with superannuation entitlements.

23. Under the Bill, a superannuation interest will be dealt with under section 79 of the Act. Therefore the jurisdictional limits that apply to section 79 proceedings will apply to proceedings that deal with superannuation interests. It is intended that the monetary limits

that apply to the jurisdiction of the Federal Magistrates Service will include the value of any superannuation interest that either party has. We will discuss with the drafting office whether this should be clarified.

Setting aside of superannuation agreements

24. A superannuation agreement is, in a sense, a "subset" of a financial agreement and a court will be able to set aside a superannuation agreement in the circumstances provided for in section 90K of the Act, which was inserted by the *Family Law Amendment Act 2000*. The grounds for setting aside contained in the Family Law Amendment Act 2000 were considered by the Senate during the passage of that Act in November 2000.

Privacy

25. It was submitted to the Committee that it is very important that privacy, and the integrity of personal information be maintained and the legislative package ensure that inappropriate information is not made available and that individual privacy is not jeopardised.

26. We have sought advice from the Information Law Branch of the Attorney-General's Department about these issues. We will give further consideration to an amendment to the Bill to make it clear that the address of a spouse must not be disclosed when a request for information is made to a trustee under proposed s.90MZB of the Act. We propose to raise with the drafter whether it is necessary to amend s.90MZB to ensure there is power to set out in regulations the information that the trustee must not disclose when a request is made under s.90MZB.

Insurance

27. Concern was expressed to the Committee about how any insurance payments to a party were to be treated.

28. The Bill provides that an entitlement of a non-member spouse to a division of a superannuation interest will be met out of what are defined to be "splittable payments". A payment made pursuant to a contract of insurance between the member spouse and an insurance provider is not, under the definition provided in the Bill, a splittable payment.

29. Therefore, any payments made pursuant to an insurance contract between the member spouse and an insurance provider are not covered by the provisions in the Bill.

Waiver

30. Section 90MZA of the Bill provides that a non-member spouse may waive rights under a payment split. Several submissions suggested that it was unclear in which circumstances such a waiver might be realised and what the legal effect of the waiver would be.

31. The Committee will be aware that for certain superannuation interests it is not possible for the legislation to provide for the creation of a new interest for the non-member spouse.

32. The policy intention of the waiver is that, in circumstances where it is not possible to provide that a new interest be created for a non-member spouse (for example, in a defined benefit interest), the non-member might be able to be "bought out" by the superannuation fund.

33. If the superannuation fund wishes to create a new interest for the non-member spouse, in circumstances where the legislation is unable to provide for the creation of such a new interest, then in order to obviate the ongoing effect of a court order or a superannuation agreement, it is necessary to provide that the non-member spouse "waive" any entitlements that s/he might have under the order or agreement.

34. We recognise that several submissions indicate that the intention of the "waiver provision" is not clear in the Bill as currently drafted, and will consult with the drafting office about how to clarify this policy intention, perhaps by including in the legislation an example of the circumstances in which a waiver might be used.

Duty owed to the non-member spouse

35. The SIS Regulations provide that, in certain circumstances, a new interest will be able to be created for the non-member spouse. If a new interest is created, then the non-member spouse will become a member of the superannuation fund and will have all the rights and responsibilities attaching to that membership.

36. Some submissions questioned what duty the superannuation fund would have to a non-member spouse under the payment splitting regime, where a new interest – and therefore a new membership – has not been created. It has been suggested that a superannuation fund should have a duty of good faith to the non-member spouse, and that the legislative package does not provide for this.

37. We recognise that there is merit in this suggestion and will give further consideration to a proposal that, for regulated superannuation funds, the duty owed to a non-member spouse when there is a division of the superannuation interest be a duty of good faith.

Fees

38. If a new membership is created for the non-member spouse, then the superannuation fund will be able to charge the fees applicable to a member of the fund (see r. 5.02 of the Superannuation Industry (Supervision) Regulations 1994). If a new membership is not created, the current legislative proposal prescribes fees for certain initial actions and, under the SIS Regulations, would allow superannuation trustees to charge fees for the ongoing requirements of maintaining dual accounting and reporting systems where a new interest is not created.

39. It was suggested, in submissions, that fees for the implementation of a superannuation interest split, in accordance with the legislation, should not be prescribed. Or, in the alternative, that if fees are to be prescribed, then:

there are a number of other "actions" that the trustees will be required to carry out and for which fees are currently not prescribed in the legislation; and

the level of fees prescribed is insufficient.

40. In developing the current fee regime, we took advice from the superannuation industry about what "actions" should attract fees and what the level of those fees should be.

41. Following further consultation with the superannuation industry, we are considering whether it is appropriate to prescribe fees and, if so, the level of those fees.

Preservation of benefits/order of benefits

42. Several submissions suggested that the current provisions for the order of taking benefits from the member spouse (ie from the non-restricted non-preserved then the restricted non-preserved and then the preserved benefits) and making these benefits preserved in the hands of the non-member spouse is unfair.

43. One alternative suggested in submissions was that the order of taking be reversed. The Government's policy is to preserve where possible retirement income. Therefore, this alternative is not compatible with this policy.

44. An alternative proposal is that the non-member spouse should have the same proportion of the types of benefits as the member spouse and that these should be taken from the member spouse pro rata.

45. We have been advised, in consultation with the superannuation industry representatives, that it would not be possible to implement this as not all the information systems retain the necessary data.

46. Therefore, consistent with recent changes to preservation rules under which all new contributions and all fund earnings are treated as preserved, we intend to retain the existing order of deduction for the payment of the non-member spouse's entitlements from the member's benefits.

ATTORNEY-GENERAL'S DEPARTMENT AND TREASURY'S RESPONSE TO SUBMISSIONS AND TESTIMONY TO THE SENATE SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES
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FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

Submission/Witness	**Comment/Recommendation**	**Departmental Response to Committee**
Andrew Dolphin (Submission 1)	[p.1] Proposed tax concessions for superannuation interests split on marriage breakdown should also be available to those whose marriages do not breakdown	The Government has introduced into Parliament the Family Law Legislation Amendment (Superannuation) Bill 2000 because it recognises that a former spouse should be able to access, in appropriate circumstances, the superannuation that was built up during the time that the parties were cohabiting.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Colin Grenfell (Submission 2)	[p.2] Value of both a defined benefit interest and an accumulation interest should be the "retrenchment benefit"	The nature of the proposed SIS Regs is to try to incorporate them as much as possible into the existing legislative framework. Retrenchment benefits are subject to the rules of the scheme and are contingent on a future event. Withdrawal benefits are applicable to all forms of superannuation funds, while retrenchment benefits relate mainly defined benefit funds. A withdrawal benefit more accurately reflects an outcome. The valuation of retrenchment benefits could be arbitrarily determined by a fund and would therefore be less certain than the methods currently being proposed.
Jacques Martin Industry Funds Administration (Submissions 3 and 15) [Rec. numbers relate to Submission 15]	(Recs. 1 and 2) : That any interest be split at the time of the Court order or agreement. If this is onerous for unfunded and defined benefit schemes, consideration should be given to allowing fund rules to determine the timing of the split. (Testimony p.6-7): When the non-member's entitlement is determined (at the time of separation or court order), a separate account should be created which could stay in the fund or be rolled over to another fund. (Testimony p.13-14 also relevant)	[See also Institute of Actuaries No.9, p.3 and No.22 p.1) We have obtained Constitutional advice since the Senate Committee hearings were held that a law providing for the trustee (at its option) to create a new interest in a regulated superannuation fund out of a portion of the member spouse's vested withdrawal benefit is within the corporations power in s.51(xx) of the Constitution and the pensions powers in s.51(xxiii) of the Constitution. Accordingly, we will give further consideration to amendments to insert an additional Division in the SIS Regns to enable the trustee, where the member has an accumulation interest to create an interest in the name of the non-member spouse having the value

		of the base amount (or the adjusted base amount, if
Jacques Martin Industry Funds Administration (cont.)		applicable), provided that that amount does not exceed the withdrawal benefit of the member spouse at the time the interest is created. The additional Division would permit transfer or roll out of the new interest, at the option of both the trustee and the non-member spouse.
	(Rec. 3): That the methods of initial valuation not be prescribed in the legislation. The value of a significant proportion of matrimonial property is difficult to determine - the Court and the parties rely on professional valuers, and superannuation should be treated no differently.	Setting out a method for valuing an interest in the legislation will require the Court, where there is any unvested portion of a superannuation interest (eg. interests in defined benefit and partially vested accumulation funds) to take into account a value of these often valuable portions in property proceedings. Using an actuarial valuation will allow a value to be given to the interest while removing the capacity for parties to incur expense by arguing on valuation issues (eg. by calling conflicting evidence from actuaries that the interest should have a different value because of the personal circumstances of the member). Prescription by legislation of valuation methods will also remind parties who negotiate their own property settlement that a superannuation interest may have a value that is higher than if the member resigned at the time of separation, and will provide a means for such persons to put a value on any on the interest.

Submission/Witness	**Comment/Recommendation**	**Departmental Response to Committee**
Jacques Martin Industry Funds Administration (cont.)	A totally vested accumulation benefit should be valued by interpolating between the values at the annual review dates. Rather than mandatory formulae in legislation, for funds where the complexity of design results in more than one possible value, the fund actuary should be consulted to either devise an appropriate formula or formulae or to value the particular benefits.	We propose to give further consideration to an amendment to r.93 of the FL Regns to provide that where the relevant date at which an accumulation interest is required to be valued is prior to the most recent review date, the interest may be valued by interpolating between the review dates immediately before and after the relevant date.
	(Rec. 4): That r.7A.02(1)(b) of the SIS Regns be amended to the effect that the trustee need only notify the member spouse if the payment split was made under a court order where no appearance was made on his or her behalf.	There may be other circumstances where the trustee may know that the interest is subject to a payment split (eg. where the member has been in contact with trustee about it). In essence, a payment split notice will have the character of an acknowledgment of service of the agreement or the order, and the trustee may consider it to be good business practice to give notices to both the member and non-member spouses.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 5): That if the interests are not to be split at the time of the agreement or order, Division 7A.2 of the SIS Regns (which requires that the non-member be given 'a copy of information' given to the member but not 'personal information if, in the circumstances, disclosure would be unreasonable' or 'information in relation to which the trustee owes the member a duty of non-disclosure') be amended to require the provision of specified information to the non-member spouse.	We propose to give further consideration to the amendments to Division 7A.2 proposed by Jacques Martin. [Same point made by ASFA p.17 and Institute of Actuaries No.22, p.4] Treasury is currently reviewing disclosure rules in relation to Division 7A.2
	(Recs. 6 to 9): That if r.7A.06 of the SIS Regns remains, it be redrafted along the lines that the member spouse is obliged to cash a lump sum which is at least equal to the lesser of: (a) the maximum amount that the member is entitled to cash in the form of a lump sum; and (b) the adjusted base amount on the day on which the member spouse's benefits are cashed. That the 28 day period in r.7A.06 for the non-member to elect that the member cash benefits in the form of a lump sum be abolished (or, failing that, enable the trustee to allow a longer period) and, if retained, commence from the date of service of the agreement or the order. An election should not, under r.7A.06(7) be irrevocable, but be allowed to be overriden by a subsequent election to split the interest.	It is necessary that the rules, in r.7A.06 and r.106 of the FL Regns, about satisfying amounts owing to a non-member spouse first out of lump sums, be aligned. We propose to give further consideration to the proposal that the rule should be (and that r.7A.06 and r.106 be amended to provide) that the member must take at least enough to satisfy the amount of the non-member's adjusted base amount, subject to a cap of the maximum amount the member can take without losing the right to take his or her remaining benefits in the form of a pension.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Recs. 10 and 11): When the splittable payment becomes payable the non-member spouse should be permitted to become a member of the fund. If a rollover or transfer cannot take place, the non-member spouse should be permitted to remain a member of the fund.	We agreed with Jacques Martin. We propose to give further consideration to an amendment to r.7A.18(1) to replace 'must' with 'may' - so that a trustee is able to retain the non-member in the fund.
	(Rec. 12): Schedule 2[26] of the SIS Regns: If the member's benefits are transferred to an Eligible Rollover Fund, the non-member spouse should be permitted to become a member of the fund.	Treasury will consider a response that will enable the trustee to retain the Non Member Spouse in the fund. One solution is to change 'must' to 'may' in Regulation 7A.18(1) that gives the trustee the option not 'to ERF' the Non Member Spouse. (ie the trustee will be provided with a discretion to retain the member)
	(Rec. 13): Schedule 2 [5A] and [8] of the SIS Regns: That the definition of "minimum benefits" should remain unaltered.	[See also Mercers comments on 'minimum benefits' in Schedule 2 [5A] and [8]] Treasury is examining the issues surrounding the need to amend the definition of minimum benefits.
	(Rec. 14): Schedule 2 [5] of the SIS Regns: That the SIS Regns need to prescribe a class of "member" for the purposes of the SIS Act.	In discussion, Jacques Martin agreed that the amendment in Schedule 4 of the SIS Regns, modifying the meaning of "member" for the purpose of section 65 of the SIS Act, addresses its concerns. We will give further consideration to such an amendment.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 15): Schedule 2[3],[3A],[3B],[3BA],[3C],[3D],[3E], [3F],[3FA] and [3G] of the SIS Regns: Given the nature of allocated pensions, sub-reg 1.06(4) of the SIS Regns should not be amended.	The re-draft of Subdivision 6.5.4 of the FL Regns - to simplify the provisions for the division of a pension in the payment phase (and on which work is now proceeding) - will make these consequential amendments to the SIS Regns unnecessary.
	(Recs. 16, 19 and 20): [A comment about a statement in the SIS Regns Explanatory Paper relevant to Subdivision 6.5.4.] (Rec. 16) That instead of a "notional commutation for tax purposes only" the provisions should require a "real" commutation. If necessary the legislation could provide that any commutation performed for Family Law purposes is (to the extent possible) to be treated as if it had not taken place. (Rec.19) (Testimony p.7-8, 12-13) Division 7A.5 of the SIS Regns: Interests being paid by way of an income stream should be treated by way of commutation instead of splitting off part of each pension payment.	To 'commute' any part of a pension payable to the member spouse to a lump sum to pay a pension out of that lump sum to the non-member may, in the case of a lifetime pension payable to the member spouse, be an acquisition of property other than on just terms contrary to s.51(xxxi) of the Constitution (eg. such an acquisition would occur if the member spouse died before the time when he or she had received by way of pension payments the amount of the lump sum sufficient to pay out the non-member spouse).
	(Rec.20) That rather than adopt the concepts of "accumulation phase" and "payment phase", the relevant distinction (for the new interest option for a non-member spouse) should be whether the interest is being received as (or is defined in terms of) an income	The problems identified in the Jacques Martin submission relevant to this recommendation (eg. the 40,000 contributing members in one fund administered by JMIFA who have received a non-preserved benefit) relate to problems with the

	stream. Any income stream which is being received should be commuted, whilst any defined in terms of an income stream should be "notionally" commuted, and the interest of the non-member split off. An interest which is being received as, or is defined as, a lump sum, can readily have the interest of the non-member spouse split off.	definition of "accumulation phase" in r.76 of the FL Regns. The FL Regn definition is not relevant to the meaning of "accumulation phase" in the SIS Regns (see proposed new r.1.03(4) to be inserted by Schedule 2[2A] of the SIS Regns).
	(Rec. 17): It should not be possible for the member spouse to instigate the transfer of the non-member spouse's entitlement out of the fund.	Treasury is considering the issues behind the situation where the Member Spouse instigates a transfer. Treasury is examining whether it is possible to amend proposed regulation 7A.07(2) to ensure the right given to the Member Spouse to rollover or transfer the Non Member Spouse is limited to a fund nominated by the Non Member Spouse.
	(Rec.18) (Testimony p.14): That either the 28 day period be abolished or, failing that, paragraph 7A.07(5)(a) of the SIS Regns be redrafted along the lines of "28 days or such longer period as the trustee allows". It does seem a little strange that the period within which the member must give the notice should run from the time when the trustee gives the payment split notice to the non-member spouse.	Treasury is considering r.7A.07(5)(a) to enable the trustee to allow a member spouse a longer period than 28 days to make a request that the Non Member Spouse be transferred or rolled out to another fund. (ie the 28 days will be a statutory minimum only).

Submission/Witness	**Comment/Recommendation**	**Departmental Response to Committee**
Jacques Martin Industry Funds Administration (cont.)	(Recs. 21 and 22): That the definitions of "member spouse" and "non-member spouse" be amended, and a new definition of "non-member spouse account" be created.	The definitions of "member spouse" and "non-member spouse" for the purpose of r.7A.14 (and all other provisions of the SIS Regns) will be in terms very similar to that suggested by Jacques Martin (see the definitions to be inserted by Schedule 2[2] of the SIS Regns). It is not appropriate to include the words "but will receive an interest after the split has been effected" in the definition of "non-member spouse" because the non-member spouse will not receive an interest unless he or she chooses to have one created for him or her under Division 7A.5 of the SIS Regns. It is not proposed to amend the SIS Regns to include a definition of "non-member account", as the term is not one used in the new provisions.
	(Rec. 23): That r.7A.14(a) of the SIS Regns be amended by substituting the words "with respect to" or "on behalf of" for the word "from", as contributions can be received from other sources, such as employers.	We propose to give further consideration to an amendment to r.7A.14(a) to substitute the words "on behalf of" for the word "from".
	(Rec. 24): r.7A.09(4) of the SIS Regns: That the non-member spouse's wishes should prevail. A notice from the non-member spouse to create a new interest should have effect even if received after: - the member spouse has commenced to receive a payment; - the 28 day notice has expired; or	We propose to give further consideration amendments to: - r.7A.07 and 7A.08 of the SIS Regns so that they provide for member spouse initiated creation of a new interest for the non-member spouse and, at the option of the non-member spouse, transfer or roll out of the new interest to a fund of his or her nomination

		[see response to JMIFA Rec 17 above];
Jacques Martin Industry Funds Administration (cont.)	- the trustee has received a notice from the member spouse to transfer out the non-member spouse's entitlement (unless the transfer has been actioned).	- provisions of the SIS Regns that provide time periods of 28 days to enable the trustee to extend that period [see response to JMIFA Rec 18 above]. Accordingly, the non-member spouse's wishes about whether to remain in the fund or transfer out will prevail, and provision will exist for the creation and/or transfer out to occur outside the 28 day period.
	(Rec. 25): That if interest are not to be split at the time of the agreement or order, r.2.05(1) of the SIS Regns be amended to incorporate non-member spouses.	Treasury is examining this issue further and will consult with the drafter.
	(Rec. 26): That r.3.01 of the SIS Regns be amended to include non-member spouses as members of the prescribed class.	An appropriate amendment will be made to the SIS Regns to ensure that a payment split does not cause the status of an employer fund to be changed to a public offer fund.
	(Rec. 27): The position with respect to insured amounts received by funds when a member spouse dies or becomes totally and permanently disabled whilst still a member of the fund must be clarified.	An insured amount received by the fund when the member spouse dies or becomes totally or permanently disabled will not effect the amount payable to the non-member spouse. However, if the adjusted base amount can not be satisfied out of other benefits payable to the member spouse in respect of his or her interest in the fund, it may be satisfied out of that insured amount.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 28): The superannuation industry should be permitted to retain its existing method for allocating surchargeable contributions.	The amendments to the surcharge legislation are still being developed and these issues will be taken into account in drafting the necessary amendments. The Australian Taxation Office intends to consult with industry in developing these amendments.
	(Rec. 29): r.75(1) of the FL Regns: The current definition of "unit trust" be replaced with the definition of "unitised fund" in r.5.14(1) of the SIS Regns.	We will give further consideration to an amendment pick up the definition of "unitised fund" in the SIS Regns.
	(Rec. 30) (Testimony p.15): r.78 of the FL Regns: That an "unsplittable interest" should be defined as one where to give effect to a payment split would result in either the member's or non-member spouses' interest being less than $1,000.	[See also Institute of Actuaries No.9 p.3] It would not be appropriate to amend the definition of unsplittable interest in the manner suggested by Jacques Martin. To do so would, in effect, identify a split of an interest that should not occur, rather than an interest that is not splittable. We intend, however, to give further consideration to amendments to r.7A.07 and 7A.09 of the SIS Regns so that the non-member spouse will not be able to be transferred out or have a new interest created in the fund if the amount transferred out, the amount remaining in the fund for the member or the value of the new interest created is less than $1,000.
	(Rec. 31): Payment splits when the member spouse is receiving pension payments. That instead of paying part of each pension payment to the non-member spouse, the income stream should be commuted and a lump sum split off as the interest of the non-member	To commute an income stream payable to the member spouse to split off a lump sum as the interest of the non-member spouse, in the case of a income stream payable for life to the member spouse, may

	spouse.	be an acquisition of
Jacques Martin Industry Funds Administration (cont.)		property other than on just terms contrary to s.51(xxxi) of the Constitution (eg. such an acquisition would occur if the member spouse died before the time when he or she had received the amount of the lump sum sufficient to pay out the non-member spouse).
	(Rec. 32): That r.84 of the FL Regns be amended so that if the spouses choose the transfer amount method, it can only be applied against the whole of the member's superannuation interest, and not against the individual pension payments.	We do not intend to amend r.84 so that the spouses can only choose to use the transfer amount method in a superannuation agreement when the amount is to be applied against the whole of the member's interest. To do so would reduce flexibility for parties, who may wish to make a private agreement applying the amount against on-going pension payments. Section 90G of the Act will require that each party receive independent legal advice about the agreement. Where a superannuation agreement is made as part of an overall property settlement between the parties, one would expect that a non-member spouse would take a greater share of other property if his or her share of on-going pension payments is not indexed.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 33): That a form of a payment splitting agreement be prescribed.	We do not propose to prescribe the form of a payment splitting agreement. The form in which parties may make a financial agreement under Part VIIIA of the Act is not prescribed. (A superannuation agreement will usually form part of a financial agreement under Part VIIIA).
	(Rec. 34): For the avoidance of doubt, r.86 of the FL Regns be amended so that the insured amounts are not included when valuing a member's total withdrawal benefit.	We are giving further consideration to amendments to r.86 of the FL Regns, including to ensure that it includes amounts payable to the member spouse from all superannuation interests (eg. from approved deposit funds and exempt superannuation schemes) if he or she voluntarily ceased to be a member.
	(Rec. 35): s.90MJ of the Bill be amended so that payment splitting agreements are required to express the base amount in whole dollars in the same way as orders of the Family Court are expressed.	We will give further consideration to amendments to s.90MJ of the Bill and to Subdivision 6.2.1 of the FL Regulations about a requirement to specify a base amount in an agreement relating to a superannuation interest in the accumulation phase. The amendments to Subdivision 6.2.1 of the FL Regulations will require the base amount to be expressed in whole dollars.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 36): That the definition of "relevant date" in r.75 of the FL Regns be amended so that: - the date cannot be prospective; - if the date is since fund membership commenced, the withdrawal date be determined by interpolating between the nearest review dates, after making allowance for any rollovers and transfers in and any partial benefit payments made during that year; - if the date is in the first year of fund membership then the interpolation be between the commencement date and the first annual review date; - if the date is in the most recent fund year where a review is yet to be completed then the interpolation be between the last review date and the effective date of a benefit quote (which would be performed as soon as practicable after the agreement or order is served); - if the date is in the first year of membership and before a review has been performed then the interpolation be between the commencement date and the benefit quote date;	We propose to give further consideration to an amendment to r.93 of the FL Regns to provide that: - where the relevant date at which an accumulation interest is required to be valued is prior to the most recent review date, the interest may be valued by interpolating between the values at the review dates immediately before and after the relevant date (after making the allowances suggested by Jacques Martin); - where the relevant date at which an accumulation interest is required to be valued is since the most recent review date, the interest may be valued by interpolating between the value at that review date and the value at the interest at the date at which agreement is served on the trustee (after making the allowances suggested by Jacques Martin); - where the relevant date at which an accumulation interest is required to be valued is before a review date, the interest may be valued by interpolating between the value at the commencement date of the interest and the value at the interest at the date at which agreement is served on the trustee (after making the allowances suggested by Jacques Martin).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	- that limb (a)(ii) of the definition (providing the date of the breakdown of the marriage as a default date if no date is agreed by the parties) be omitted, so that parties will be required to agree on a relevant date and disclose it in the agreement; - that is limb (a)(ii) of the definition is retained, the parties be required to provide the date of breakdown of the marriage.	We also propose to give further consideration to amendments to r.103 of the FL Regns to provide, where the parties agree to split the interest according to the fixed percentage method and the relevant date selected by the parties is retrospective (eg. which it will be if they select the date on which the parties separated), for the application of a growth factor to the base amount for the period between the relevant date and the date of service on the trustee of the agreement. We are also considering whether it would be desirable to place a limit upon the date which parties to a superannuation agreement may select as a relevant date (in some cases a fund will not have records about what the value of an interest was at a date many years ago). We propose to give further consideration to amendments to the definition of relevant date in r.75 of the FL Regns so that: - the date can not be any later than the operative date of the agreement; - to replace subparagraph (a)(ii) of the definition so that if no date is agreed upon by the parties, the date should be the date the agreement is signed, and the date agreement is undated the date on which the agreement is served on the trustee.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 37): That r.99(4) of the FL Regns be amended by deleting the reference to Taxation Determination 2000/29 and replacing it with a reference to the balance in the member's account.	We propose to give further consideration to the amendment to r.99(4) of the FL Regns suggested by Jacques Martin.
	(Rec. 38): That the requirement in r.103(2) of the FL Regns for trustees to index the base amount annually be removed and replaced with a requirement to index the base amount at the point the interest is to be split, paid or transferred out.	In discussion, Jacques Martin informed Department officers that (instead of Rec. 38) Jacques Martin considered that the requirement, in r.103(2) of the FL Regns, for annual indexation of the base amount on the first day of each annual period, should be replaced by a requirement for annual indexation with effect from that day (but not necessarily done on that day). We will give further consideration to an appropriate amendment to r.103 of the FL Regns to give effect Jacques Martin's suggestion.
	(Rec. 39): That in circumstances where the member's account balance is invested in a different investment strategy or strategies to the ones in which their contributions are invested, r.103(4)(a) should be amended to provide that the base amount be indexed at the interest rate applicable to the account.	In discussion, Jacques Martin explained that the problem was that some funds permitted members to have their contributions invested in a different investment strategy from that in which the balance of their account is invested. We will give further consideration to an amendment to r.103(4)(i) of the FL Regns to provide that in those circumstances the crediting rate should be the rate applicable to the balance of the member's account.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 40): If Subdivision 6.5.4 of the FL Regns remains, the definition of "payment year" in r.108 be amended so that it is consistent with the fund's financial year.	We are working on a re-draft of Subdivision 6.5.4 of the FL Regns to simplify the provisions for the division of a pension in the payment phase.
	(Rec. 41): That any fees payable by the member spouse or non-member spouse should be able to be deducted from their respective accounts.	Prescribed fees are being reconsidered.
	(Rec. 42): That forms should be prescribed for all agreements, declarations, notices and requests which are able to be given under the proposed legislation	We do not propose to prescribe the form of superannuation agreements. The form in which parties may make a financial agreement under Part VIIIA of the Act is not prescribed. (A superannuation agreement will usually form part of a financial agreement under Part VIIIA).
		In relation to other notices, Jacques Martin pointed out in discussion with Departmental officers that a prescribed form of notices etc. would be useful so that funds were to able to quickly identify them to action them promptly in view of the requirements in the Regulations for things to be done within specified time periods. The time period provisions in the Regulations are, however, being modified in response to submissions put to the Committee (eg. we giving further consideration to an amendment to modify the requirement in r.7A.10 of the SIS Regns of a

		time period of 4 business days for funds to create an interest on receipt of a notice from a non-member spouse so that the creation of the new interest should be effective from the date of service of the notice [see Mercers, r.7A.10 of the SIS Regns]).
	(Rec. 43): That the trustee should be required under r.119(3) of the FL Regns to give information with respect to the amount in the member's account at some defined time.	[See also Mercer's r.119] We propose to give further consideration to an amendment to r.119(3) of the FL Regns to require the trustee to provide information about the withdrawal benefit of any accumulation interest and the unvested portion of any partially vested accumulation interest.
		In discussion, Jacques Martin also mentioned to Departmental officials that the trustee should be required to give information about the preservation status and the tax components of the withdrawal benefits. We propose to give further consideration to further appropriate amendments to r.119(3).

Submission/Witness	Comment/Recommendtion	Departmental Response to Committee
Jacques Martin Industry Funds Administration (cont.)	(Rec. 44): That service of an agreement or splitting order should not be considered valid unless it is accompanied by information about the contact details of the non-member spouse.	We do not propose to change the requirement that it should be the non-member spouse who should provide contact details to the trustee. It may be in the interests of the member spouse to serve the agreement or order on the trustee, and the non-member spouse may have genuine reasons in shielding her postal address from the member spouse.
	(Rec. 45): That r.120(2)(g) of the FL Regns, which provides for the non-member spouse to give to the trustee, as part of his or her contact details, his or her place and country of birth, be deleted.	We propose to give further consideration to an amendment to s.120(2) of the FL Regns to limit the information that the non-member must provide to the trustee to his or her name and postal address, which is sufficient to identify him or her, and his or her date of birth, which is necessary so that the trustee knows whether to not the non-member spouse's entitlement is preserved when the member satisfies a condition of release.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Ms Fiona Galbraith **Compliance Manager** **Jacques Martin** **Industry Funds** **Association** (Testimony)	(Testimony p.11): At the hearing, in an exchange with Ms Galbraith Senator Watson's said "So when the member leaves the spouse has to leave as well. The spouse cannot just sit there and allow the funds to accumulate". In response Ms Galbraith replied " I think in some circumstances they can subject to fund rules. It is not very clear in the legislation whether that is the case or whether they are forced out."	If the member spouse leaves a fund and transfers his benefits in the fund to another fund, that transfer will be a splittable payment under s.90ME(1)(b) of the Bill, and the non-member spouse will be entitled to be paid the adjusted base amount at the time of the transfer.
	(Testimony p.7, 12-13) The way the legislation is drafted persons cannot have access to non-preserved elements of their superannuation because they will be in the payment phase.	Regulation 76(4) of the FL Regns would treat, for the purposes of the FL Regns, the superannuation interest of a member of a superannuation fund who has received a portion of his or her non-preserved elements as being in the payment phase. We propose to give further consideration to an amendment to r.76 of the FL Regns to pick up the definition of "accumulation phase" proposed for the SIS Regulations.
	(Testimony p.14-15) It is possible that a malicious member who has lost two-thirds of his or her interest to the member spouse to get at their ex-spouse maliciously by dumping the amount in capital guaranteed for the next 20 years have their employer put money into another fund which they are doing the right thing by.	It is possible that this might happen, and that the adjusted base amount could grow to more than the amount in the fund in which the interest has been split. If the fund is an accumulation fund, and there is a possibility that the spouse might act maliciously in this way, the non-member spouse would be well advised to elect to create a new interest in the fund.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Margaret Lukes (Submission 4)	[p.3] Supports the proposal, with the example of her own story	No response required.
Australian Institute of Family Studies (Submission 5)	[p.1] Currently both men and women tend not to take superannuation into account when dividing property	This is the major reason for the proposed reforms.
	[p.1] An education campaign will be required to increase public awareness of superannuation and its value	The Government is aware of this.
CSS and PSS Boards (Submission 6)	[p.1] Superannuation trustees will be subject to additional responsibilities and additional administrative costs	AGs and Treasury have been consulting with the superannuation industry about how to minimise as far as possible the administrative burdens and costs.
	[p.3] "Flagging orders" will generally be the preferred way to deal with the CSS and PSS schemes as these defer the actual division of the payment until the benefit becomes payable.	The submission misunderstands the proposal. For defined benefit schemes, the actual division will not occur until a splittable payment becomes payable.
	[p.4] Consequential amendments to the CSS and PSS legislation will be required.	AGs and Treasury are consulting with DoFA about what, if any, consequential amendments are necessary.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
National Network of Women's Legal Services (Submission 7)	[p.2] Need to ensure that legal advice and representation is available for women in family law property proceedings	The current legal aid guidelines, which have been provided to the Committee, include property proceedings as a family law priority in specified circumstances.
	[p.3] Need to monitor the legislation to ensure that it does not result in undesirable outcomes.	Noted.
	[p.4] The grounds on which superannuation agreements can be set aside should be widened, particularly when the agreement was entered into prior to marriage or in the early stages of the relationship.	The grounds on which superannuation agreements can be set aside will be the same as the grounds on which general financial agreements can be set aside. See section 90K of the *Family Law Act 1975*.
	[p.5] The superannuation industry should develop privacy protocols around s. 90MZB concerning the release of information to non-member spouses, setting out what information can be released and how it should be released, to ensure that member's addresses and other information not relevant to negotiating a property settlement is not released.	[See pages 4 to 5 of the Department's letter of 22 December 2000 to the Committee]. We propose to give further consideration to an amendment to the Bill to make it clear that the address of a spouse must not be disclosed when a request for information is made to a trustee under proposed s.90MZB of the Act. We propose to raise with the drafter whether it is necessary to amend s.90MZB to ensure there is power to set out in regulations the information that the trustee must not disclose when a request is made under s.90MZB.

Institute of Chartered Accountants in Australia (Submissions 8, 27 & 32)	[No. 27, p.1, s.8] Provisions dealing with accumulation interests should be passed even if it is not possible to resolve all the issues relating to defined benefit interests.	This would mean that not all superannuation interests, and therefore not all couples, would be covered by the legislation, which is an undesirable outcome, and not necessary as the legislative package will deal with defined benefit interests appropriately.
	[No. 27, p.1, s.27] Concerned that these reforms precede the foreshadowed comprehensive review of superannuation policy.	The Government is undertaking a number of superannuation reforms including the splitting of superannuation on marital breakdown. Whilst the Treasurer identified the level of complexity in superannuation as an area for future attention he specifically made clear that this was 'down the track'. There is no immediate timetable for a review. The principle focus of the Government's economic agenda at present is bedding down Tax Reform. .
	[No. 27, p.2, s.27] Concerned that the reform proposals are in family law legislation rather than superannuation legislation.	The reforms are family law reforms and cover all superannuation interests, not only those regulated by the superannuation industry supervision legislation.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Chartered Accountants in Australia (cont.)	[No. 27, p.2, s.27] Increased portability options for members whose interest is subject to a payment split, which discriminates against members whose marriages have not broken down.	At present, the portability of superannuation benefits regardless of marital status is a matter determined by the individual fund. Some superannuation funds provide portability, but not all. The Government indicated its support for changes in this area in its 1996 pre-election statement *Super for All - Security and Flexibility in Retirement,* and reaffirmed its support in the Government's response to the Financial System Inquiry.
	[No. 27, p.2, s.27] Commencement of an eligible service period for a non-working spouse from the date of the split potential discriminates against the non-working spouse by increasing the tax payable on the benefit when compared to that of the working spouse.	The ESP for the non-contributing spouse is the date of splitting the superannuation benefit. Note that AFSA(in submission No. 19 p.2 state that this approach 'is a victory for simplicity and [will not] have a significant detrimental impact. The reasons supporting this are that: • in some cases an ESP is very difficult to determine; • the pre July 1983 component is decreasing over time and could be disadvantageous;and • the overall tax treatment of a split for separation is very generous, providing two ETP tax free thresholds and two Reasonable Benefits Limits. It should be noted that a non-working spouse may be made worse off if they are given the eligible service period (ESP) from their ex-spouse as the first

		$100,696 of the post June 1983 component of an ETP received by a person aged over 55 years is exempt from tax.
		For simplicity it was decided to make the ESP for the non-contributing spouse, the date of splitting the superannuation benefit. Note that ASFA (in submission No. 19 p 20 state that this approach 'is a victory for simplicity and [will not] have a significant detrimental impact.'
	[No. 27, p.2, s.27 and No. 32] consideration should be given to the impact of the proposals on government income streams, for example the assets test and draw down requirements.	This is being considered by the Department of Family and Community Services in the context of developing necessary consequential amendments.
	[No. 27, p.3, s.27] Proposals should apply not only to interests in regulated superannuation funds but also other funds, eg statutory schemes.	The Bill specifically provides that the proposals will apply to statutory schemes and other non-regulated funds.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (Submissions 9, 22 & 31)	(No.9, p.1) (Testimony p.79) Broadly supports the Government's objective of ensuring that parties are given the opportunity to split a superannuation interest in the event of marriage breakdown.	Noted.
	(No.9, p.2) (Testimony p.80) Supports the general approach in the Bill and Regulations where a value is placed on the superannuation interest taking into account any contingent interests or benefits.	Noted.
	(No.9, p.2) (Testimony p.80) As long as they are appropriately constructed, inclusion of standard valuation factors in the regulations, with funds being able to apply to the Australian Government Actuary to use alternate factors, as a satisfactory approach. (No.22, p.4) (Testimony p.80) It is important for a facility to be included for funds to be able to develop its own set of factors and for these to be submitted to the Australian Government Actuary for approval.	The attached revised term factors have been prepared by the Australian Government Actuary, and provided to the Institute for comment. [See also ASFA p.12] We will ensure that an amendment is made to the FL Regns to provide for funds to have their own valuation factors approved.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	It is administratively unwieldy and unnecessary for plan specific valuation factors to be included in the FL Regns. The Institute suggests that if a plan is allowed to use another set of factors, trustees should be obliged to provide a copy of them under r.119 of the FL Regns.	We will give further consideration to an amendment to the FL Regns to include a Schedule in the regulations listing the funds for which plan specific valuation factors have been approved.
	(No.9, p.3 and No.22, p.7) If the non-member spouse dies prior to the non-member spouse's entitlement being paid out, the non-member spouse's entitlement will be able to paid from any reversionary interest payable. It is important that all parties understand the payment implications and the risk of non-payment in the event of the member spouse's death (eg. if no reversionary benefit is payable because the member spouse had not remarried prior to death, the non-member spouse may not receive full settlement of the adjusted base amount).	We agree it will be important that both member and non-member spouses understand when negotiating their agreements, and that courts bear in mind when framing orders, the situations in which payment of benefits will occur when an interest is split. There is a possibility that in some cases (eg. the situation outlined by the Institute, or where the member in a defined benefit fund resigns soon after divorce) an amount agreed or ordered to be paid under a payment split may not be fully satisfied.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.9, p.3) (Testimony p.80, 84) It is important that when an interest is split, the resulting two interests are not subject to member protection. The definition of "unsplittable interest" in the Regulations should be defined as an interest which when split along the lines agreed by the two parties will give rise to a superannuation interest of less than $1,000 or such other amount specified by the SIS Regulations.	[See also JMIFA Rec. 30] It would not be appropriate to amend the definition of unsplittable interest in the manner suggested by the Institute. To do so would, in effect, identify a split of an interest that should not occur, rather than an interest that is not splittable. Treasury is considering the amendment of 7A.07 and 7A.09 of the SIS Regulations so that the Non Member Spouse will not be able to be transferred out or have a new interest created in the fund if the amount transferred out, the amount remaining in the fund for the member or the value of the new interest created is less than $1000. That is, Treasury will examine the issue to ensure that the proposed Regulations do not allow amounts below a certain threshold to be split.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.9, p.3 and No.22, p.1) (Testimony p.80, 83, 85-86) The Regulations have been drafted so that it is not possible to split a defined benefit interest in the accumulation phase (that is, the actual split does not occur until a splittable payment is made, for example, when one is made after the defined benefit member has satisfied a condition of release). It would be preferable to allow trustee discretion to decide whether a defined benefit interest can be split while in the accumulation phase, and whether a new interest be created in the plan in the name of the non-member spouse or whether the benefit should be rolled out to another arrangement. It is important that trustees not be required to split a defined benefit interest.	We are seeking Constitutional advice on this issue.
	(No.22, p.2) (Testimony p.80, 87) The Regulations should address the valuation of partially vested accumulation benefits so that any entitlement that is not fully vested is not ignored.	[See also ASFA p.12] Factors applicable for partially vested accumulation schemes (copy also attached) have been prepared by the Australian Government Actuary, and provided to the Institute for comment.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.22, p.3) There is a gap between the accumulation phase and the payment phase between satisfying a condition of release and receiving a payment.	[See also Mercers r.76] The gap is in the definition in r.76(2) for the purposes of the FL Regns. We propose to give further consideration to an amendment to the definition to pick up the definition of "accumulation phase" proposed for the SIS Regulations.
	(No.22, p.3) (Testimony p.81) Subregulation 119(3) does not include any information relating to accumulation style benefits or offsets relating to debts such as superannuation surcharge attributable to the member spouse.	[See also Mercers r.119] We propose to give further consideration to an amendment to r.119(3) to require the trustee provide information about the withdrawal benefit of any accumulation interest, the unvested portion of any partially vested accumulation interest and, where applicable, the amount of any superannuation surcharge debt.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.22, p.3) The concept of "assumed retirement age" in r.119(3) should be replaced by a new operating standard under SIS requiring trustees to nominate the age by the commencement date of the legislation. The nomination date would stand unless the trustee applied to the regulator for a change.	[See also Mercers r.119] The revised term factors (copy attached) prepared by the Australian Government Actuary will require the trustee to provide the accrued retirement multiple only at the time that the interest is to be valued. Accordingly, we will give further consideration to an amendment to r.119(3)(c) to omit the words "at the assumed retirement age". The revised term factors will, however, require the trustee to provide, where the defined benefit scheme provides pension benefits, the normal retirement age for the spouse member. We propose to give further consideration to amendments to provide that: - that this age will be the normal retirement age (NRA) specified in the trust deed for the fund - that if no NRA is so specified, the default age will be 65 years - to include a power for a fund to apply to depart from the age specified in the trust deed (eg. which would be approved on evidence that the tendency is for members of the fund or an identifiable class of members of the fund to retire at a particular age).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)		We will give further consideration to an amendment to r.119(3) of the FL Regulations to require the trustee to provide information about the NRA specified in the trust deed for the fund or a departure from the age specified in the trust deed has been approved, or has been approved for an identifiable class of members that includes the member spouse.
	(No.22, p.3-4) (No.9 p.6 also relevant) (Testimony p.81) Division 7A.2 of the SIS Regns, which outlines trustees' responsibilities regarding providing information when a benefit is subject to a payment split, is too broad and subject to differing interpretations. It would be preferable for the information to be given to the non-member spouse to be explicitly specified in the Regulations.	[See also JFIMA rec.5 and ASFA p.17] We agree that it would be preferable to explicitly specify the information required to be given to the non-member spouse. We will give further consideration to amendments to Division 7A.2.
	(No. 9, p.4-5, No. 22 p.5 and No.31 p.1-2) (Testimony p.80-81) The base amount assigned to a non-member spouse should not be increased by the Treasury bond rate but by a salary related index so that it increases at a rate at which the member's entitlement is likely to increase.	Treasury is giving consideration to whether to retain the Treasury bond rate as the growth factor for the adjusted base amount where the interest is held in a defined benefit fund.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.22, p.5) (Testimony p.80) Subregulation 103(4) of the FL Regns needs to refer to accumulation interest and defined benefit interests, rather than funds. The rate at which the base amount is increased must be consistent with the nature of the member's interest and hence at the rate at which that interest increases.	[See Mercers comment on r.103] Subregulation 103(4) sets out the growth factor for determining the adjusted base amount. If the provision referred to interests rather than funds, there would, in the case of an interest in a superannuation fund made up of a component that is a defined benefit interest and a component that is an accumulation interest, be separate growth factors for different components of the one superannuation interest, increasing complexity.
	(No.9, p.6 and No.22, p.4) (Testimony p.81) That the Regulations be altered to require that deductions from a member spouse's benefit to pay the non-member spouse's entitlements be made initially from preserved benefits, then restricted non-preserved benefits and finally unrestricted non-preserved benefits.	Consistent with recent changes to preservation rules under which all new contributions and all fund earnings are treated as preserved, we intend to retain the existing order of deduction for the payment of the non-member spouse's entitlements from the member's benefits.
	(No.22, p.5) (Testimony p.81) The administratively simple solution of no superannuation surcharge liability being passed on to the non-member spouse may have funding implications if after a benefit split there is insufficient remaining to cover any surcharge liability attributable to the member spouse.	[See also ASFA p.20] The amendments to the surcharge legislation are still being developed and these issues will be taken into account in drafting the necessary amendments. The Australian Taxation Office intends to consult with industry in developing these amendments.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.22 p.5) (Testimony p.84) All superannuation interests be valued net of any surcharge liability attributable to the member spouse.	[See also ASFA p.20, Mercers r.92, 93. 94. IFSA Testimony p.66] We propose to give further consideration to an amendment to the actuarial method of valuing a defined benefit interest in the FL Regulations to take off the value of the surcharge debt as notified in the most recent member statement. (The method for valuing an accumulation interest - the withdrawal benefit - will already take into account the existence of the surcharge debt).
	(No.22 p.5) Benefits only be allowed to be split where the benefit that will remain attributable to the member spouse is sufficient to cover any surcharge liability.	The amendments to the surcharge legislation are still being developed and these issues will be taken into account in drafting the necessary amendments. The Australian Taxation Office intends to consult with industry in developing these amendments.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No. 22 p.5) It is possible that, after a benefit split, another surcharge return in respect of the member spouse may be received by the plan which should have been taken into account when determining the amount payable to the non-member spouse.	The amendments to the surcharge legislation are still being developed and these issues will be taken into account in drafting the necessary amendments. The Australian Taxation Office intends to consult with industry in developing these amendments.
	(No.22, p.5) Subregulation 103(4)(b)(ii) of the FL Regns - referring to a defined benefit that is a unit trust - is not needed.	We will give further consideration to an amendment to omit r.103(4)(b)(ii).
	(No.22, p.5-6) A method be included that would allow agreements in the accumulation phase to split the member's final benefit in a specified proportion (that is, as a percentage of the final benefit payable).	We do not intend to include a second percentage method for splitting a superannuation interest (that is, in addition to the method set out in the Bill and the Regulations which enables parties to agree to split a specified percentage of the value of the interest at the date set out in the agreement, for example, the date of separation or the date of the agreement). As the Institute acknowledges, it is possible to give effect to an agreement to split the final benefit payable in specified proportions by flagging the interest and splitting it when it becomes payable.

Institute of Actuaries of Australia (cont.)	(No.22, p.6) r.81 and 82 of the FL Regns, and r.7A.11 of the SIS Regns, need revision to ensure that the non-member spouse's entitlement is only subject to the maximum of the member's vested benefit immediately prior to the benefit being split.	[See also ASFA p.14] It is less likely that the non-member's entitlement will exceed the member's vested benefit immediately prior to the benefit being split if the base amount is less than the overall value of the superannuation interest at the operative time. Accordingly it is not proposed to amend r.81 of the FL Regns. It is not necessary to impose a maximum under r. 82 of the FL Regns for agreements which use the fixed percentage method. The fixed percentage will be a percentage that is equal to or less than the overall value of the superannuation interest at the operative time. We will give further consideration to amendments to provisions of the SIS Regns that provide time periods of 28 days (including r.7A.09(4) which provides such a period for a non-member spouse to elect to have a new interest created for him or her in the member's fund) to enable the trustee to extend that period. If these amendments proceed, consequential amendments will be necessary to r.7A.11 of the SIS Regns to provide that the value of any new interest created will be the adjusted base amount at the time of the creation of the new interest provided that it is not more than the overall value of the member spouse's interest at the time that the non-member spouse elects to have the new interest created.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.22 , p.6-7) (Testimony p.81) Subdivision 6.5.4 of the FL Regns is far more complex than necessary and needs to be revised: - no need to r.113 and 114, which seem to assume that further commutation is possible. - in r.111 it would be more appropriate to use Pension Factors determined on a basis consistent with Schedule 9 to convert the adjusted base amount of the non-member spouse to a pension account. - the shortfall amount in r.112 should be removed and a set amount of pension should be paid to the non-member spouse each year until the adjusted base amount is exhausted. - it would not be necessary to go through any notional pension calculation if trust deed limits on the amount that can be taken as a lump sum were overriden to ensure that the member would have to commute enough of their pension to pay out the spouse.	We are working on a re-draft of Subdivision 6.5.4 of the FL Regns to simplify the provisions for the division of a pension in the payment phase.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Institute of Actuaries of Australia (cont.)	(No.9, p.5) The references throughout the Bill to timeframes for the completion of certain actions (eg. 4 business days) be changed to "with effect from" so that actions would be deemed to occur on the relevant date and the required paperwork could follow in due course. It is currently uncertain whether these timeframes are sufficient.	The Institute's comment is relevant only to the concept of "operative time" for a payment split under a superannuation agreement in s.90MI of the Bill. Other timeframes in the Bill provide for a time period in which notice must be given (s.90ML(5)) and the date of signature of breakdown declarations (s.90MI and 90MK). Under s.90MI, the operative time of a payment split under a superannuation agreement is the beginning of the fourth working day after the day on which a copy of the agreement is, with other documents, served on the trustee. The purpose of the time period in s.90MI is to provide sufficient time for the trustee to instruct any person administering the fund on behalf of the trustee that the interest is subject to a payment split, so that no action is taken to frustrate the payment split (eg. payment out to the member of an amount not subject to preservation rules which would reduce the value of the interest to below the base amount identified in the agreement). To provide, in effect, that a payment split is effective from the date an agreement is served on the trustee would not achieve that purpose. Also, we recognise that the period of 4 business days is also insufficient, and that the period needs to be longer. We propose to consult with industry whether a period of 14 days is sufficient.

Institute of Actuaries of Australia (cont.)	(No.9, p.5) It would be simpler, for most fees, to reduce the benefit by the amount of the fee, rather than require the fee to be paid to the trustee. Any fee charged in respect of the provision of information should be paid at the time of request for information. (Testimony p.87) In a number of instances the prescribed fee of $100 is not likely to be sufficient. Where you involve benefit payment processing and the setting up of records, the cost may be more in the order of $200 to $300. The Institute's suggestion is that probably a number higher than $100 should be considered. You may wish to phrase the legislation so that it is an amount up to whatever the set dollar limit is rather than just saying it is the set dollar limit.	Prescribed fees are being reconsidered.
	(No.9, p.7) The words "business day" from s.10 of the SIS should replace "working day" currently defined in s.90MD of the Bill.	We give further consideration to amendments to s.90MD, and also s.90MI of the Bill (the provision which uses the concept of "working day"), to substitute the SIS Act concept of "business day".
	(No.31, p.2-3). The Institute suggests that the only way part of an insured benefit could be paid to the non-member spouse would be if the benefit was flagged until it became payable.	The Bill and the regulations make no distinction about whether or not a benefit in respect of a superannuation interest is funded by an insurance policy. A payment is a splittable payment if it falls within one of the categories in s.90ME(1) of the Bill irrespective of how the trustee meets the payment. In the event of a payment made by

Institute of Actuaries of Australia (cont.)		the trustee in respect of the interest after death of the member spouse from the proceeds of an insurance policy held by the trustee on the life of that spouse, the payment will be a splittable payment out of which any unpaid portion of the adjusted base amount owing to the non-member spouse must be paid if it is a payment to the legal personal representative of the member spouse.
	(No.31, p.3) That, if there is adequate education of the public, trustees and lawyers about the legislation and the rights and responsibilities of parties, the requirement to value a superannuation interest need not delay parties endeavouring to enter a superannuation agreement.	Noted.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Helen Martin **Vice President** **Institute of Actuaries** (Testimony)	(Testimony p.81) A requirement should be included in the regulations for trustees to develop a policy on issues and decisions required under the Bill (covering things like nominating what the assumed retirement age is and dealing with some of the other administrative aspects of the Bill), which must be followed and can only be varied with the approval of the regulator.	[See also Mr John Morgan, Testimony, p.34 and 41] We propose to give further consideration to amendments to the SIS Regns to provide that the trustee of a regulated superannuation fund owes, in respect of an interest in the fund that is subject to a payment split (and until a separate interest is created for the non-member spouse in the fund, if that happens), a duty to act in good faith. [Note: See response to Institute of Actuaries, Submission No.22, p.3 for the Department's proposal to omit the concept of "assumed retirement age" in r.119(3)]
	(Testimony p.82) The Institute would support the use and development of standard forms for both requests for information from trustees and provision of information by trustees to the various parties.	[See also ASFA p.13] Discussion with the Institute of Actuaries clarified that it is proposing that funds develop their own forms, which the Institute is willing to assist prepare, rather than having a standard form prescribed in legislation.
	(Testimony p.84) Mrs Martin mentioned that she was not a lawyer and could not tell the Committee whether there were any regulatory issues with amending the actuarial method in the FL Regulations for valuing a defined benefit interest to take off the value of any surcharge debt (Senator Watson asked whether regulations can "effectively deal with a tax?")	The amendment to the FL Regulations, to provide that in determining the overall value of a member's interest in a defined benefit fund the member's surcharge debt is to be deducted, could not be described as a law imposing taxation and so no regulatory issue arises.

Helen Martin **Vice President** **Institute of Actuaries** (Testimony) (cont.)	(Testimony p.88) There should be 12 months between gazettal and the operative date of the legislation	[See also ASFA p.10] The Government intends to allow 12 months between gazettal of the regulations and the commencement of new Part VIIIB of the Family Law Act.
	(Testimony p.88) Education is fundamental to this process. The parties need to have available information to help them understand the agreements and the decisions they are making; they need to know what information is available and how to get it. Trustees need to be educated about the provisions of the Bill and what they need to do to comply. There is a role for industry, government and the various regulators in that process.	Noted.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Superannuated Commonwealth Officers' Association (Submission 10)	[p.2] Concerned that the proposals may encourage people to enter "sham" separations for taxation or other financial gains	The Bill provides for a "breakdown declaration", where taxation advantages might arise, to minimise this risk.
Kevin Munro & Associates (Submission 11)	[p.2] The proposals should apply retrospectively, provided that both parties agree to the application of the proposals.	The accepted policy as that, in general, legislative change should not be retrospective.
	[p.4] The range of superannuation interests and payments that will be "unsplittable" should be very narrow.	The range of superannuation interests and payments that are prescribed to be "unsplittable" is narrow. The FL Regulations provide that an "unsplittable interest" is one where the withdrawal benefit is less than $1,000. The FL Regulations also provide that a payment is not splittable in limited circumstances, for example if it is made on compassionate grounds, for severe financial hardship or temporary incapacity.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (Submissions 12 and 25)	(No.12, p.1) s.90MD: Constitutional power to impose requirements on overseas funds and other non-resident or non-complying funds.	The coverage of funds under the Bill relies on the marriage power in s.51(xxi) of the Constitution, rather than ss.51(xx) and (xxiii) which underpin the SIS Act. There will, of course, be practical problems with enforcing orders under proposed Part VIIIB of the Family Law Act in respect of overseas funds, as existing arrangements for foreign enforcement of judgements do not extend to orders splitting a superannuation interest.
	(No.12, p.2) s.90ME: Does 90ME(1)(c) and (d) cover payments made to a dependent or other person after the death of a spouse?	Such a payment is intended to be covered by s.90ME(1)(d) (a payment to a reversionary beneficiary after the death of a spouse). We will give further consideration to whether there needs to be a specific reference in s.90ME(1) to these type of payments.
	(No.12, p.2) s.90MQ: Whether a breakdown declaration is required for splitting an interest that has a withdrawal value of less than the ETP threshold.	A breakdown declaration is not required to be served on the trustee if a copy of a decree absolute dissolving the marriage of the parties is served with the agreement on the trustee. The scheme has been designed so that if the parties have been divorced, they can serve a copy of the decree absolute rather than preparing, executing and serving a further instrument (the relevant type of breakdown declaration under either s.90MP(3) or (4), depending on whether or not s.90MQ applies to the declaration).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.12, p.2) s.90MX: Whether s.90MX(3) picks up the amount of all earlier splits where there are multiple payment splits of the one interest when the member has divorced 3 or more times.	Mercer's submission misreads s.90MX(3) of the Bill. In the case of three payment splits: - payment split 2 would take into account payment split 1; and - payment split 3 would take into account payment split 2, which would already have taken into account payment split 1.
	(No.12, p.2) s.90MY: Fees being payable at the operative time is a long time after work is done. Operative time may never arise if parties do not serve the agreement on the trustee.	Prescribed fees being reconsidered. Mercer's comment has been made on the assumption that prescribed fee in respect of payment split includes valuation. A separate fee is prescribed for pre-agreement information requests.
	(No.12, p.3) s.90MZ: Should be amended to expand on preservation requirements. The Family Law Regulations do not address s.90MZ.	Section 90MZ contemplates that the preservation requirements will be specified in other instruments (eg regulations made under the SIS Act, the RSA Act or a law or other instrument of the kind set out in s.90MZ(3)). It is not the intention to address preservation requirements in the Family Law Regulations. In relation to regulated superannuation funds the preservation requirements are set out in proposed rr.7A.10(3) and 7A.18(5) of the SIS Regns.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.12, p.3) s.90MZA: What happens to the amount by which the benefit is reduced when a wavier notice has been served. The non-member spouse should be required to have obtained independent legal advice.	[See ASFA p.17] A waiver notice will be used by a trustee of a non-SIS regulated fund who prefers to 'buy out' the non-member's entitlement rather than to continue to make payments pursuant to a payment split. Neither the member nor the non-member will be giving up anything when a waiver notice is served. The trustee would be paying out the non-member's entitlement from the entitlement of the member. Hence, the reference in s.90MZA(1)(c) to the benefit 'continues to be reduced in the same way.'
		As the waiver is not a waiver of legal rights but of a right to receive future payments, it is appropriate that the requirement for independent advice should be from a financial adviser rather than a lawyer. We propose to give further consideration to an amendment to the Bill to include an example to explain the situations in which s.90MZA will operate.
	(No.12, p.3) s.90MZB: It would be difficult to require overseas funds to comply the obligation to provide information, and to impose penalties on them.	Noted. [See also response above to Mercers s.90MD]

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.12, p.1) s.90MZC: Where the share of the non-member spouse is expressed as a percentage, insurance benefits on the death of the member spouse should not be split.	If the share of the non-member spouse is, under a superannuation agreement, expressed as a percentage, the percentage is one that is calculated as a percentage of the value of the superannuation interest at the time set out in the agreement (eg. the date of separation or the date of the agreement). That amount will be converted into a base amount, which is adjusted in accordance with the growth factor in r.103 of the FL Regns. That adjusted base amount will be able to be satisfied out of any splittable payments made in respect of the superannuation interest, including any payment that is funded by an insurance policy.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont)	(No.25, App A, p.1) r.75 of the FL Regns, defn of "condition of release": Reason for omission of item 108.	Item 108 provides a nil cashing restriction for restricted non-preserved benefits and preserved benefits taken in the form of a non-commutable life pension on termination of a member's employment with an employer who had at any time made superannuation contributions in relation to the member. The term "condition of release" is used in 2 places in the FL Regulations - in r.76(1) to mark the difference between the accumulation phase and the payment phase, which is relevant for the valuation rules in the FL Regulations, and in Schedule 9 for determining which of the lump sum only, pension only or lump sum/pension combination methods is to apply to the valuation of a defined benefit interest in the accumulation phase. Except in the case of a non-commutable life pension taken when the member spouse remains in employment, it is not necessary to include item 108 in the definition of "condition of release".

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)		We will give further consideration to an amendment to r. 99(2) of the FL Regns, which provides the method for valuing a lifetime pension in the payment phase, so that it also applies to the valuation of a non-commutable pension payable out of preserved benefits in the accumulation phase.
	(No.25, App A, p.1) r.75 of the FL Regns, defn of "superannuation fund": Definition is better placed in the Act.	The suggestion will be taken up with the drafters of the Bill and the FL Regulations.
	(No.25, App A, p.1) r.76 of the FL Regns: There are situations that fit into neither the accumulation phase or the payment phase. To avoid confusion, 'growth' or 'amassing' phase could replace 'accumulation phase'. Inconsistency between proposed definitions of the accumulation phase in the FLR Regns and SIS Regns.	We propose to give further consideration to an amendment to regulation 76(2) to pick up the defn of "accumulation phase" proposed for the SIS Regulations. We do not propose to replace the concept of 'accumulation phase'. The member spouse's interest is accumulating, rather than 'growing' at that time.
	(No.25, App A, p.2) r.79(1)(c) of the FL Regns: Reason for making a temporary incapacity payment not a splittable payment.	A payment made to a spouse because of a temporary incapacity is made for the purpose of income support for a confined period. It is not considered appropriate to split these payments.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.2) r.79(1)(d) of the FL Regns: What is the provision trying to achieve.	The re-draft of Subdivision 6.5.4 of the FL Regns - to simplify the provisions for the division of a pension in the payment phase (and on which work is now proceeding) - will make r.79(1)(d) unnecessary.
	(No.25, App A, p.2) r.84 and 85 of the FL Regns: Method of valuation when the transfer amount method or the percentage method is specified in an agreement made in the payment phase.	The interest does not have to be valued for the purpose of executing a payment split under an agreement made in the payment phase.
	(No.25, App A, p.2)(Testimony p.113) r.90 of the FL Regns: Should not be splitting a pension in the payment phase but treat it in the same way as salary or income.	We propose to retain r.90 (and also rr.84 and 85, which provide for pension splitting by agreement in the payment phase). The non-member spouse will not remain dependent on arrangements capable of being unilaterally changed by the member spouse if his or her share of the pension payment is paid directly by the trustee.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.2-3) r.92, 93 and 94 of the FL Regns: Different valuation methods according to the type of interest adds to the complexity - simpler to use to withdrawal benefit in all cases. (Same point made at Testimony, p.113, 118) Actuarial valuation may produce inappropriate valuations depending on the benefit design of the fund. May produce a value that is less than the withdrawal benefit, or far greater than any eventual benefit. Will there be any adjustment to the withdrawal benefit to allow for the vested component? If the benefit payable on retrenchment is higher than that payable on resignation, will the determination of the 'withdrawal benefit' take this into account?	To use the 'withdrawal benefit' to value all superannuation interests will undervalue interests in defined benefit and partially vested accumulation funds - leaving the valuable unvested portions entirely to the member spouse. We will give further consideration to an amendment to the FL Regulations to include an express provision for scheme specific valuation factors for defined benefit interests. We will give further consideration to amendments to the FL Regulations to include valuation factors for the unvested component of a partially vested accumulation interest and an express provision for scheme specific valuation factors for such interests. The withdrawal benefit only takes into account the amount that would be payable on voluntarily ceasing to be a member of the fund (that is, on resignation, not on retrenchment). If a member is about to be retrenched, the value of any higher retrenchment benefits would be taken into account by the Family Court as a financial resource under s.75(2)(b) of the Family Law Act.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	Known surcharge liability at the relevant date should not be ignored in the actuarial method for valuing a defined benefit interest.	We will give further consideration to an amendment to the actuarial method of valuing a defined benefit interest in the FL Regulations to take off the value of the surcharge debt as notified in the most recent member statement.
	(No.25, App A, p.3) r.98 of the FL Regns: Is a defined benefit interest reclassified as an accumulation interest for the purpose of determining the overall value of the interest in the payment phase when the member leaves service with his or her benefit remaining in the fund accruing interest? Are r.98(3) and (4) intended to cover defined benefit interests?	We consider that there is merit in the suggestion that the withdrawal benefit should be the method of valuing the superannuation interest in this situation. We propose to give further consideration to amendments to r.98 to omit r.98(3), (4) and (5) and to apply the method in r.98(2) to the valuation of all superannuation interests in the payment phase.
	(No.25, App A, p.3) r.99 of the FL Regns: Certain components (eg. undeducted components) excluded in the valuation methods for RBL's from the Tax Act applied by r.99(2), (3) and (4) for lifetime pensions, fixed term pensions and allocated pensions in the payment phase should be included when the pension is valued for family law purposes.	We consider that there is merit in this proposal. We propose to give further consideration to amendments to r.99(2), (3) and (4) that will exclude those components.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.3) r.103 of the FL Regns: The rules setting out the interest rate for the base amount apply to 'accumulation funds' and 'defined benefit funds', rather than to interests in funds. If the member's interest is a combination of defined benefit and accumulation components, should interest be added to the base amount in accordance with the rules for interests in defined benefit funds set out in r.103(4)(b)?	[See Institute of Actuaries No. 22, p.5] If the rules applied to interests in funds, there would, in the case of an interest in a superannuation fund made up of a component that is a defined benefit interest and a component that is an accumulation interest, be separate growth factors for different components of the one superannuation interest, increasing complexity. We consider that interest should be added in accordance with the rules for interests in defined benefit funds. However, we will give further consideration to an amendment to r.103(4)(b) to provide that if the superannuation interest in the defined benefit fund is wholly an accumulation interest, interest should be added in accordance with the rule for interests in accumulation funds (the interest rate that applies to the interest for the accrual period).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.4) r.106 of the FL Regns: Requiring the member if able to cash part of a benefit to cash out up to the amount of the non-member's adjusted base amount, is unfair. It may be better to leave money invested in superannuation. The cash alternative may not be good value. The member spouse may lose the right to commute any remaining part of a pension benefit. Any lump sum option should be shared pro rata.	We propose to give further consideration to an amendment to r.106 to provide that the member must take at least enough to satisfy the amount of the non-member's adjusted base amount, subject to a cap of the maximum amount the member can take without losing the right to take his or her remaining benefits in the form of a pension.
	(No.25, App A, p.4) r.108-114 of the FL Regns: Approach to pensions is complicated, problematic and impossible to explain to divorcing couples.	We are working on a re-draft of Subdivision 6.5.4 of the FL Regns to simplify the provisions for the division of a pension in the payment phase.
	(No.25, App A, p.4) (Testimony p.114, 120) r.115-117 of the FL Regns: Fees are inadequate and will not cover costs of work required by the regulations to be done. Fees should be able to be deducted from the benefit payable rather than relying on separate payment by the parties. There are areas where the trustees will occur additional costs. Drafting comment about r.117(2)(b)(i).	Prescribed fees are being reconsidered. We will raise the comment with the drafter.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.5) r.118 of the FL Regns: What happens to the amount by which the member spouse's entitlement is reduced when a waiver notice has been served on the trustee? Who is entitled to receive the amount when the member leaves service? What is shown on the annual benefit statements? An ability to serve a waiver notice may lead to inequities.	A waiver notice will be used by a trustee of a non-SIS regulated fund who prefers to 'buy out' the non-member's entitlement rather than to continue to make payments pursuant to a payment split. Neither the member nor the non-member will be giving up anything when a waiver notice is served. The trustee would be paying out the non-member's entitlement from the entitlement of the member. Hence, the amount by which the member's entitlement is reduced is retained by the trustee of the superannuation fund. We will give further consideration to an amendment to the Bill to include an example to explain the situations in which s.90MZA will operate.
	(No.25, App A, p.5) r.119 of the FL Regns: The information that the trustee is required to provide is relevant to defined benefit interests only. There should be a requirement to for trustees to provide information about accumulation add-ons and accumulation benefits.	We consider that there is merit in this proposal. We will give further consideration to amendments to r.119(3) to require the trustee provide information about the withdrawal benefit of any accumulation interest and the unvested portion of any partially vested accumulation interest.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	Is assumed retirement age the normal retirement age set out in the fund rules?	[See also Institute of Actuaries No.22 p.3] The revised term factors (copy attached) prepared by the Australian Government Actuary will require the trustee to provide the accrued retirement multiple only at the time that the interest is to be valued. Accordingly we will give further consideration an amendment to r.119(3)(c) to omit the words "at the assumed retirement age". The revised term factors will, however, require the trustee to provide, where the defined benefit scheme provides pension benefits, the normal retirement age for the spouse member. We propose to give further consideration to amendments to provide that: - that this age will be the normal retirement age (NRA) specified in the trust deed for the fund - that if no NRA is so specified, the default age will be 65 years - to include a power for a fund to apply to depart from the age specified in the trust deed (eg. which would be approved on evidence that the tendency is for members of the fund or an identifiable class of members of the fund to retire at a particular age).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)		We will give further consideration to an amendment to r.119(3) of the FL Regulations to require the trustee to provide information about the NRA specified in the trust deed for the fund or a departure from the age specified in the trust deed has been approved, or has been approved for an identifiable class of members that includes the member spouse.
	What value should the accrued retirement multiple be at the assumed retirement age when the member is on leave without pay or working part-time at marriage breakdown? Is an assumption made that the current working conditions will apply until normal retirement age?	The revised factors do not make it necessary to make assumptions about the pattern of employment or working hours between time of marriage breakdown and retirement.
	It would be beneficial if a standard form were developed for completion by the trustee to provide the information.	Mercers advised officials that it would prefer that the standard form not be prescribed in legislation.
	Are they any privacy issues that the trustee needs to be concerned about if the request for information comes from a person other than the member of the plan?	We propose to give further consideration to an amendment to s.90MZB of the Bill to: - require the consent of the member where the application for information is made by a person other than a spouse of the member; - (if considered necessary by the drafter) to enable the regulations to set out the information that the trustee must not disclose when a request is made under s.90MZB.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.6) Schedule 9 of the FL Regns: The factors only cover the situation where the assumed retirement age is 65. There is no allowance in the factors, which seem to relate to lifetime pensions, for different types of pensions (a 5 year pension would have the same value as a lifetime pension). Cl. 8 and 9 of Schedule 9 conflicts with r.106, which requires the non-member's benefit to the taken as a lump sum to the maximum extent possible.	The attached revised term factors adopt a different approach, where the factor used relates to years to normal retirement age. The attached revised term factors provide for different pension valuation factors depending on whether the pension is a lifetime pension or has a guaranteed payment period of 5 or 10 years. There is no conflict. Schedule 9 deals with the valuation of a defined benefit interest in the accumulation phase, while r.106 deals with how a payment split will be effected.
	(No.25, App A, p.6) r.3.01 of the SIS Regns: Needs to be amended to ensure that a payment split does not cause the status of an employer fund to be changed to a public offer fund.	We will give further consideration to an appropriate amendment to the SIS Regns to remove this unintended consequence.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.6) r.7A.02 of the SIS Regns: Is there a need for the trustee to provide notice of a payment split? Needs to be a deadline by which the non-member spouse must provide contacts details to the trustee? Should there be an onus on the trustee to advise that the administrator and employer that the member's benefit is subject to a payment split?	In essence, a payment split notice has the character of an acknowledgment of service of the agreement or the order. Regulation 120(3) of the FL Regns requires contact information to be provided by the non-member to the trustee as soon as practicable after the agreement is served on the trustee or the splitting order made. If a set time period was provided, there would still be a problem if the non-member did not comply with it. Disagree with Mercers. Where a duty is placed by other provisions of the SIS Regns on a trustee, there is no accompanying provision placing an onus on the trustee to inform their fund administrator or any other person of the duties they may be performing on his or her behalf.

William M Mercer Pty Ltd (cont.)	(No.25, App A, p.7) r.7A.03 of the SIS Regns: It should be mandatory for the non-member to notify the trustee of his or her contact details. The information required to be provided should be the same as required by r.120 of the FL Regns or at the very least r.7A.03 should require provision of the non-member's date of birth.	Regulation 120(3) of the FL Regns requires contact information to be provided by the non-member to the trustee as soon as practicable after the agreement is served on the trustee or the splitting order made. We will give further consideration to an amendment to r.120(2), which sets out the information which the non-member spouse is required to provide, to require the non-member only to provide his or her name and postal address, which is sufficient to identify him or her, and his or her date of birth, which is necessary so that the trustee knows whether to not the non-member spouse's entitlement is preserved when the member satisfies a condition of release.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.7) r.7A.04 of the SIS Regns: Trustees will incur additional costs developing the new member information under Division 2.3 that will be required to be given non-members. Depending on the terms of the order or agreement, generic material may not be able to be prepared and information may need to be prepared for each case separately.	Generic material should be capable of being prepared. We are only prescribing reporting information in the Family Law and SIS consequential amendments. Member booklets should be revised so that they will contain general information about what will happen if there is a payment split. However, the obligation on trustees to provide new member information to non-members arises once an interest becomes subject to a payment split, so funds will probably find it convenient to provide the specific information to non-members individually at that time. There is always a continuous disclosure obligation under the SIS Regulations.
	Member booklets will also need to be updated to include a general provision on the adjustment of benefits due to divorce, or will individual members have to be provided with specific information at the relevant time?	Member booklets should be revised so that they will contain general information about what will happen if there is a payment split. However, the obligation on trustees to provide new member information to non-members arises once an interest becomes subject to a payment split, so funds will probably find it convenient to provide the specific information to non-members individually at that time.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.7) Superannuation (Resolution of Complaints) Act: Has consideration been given to amending this Act to encompass complaints arising out of family law payment splits?	The amendments made to the Superannuation (Resolution of Complaints) Act (the Complaints Act) by Schedule 1 of the Bill will provide a regulation making power to enable regulations to be made to provide that a person is to be treated as a member of a superannuation fund or a beneficiary of an approved deposit fund for the purposes of the Complaints Act or specified provisions of that Act. This will enable any amendments that are necessary to give a non-member a right make a complaint to the Superannuation Complaints Tribunal to be made by regulation.
	(No.25, App A, p.7) r.7A.06(6)(a) of the SIS Regns: No need for 28 day limit for non-member to elect that member cash benefits in the form of a lump sum.	We consider that there is merit in this recommendation. We will give further consideration to amendments to the provisions in the SIS Regns that provide time periods of 28 days to enable the trustee to extend that period.
	(No.25, App A, p.7) r.7A.06(1)(b) of the SIS Regns: Meaning of 'cash benefits in the form of a lump sum' needs clarification. If the benefit payable on leaving the fund is fully preserved, there is no 'cash' benefit.	We will give further consideration to amendments to bring r.7A.06 of the SIS Regn into line with r.106 of the FL Regns. [See JMIFA Recs 6 to 9]

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.8) Division 7A.4, r.7A.07 and 7A.08 of the SIS Regns: Is a member able to request transfer out of the fund of an accumulation add-on in a defined benefit fund, or the transfer out of part of a benefit? Is a non-member a member for the purpose of trustee elections, lost member and unclaimed monies requirements, and member protection standards?	No. The transfer out option only applies to an accumulation interest (r.7A.07(1)(a)). A non-member spouse is not a member of a fund for these purposes.
	(No.25, App A, p.8) (Testimony p.114) r.7A.08 and 7A.12 of the SIS Regns: The order in which benefits are transferred out is unfair to the member. The amount transferred to the non-member is first taken from unrestricted non-preserved component, and presumably retains that status after transfer. The unrestricted non-preserved component is a fixed dollar amount, and it would be quite simple to allocate it pro rata between the spouses. As non-member cannot access restricted non-preserved component, it would be better to secondly draw on preserved benefits before restricted non-preserved benefits, which can be accessed by the member if he or she leaves current employment.	Consistent with recent changes to preservation rules under which all new contributions and all fund earnings are treated as preserved, we intend to retain the existing order of deduction for the payment of the non-member spouse's entitlements from the member's benefits.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.8) Division 7A.4 and 7A.5 of the SIS Regns: The transfer out and creation of new interest options could result in two benefits being subject to member protection where prior to payment split member protection did not apply.	We will give further consideration to amendments to r.7A.07 and 7A.09 of the SIS Regns so that the non-member spouse will not be able to be transferred out or have a new interest created in the fund if the amount transferred out, the amount remaining in the fund for the member or the value of the new interest created is less than $1,000.
	(No.25, App A, p.8) Division 7A.5, r.7A.09 of the SIS Regns: If the non-member is transferred out or a new interest created, is the remaining spouse's benefit subject to the fund's SG minimum benefit test, if one exists? Could the situation arise where a pre-split benefit was greater than the MRB, but the post-split member's benefit is less than the MRB?	Treasury is examining this issue.
	(No.25, App A, p.8) r.7A.10 of the SIS Regns: Would not usually be possible to issue a new interest within 4 days of receiving a notice. The issue of the new interest should be effective from that day.	We consider that there is merit in the suggestion that the new interest need not be issued within 4 days of receiving a notice. We will give further consideration to an amendment to r.7A.10 that the issue of the new interest should be effective from the date of receipt of the notice.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.8) r.7A.14 of the SIS Regns: In 7A.14((b)(i), 'fund' should be 'fund or RSA'.	We will give further consideration to this proposed amendment.
	(No.25, App A, p.9) r.7A.17 of the SIS Regns: It should be possible, where the non-member has satisfied a condition of release when a splittable payment has become payable, for the non-member's benefit to be retained in the fund or rolled over rather than insisting that it be cashed.	We will give further consideration to an amendment to r.7A.17(1) to replace 'must' with 'may' - so that a trustee is able to retain the non-member in the fund - and to give the trustee the power to transfer out to another fund.
	(No.25, App A, p.9) r.7A.18 of the SIS Regns: Wording of r.7A.18(3) is inconsistent with r.7A.14.	We will give further consideration to an amendment to change 'must' in r.7A.18(3)(a) to 'may'.
	(No.25, App A, p.9) (Testimony p.114) r.7A.19 of the SIS Regns: The order in which benefits are taken from the member disadvantages the member, who could end up with a fully preserved benefit after the split. Inequities could result from the different tax treatments of the different categories of benefits (preserved, restricted non-preserved and unrestricted non-preserved). The unrestricted non-preserved component is a fixed dollar amount, and could be split pro rata between the spouses and retain its status on transfer.	Consistent with recent changes to preservation rules under which all new contributions and all fund earnings are treated as preserved, we intend to retain the existing order of deduction for the payment of the non-member spouse's entitlements from the member's benefits.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.9) Schedule 2[2A] of the SIS Regns: The definition of 'accumulation phase' is inconsistent with the definition used in the FL Regns.	We will give further consideration to an amendment to r. 76(2) of the FL Regns to pick up the defn of "accumulation phase" proposed for the SIS Regns.
	(No.25, App A, p.9-10) Costs of implementing the legislation: The Committee's attention is drawn to areas where trustees will occur additional costs.	Noted.
	(No.25, App A, p.10) Schedule 2[3A] and [3E] of the SIS Regns: Not practical or reasonable for allocated pensions and annuities, which permit income streams to be drawn between minimum and maximum amounts, for contracts for their provision to include a means for determining, before the first payment is received in a year, the total amount payable in the year.	We are working on a re-draft of Subdivision 6.5.4 of the FL Regns to simplify the provisions for the division of a pension in the payment phase.
	(No.25, App A, p.10) Schedule 2[3C] and [3G] of the SIS Regns: Provision is unnecessary as Subdivision 6.5.4 of the FL Regns already limits the entitlement of the non-member to the total benefit payable.	We are working on a re-draft of Subdivision 6.5.4 of the FL Regns to simplify the provisions for the division of a pension in the payment phase.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
William M Mercer Pty Ltd (cont.)	(No.25, App A, p.10) Schedule 2[5A], [8] and [10] of the SIS Regns: It is not clear who is 'the member' in the proposed defn of 'Part 7A benefits'. Is it the non-member spouse? [When meeting with Mercers, it was suggested that the member spouse's interest in the fund were 'double counted' in paragraph (c) of the defn of 'Part 7A benefits' and in new subparas 5.04(3)(b)(i) and (ii).]	The 'member' is the 'member', but his or her Part 7A benefits may include new interests he or she has had created in or transferred into the fund because he or she is the spouse of another member. Mercer's comment overlooks that subparagraph 5.04(3)(b)(iii) includes on Part 7A benefits that are not included in subparagraphs 5.04(3)(b)(i) and (ii).
	(No.25, App A, p.10) Schedule 2[7] of the SIS Regns: The alteration to r.5.02(2) would be more appropriately replaced by a similar amendment to 5.02(3).	Treasury will give this comment consideration in the re-draft of the SIS Regns. The intention is to allow the trustee to charge on-going fees for the administration of a payment split.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Mr Ray Stevens **Manager** **Technical Support** **Mercer Financial Planning** **William M Mercer Pty Ltd** (Testimony)	(No.25, App A, p.10) Schedule 4[2] of the SIS Regns: The provision seems unnecessary and confusing. [When meeting with Mercers, it was suggested that the provision would achieve its apparent objective if it were re-drawn along the lines 'if you are a self managed fund, you don't lose your self managed status for 6 months'.]	This provision needs to point to the relevant sections of the Act to assist users of the provision. We will give further consideration an amendment so that s.17A(5) of the SIS Act does not apply, thus allowing the small self managed fund to retain its status for the 6 month period.
	(Testimony p.114) More consideration needs to be given to what happens if the member spouse dies or becomes disabled after an agreement to split a benefit has been made. If it has been agreed that 40% of a benefit is to be payable to the member's former spouse when it becomes payable, and the benefit increases by $50,000 because of death or disablement, it does not follow that 40% of that extra $50,000 should be payable to the former spouse. 10 years down the track there may be other dependants who have quite legitimate rights to be considered in the distribution of that extra benefit.	If parties agree to use the percentage method in their agreement to split a superannuation agreement, the non-member spouse only will be entitled to a specified percentage of whatever value the superannuation interest has at the time identified in the agreement, adjusted annually by the relevant growth factor under r.103 of the FL Regns. The non-member will not be entitled to the specified percentage of whatever benefit is payable.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Mr Ray Stevens **William M Mercer Pty Ltd** (Testimony) (cont.)	(Testimony p.114) To address the potential problem of sham divorces, Mercers wonders whether it would be better to consider whether the opportunity to split benefits on divorce should be extended to couples who do not divorce. Rather rely on the threat of penalties, you should perhaps rely on all couples with the partner with the benefit is over age 60, if you want to restrict it in some way, to transfer benefits from one spouse to the other and thereby reduce the incentive for people to go through a sham divorce.	The Government has introduced into Parliament the Family Law Legislation Amendment (Superannuation) Bill 2000 because it recognises that a former spouse should be able to access, in appropriate circumstances, the superannuation that was built up during the time that the parties were cohabiting.
Mr Ray Stevens **William M Mercer Pty Ltd** (Testimony) (cont.)	(Testimony, p.121) In respect of tax and preservation, Mercers do not think logical decisions have been made. The procedure proposed for RBL's can potentially be of benefit to a couple or it can be disadvantageous, depending on their situation (examples given include a transitional RBL) . With some areas in tax (eligible service date, the date used for splitting a benefit between pre and post 1983) seems to disadvantage the non-member spouse without giving any corresponding benefit to the member spouse.	Transitional RBLs have not been taken into account in the tax consequentials to the Family Law Legislation Amendment (Superannuation) Bill 2000. An appropriate balance had to be struck between simplicity (keeping administration cost down) and trying to find an ideal solution to every possible situation that may arise. As an overall package the taxation changes which are based on an object of simplicity are beneficial in the vast majority of circumstances.
	With preservation, it seems that both partners, basically, lose.	In relation to preservation, it is consistent with overall policy to preserve all contributions and earnings. This ensures equality between parties in terms of rights to access subsequent benefits.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Australian Council of Public Sector Retiree Organisations Inc and Regular Defence Force Welfare Association Inc (Submissions 13, 14 & 26)	(No.13, p.1) In earlier discussions we were left with the impression that a former spouse, following marriage breakdown, would be able to claim a superannuation entitlement following the death of the contributor. Contrary to this earlier advice, what is now proposed requires that superannuation entitlements must either from part of the divorce proceedings with the issue of court orders, or there must be an agreement in writing between the parties dealing with the division of superannuation.	It has never been part of the Government's proposals that that a former spouse could claim a superannuation entitlement following the death of the contributor. Following discussions with it in May 1999, the Regular Defence Force Welfare Association was advised in writing twice that the splitting of a superannuation interest of a party to a marriage after marriage breakdown would be effected by a court order or an agreement between the parties.
	(No.13, p.2) (Testimony p.53-4) Concerned that the Bill does not clearly cover what will happen in the event of the death of the member spouse and what will happen to the entitlement of a subsequent spouse.	Section 90ME of the Bill provides that a payment to a reversionary beneficiary, after the death of the spouse, is a splittable payment. If the surviving subsequent spouse, as a reversionary beneficiary, receives 67% of the member's full pension, any portion of the adjusted base amount remaining owing to the (first) non-member spouse on the death of the member will be satisfied out of the pension payments payable to the surviving subsequent spouse.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Australian Council of Public Sector Retiree Organisations Inc and **Regular Defence Force Welfare Association Inc** (cont.)	(No.13, p.2) Concerned that if there are multiple marriages, and therefore multiple splits of a superannuation interest, then there may be a negligible amount left for the last surviving spouse.	This scenario is possible where there have been multiple marriages. However, if there is a substantial sum remaining to be paid as an adjusted base amount to one or more (earlier) non-member spouses, this would nearly always have been because the member spouse would have traded away his or her future superannuation entitlements to take a greater share of current property on marriage breakdown.
	(No.13, p.2) Concerned that a defined benefit pension will be split and the component payable to the non-member spouse will be converted to a lump sum.	The submission seems to have misunderstood the proposals as the Bill does not provide for this. Converting pension benefits in a defined benefit scheme to a lump sum runs the risk of being an acquisition of property other than on just terms contrary to s.51(xxxi) of the Constitution, so has not been included in the proposals in the Bill or the Regulations.
	(No.13, p.2) If the non-member spouse survives for a shorter period than expected, it would be unfair for the non-member spouse's estate to continue to receive payments, and the member spouse's pension should be restored to its former full rate.	Considerations of equity are made at the time that the superannuation interest is split, either by court order or agreement.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Australian Council of Public Sector Retiree Organisations Inc and Regular Defence Force Welfare Association Inc (cont.)		It would not be equitable for the member spouse's pension to be restored to its full rate as the split has been instituted on the basis of equitable division between the parties to the marriage. For example, where the parties on marriage breakdown have made an agreement, the member spouse will have traded away part or all of his or her future superannuation entitlements to take a greater share of current assets. It would not be fair enable the surviving former spouse to retain those assets and also have the pension restored to its full rate.
Australian Council of Public Sector Retiree Organisations Inc and Regular Defence Force Welfare Association Inc (cont.)	(No.13, p.3) Suggest that the proposals contradict the Commonwealth Heads of Government Agreement, between the States and Territories and the Commonwealth, about superannuation schemes. (No. 26 p.2) (Testimony p.57) The overriding provisions of the Bill will in effect eliminate the need to make consequential amendments to Head of Government Agreement (as well as to the various Superannuation Act covering the Public Sector)	The Agreement requires the States and Territories to adhere to the Commonwealth's retirement income policy. As these proposals form part of that policy, there is no conflict, and no need to make consequential amendments to the Agreement.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Australian Council of Public Sector Retiree Organisations Inc and Regular Defence Force Welfare Association Inc (cont.)	(No.13, p.4; No.26, p.4) (Testimony p.54-55) Division of superannuation should be available for intact couples as well as where marriages breakdown.	The Government has introduced into Parliament the Family Law Legislation Amendment (Superannuation) Bill 2000 because it recognises that a former spouse should be able to access, in appropriate circumstances, the superannuation that was built up during the time that the parties were cohabiting.
	(No.26, p.2) (Testimony p.52) Superannuation entitlements are a condition of employment and changes to them should not be made unless they have been negotiated between the employer and the employees. (Testimony p.57) Section 90MB walks right over the top of the Superannuation Acts. From where we and our people sit, they see this as Governments almost trampling over existing provisions without proper consultation. Nobody is saying to us that they will object to the division , but they believe it needs to be done in the proper way and that the Superannuation Acts themselves should be amended to contain the relevant separating provisions.	The Bill is not making any changes to the superannuation entitlements of employees. It is bringing, for the first time, superannuation into the pool of matrimonial property which can be the subject of division by spouses or by the Court on marriage breakdown, which is a different issue. Whether legislative policy, once determined, is effected by amendments to superannuation or to family law legislation is only a matter of form rather than one of substance.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Australian Council of Public Sector Retiree Organisations Inc and Regular Defence Force Welfare Association Inc (cont.)	(No.26, p.2) (Testimony p.52-53) Division of a superannuation interest should be terminated if the non-member spouse remarries or enters a de-facto relationship, and the member's interest should be re-instated.	The division of a superannuation interest is either by agreement between the parties or by the court, which is required to make an order that is just and equitable. It would not be equitable to terminate the benefit of such an order/agreement if the non-member spouse repartners.
		Where part or all of a party's future superannuation entitlements are traded off by the Court in making an order or in the negotiation of an agreement, the future entitlements will be traded in order for the party with the superannuation interest to obtain a greater share of current assets. It would not be equitable for that party, if the other party repartners, to retain those assets and also have the superannuation interest reinstated.
	(No.26, p. 3) (Testimony p.54) The Bill should prescribe a certain length of marriage before it will be possible to divide a superannuation interest.	This would be contrary to the way that all other property is treated. Parties should be able to agree to divide a superannuation interest whenever they like and in whatever manner they like.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Australian Council of Public Sector Retiree Organisations Inc and Regular Defence Force Welfare Association Inc (cont.)		In the case of short marriages, the Court will take into account the length of the marriage when making a property settlement order, including any order dividing a superannuation interest.
	(No.26, p.3) The marital breakdown declaration needs to be more stringent if it is to act to prevent marital breakdown to access tax advantages. (Testimony p.54) The marital breakdown declaration needs to be much more stringent to eliminate the prospect of bogus breakdowns. It does not have to be a decree; it can simply be a signed declaration.	The marital breakdown declaration is designed to act as a disincentive to sham separations, not to prevent actual marital breakdown – whatever its cause.
Mr Gordon Johnson National President Australian Council of Public Sector Retiree Organisations Inc (Testimony)	(Testimony p.54) In the non-splitting situation, as a former contributor ages, he can get into a situation where the interest does not have to be split, depending on what his age was when he retired and what the life expectancy is.	This is a comment about r.79(1)(d) of the FL Regns. We are working on a re-draft of Subdivision 6.5.4 of the FL Regns - to simplify the provisions for the division of a pension in the payment phase - which will make r.79(1)(d) unnecessary.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Regular Defence Force Welfare Association Inc (Submission 14)	[p.1] Supports submissions of Australian Council of Public Sector Retiree Organisations Inc	Noted. See comments on Submissions 13 & 26.
CPA Australia (Submission 16)	[p.2] Government should consider a full review of the superannuation and retirement income system.	The Government is undertaking a number of superannuation reforms including the splitting of superannuation on marital breakdown. Whilst the Treasurer identified the level of complexity in superannuation as an area for future attention he specifically made clear that this was 'down the track'. There is no immediate timetable for a review. The principle focus of the Government's economic agenda at present is bedding down Tax Reform. .
	[p.2] Concerned about the constitutionality of the proposals and seeks detailed clarification on the investigations that have been made into the constitutionality.	Detailed constitutional advice has been sought and the Government is satisfied that the proposals are constitutionally secure.
	[p.3] The existing early release provisions should be reviewed to ensure that separating couples are not adversely affected by the need to preserve more superannuation monies.	Where have a new interest in an accumulation fund, the new Member will have access to early release provisions. Changes to early release provisions would come within a wider review of the superannuation system.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
CPA Australia (cont.)	[p.3] CGT rollover relief should be available to funds if they need to reorganise superannuation assets to effect the split of the superannuation interest.	Proposals are being considered to ensure that capital gains tax would not apply to payments made from a superannuation fund to a non-member spouse under the payment splitting arrangements. Proposals are also being considered to provide roll-over relief for in-specie transfers between funds with fewer than five members resulting from a payment split.
	[p.4] Recommend the removal of prescribed fees, and the superannuation funds should be allowed to levy fees as they see fit.	The issue of fees, including whether or not they should be prescribed and if so at what level, is being reconsidered.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Lone Fathers' Association (Submissions 17 and 34)	[No. 17, p.2; No 34, p.1] Concerned that there are no guidelines to assist couples or the Family Court to decide on an appropriate division of superannuation interests.	Couples will be able to agree on whatever division they consider appropriate. The Court will treat superannuation as property and, under section 79, is required to make a property settlement that is just and equitable, taking into account the contributions of both parties.
	[No. 17, p.2; No. 34, p.1] Concerned that the court will be able to overturn agreements that it perceives to be "unfair", regardless of whether the parties think it fair or not.	Section 90K of the *Family Law Act 1975* provides for the limited circumstances in which a court will be able to set aside a financial agreement. This doe not include that the court perceives the agreement to be "unfair".
	[No. 34, p.2] concerned that the legislation will further advantage women in property settlements, as seems to have been suggested by one of the "lobby groups" which gave evidence to the Senate Committee.	When making a property settlement order, the court is required to make an order that is just and equitable. The Bill provides that superannuation interests will be treated as property and will be able to be included in a property settlement order.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Lone Fathers' Association (cont.)	[No. 34, p.3] cites unsourced data that indicates that in the US women own 70% of "total personal wealth" and that this is likely to also be occurring in Australia. Suggests that this strongly indicates that many women are already quite adequately looked after in retirement and, by implication, that the legislation may not be necessary.	There is no evidence that this is in fact the case in Australia, and some doubt about the claims about the ownership of personal wealth in the US. The ADTP data, that was put before the Committee by the Australian Institute of Family Studies, would appear to contradict this assertion.
	[No. 34, p.4] cautions Senators against being influenced by data on domestic violence, which the LFAA suggests is misleading and contrary to the facts.	The relevance of this comment to the legislation proposal is unclear. Moreover, the data in the table needs to be cautiously interpreted. More sophisticated analysis of both type and level of violence indicates a contrary view to that which has been expressed by the LFAA submission. If the Committee is interested in following up this issue, we could provide more detailed information.
	[No. 34, p.4] supports a number of suggestions made in the submissions by William Mercer for improvements to the legislation.	See comments/responses to Submissions 12 and 25.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Kevin Sappanen (Submission 18)	[p.1] need to consider the consequential flow on effects to child support as provided by the child support legislation.	In making a property settlement order, the court takes into account a number of factors, including any liability of a party to pay child support.
	[p.1] wants to know how defined benefit superannuation interests will be split.	The Bill provides for splittable payments to be split, when payable, in accordance with either an agreement or a court order. There is no provision, under the SIS Regns, for a defined benefit interest to be split.
Association of Superannuation Funds of Australia (ASFA) (Submission 19)	(p.8) (Testimony p.44) ASFA supports Government's objective to assist people whose marriages have broken down to down to deal equitably with the division of property, including any superannuation interests held by either party to the marriage.	Noted.
	(p.8) (Testimony p.44) ASFA considers we should strive for simple system, with flexibility to take account of complicated situations.	Noted.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.9) (Testimony p.44) ASFA believes that the proposed legislation is a reasonable approach in light of constitutional and legal restraints, and meets objectives of 1998 Position Paper	Noted.
	(p.10) (Testimony p.45) ASFA urges the Government to honour its intention to provide time for consultation (over the next few months) and implementation (one year between gazettal of regulations and commencement of new provisions).	The Attorney-General's Department and Treasury have continued to consult with industry since ASFA's submission to the Committee. The Government's commitment to allow one year between gazettal of the regulations and the commencement of the new provisions will be honoured.
	(p.10) (Testimony p.45) ASFA urges the Government to honour its intention to provide time for consultation (over the next few months) and implementation (one year between gazettal of regulations and commencement of new provisions).	The Attorney-General's Department and Treasury have continued to consult with industry since ASFA's submission to the Committee. The Government's commitment to allow one year between gazettal of the regulations and the commencement of the new provisions will be honoured.

Submission/Witness	Comment/Recommendation	Departmental Response to the Committee
ASFA (cont.)	(p.11) (Testimony p.45) ASFA urges the Committee to use its enquiry powers to ensure that the proposed legislation is soundly based. Some areas where information is needed about the measures taken to ensure the soundness of the approach include: - power of the Family Court to order the trustee; - application of s.51(xxxi) of the Constitution; - power to reduce member's accrued benefit; - power to create new interests.	We are confident, based on the extensive constitutional advice received, that the proposed legislation is within the constitutional power of the Commonwealth.
	(p.12) ASFA believes that completion of suitable factors applicable to most defined benefit schemes should be a priority the Australian Government Actuary, so they are available for comment by industry.	The attached revised term factors have been prepared by the Australian Government Actuary, and provided to ASFA for comment.
	(p.12) (Testimony p.46) ASFA believes that completion of suitable factors applicable for partially vested accumulation schemes should be a priority the Australian Govt Actuary, so they are available for comment by industry.	Factors applicable for partially vested accumulation schemes (copy also attached) have been prepared by the Australian Government Actuary, and provided to ASFA for comment.

Submission/Witness	Comment/Recommendation	Departmental Response to the Committee
ASFA (cont.)	(p.12) (Testimony p.46-47) ASFA supports the flexible approach which allows funds to have their own valuation factors approved, but there is currently no provision for this in the legislation.	We will give further consideration to the recommendation that the Regns be amended to provide for funds to have their own valuation factors approved.
	(p.13) ASFA is pleased to note that a standard declaration will ensure that trustees are satisfied that they are able to release information to a non-member spouse.	Noted.
	(p.13) It is ASFA's view that the obligation for the trustee to provide information should not arise until adequate proof of spouse status and the requisite fee is received.	[See last comment by Mercers re r.119] In relation to adequate proof of spouse status, we will give further consideration to the proposal that s.90MZB of the Bill be amended to: - require the consent of the member where the application for information is made by a person other than a spouse of the member; - (if considered necessary by the drafter) to enable the regulations to set out the information that the trustee must not disclose when a request is made under s.90MZB. In relation to receipt of fees, prescribed fees are being reconsidered. If retained, we will give further

Submission/Witness	Comment/Recommendation	Departmental Response to the Committee
ASFA (cont.)		consideration to the proposal that amendments be made to s.90MZB of the Bill to provide a regulation making power in relation to the fees payable to a trustee for an application for information under s.90MZB, the person or persons liable to pay the fees and, relevantly in relation to ASFA's comment, that the fee for such an application is due at the time the application is made.
	(p.13) ASFA recommends that the trustee be required to notify the fund member that: - a request for information has been received from their spouse; and - as required by law, certain information has been provided. Also, a copy of the information supplied to the non-member spouse should be provided to the member.	There is a risk of a deterioration of an established relationship (or, in some cases, possible domestic violence) if the trustee is obliged to tell the member spouse that a request has been made or provide a copy of the information provided to the applicant to the member spouse.
	(p.13) ASFA supports the use of a standard form for the provision of information and is willing to assist in drafting of a new form to meet the new requirements for information from the trustee.	[See also Institute of Actuaries, Testimony p.82] Discussion with ASFA clarified that it is proposing that funds develop their own forms, which ASFA is willing to assist prepare, rather than having a standard form prescribed in legislation.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.14) ASFA has some operational concerns about establishing the base amount and, in the case of defined benefit interests, the adjustment of the base amount: - where splitting by agreement, the valuation is required to be determined at the relevant date, which may be some time in the past (if there is a lapse between the separation of the parties and giving the agreement to the trustee). Recreating past value is often a costly exercise. There should be some limit on the time between the relevant date and the operative time; - AFSA does not believe that r.103 of the FL Regns does what it intends in relation to adjusting the non-member spouse's adjusted base amount until payment or transfer to another fund (that is, that the final base amount payable to the non-member spouse can never be more than the final entitlement of the member); - the submission says much the same thing at p.19, where it is stated that ASFA is unclear whether the objective that the total payment to both parties should not exceed the benefit which would have been payable to the member has been achieved;	[See JFIMA, Rec. 3, 2nd last comment] We will give further consideration to the proposal that r.93 of the FL Regns to provide that where the relevant date at which an accumulation interest is required to be valued is prior to the most recent review date, the interest may be valued by interpolating between the review dates immediately before and after the relevant date. The structure of the legislative scheme is that a liability to pay an amount to the non-member only arises when a splittable payment becomes payable. Once the member spouse has received his or her full entitlement, no further splittable payment will become payable. However, we will raise with the drafter the possibility of including a provision in the FL Regns stating that, for the avoidance of doubt, the amount which the non-member spouse is entitled to be paid can never exceed the entitlement of the member spouse in respect of the superannuation interest.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.14) ASFA has some operational concerns about establishing the base amount and, in the case of defined benefit interests, the adjustment of the base amount: - in ASFA's view the bond rate for adjusting the base amount for interests in defined benefit funds is not appropriate and could lead to inequitable outcomes. A rate related to the notional salary increases would be more likely to produce an equitable outcome. (Testimony p.47 and 48 is also relevant here)	The issue of what is the appropriate rate for adjusting the base amount for defined benefit interests is being reconsidered in accordance with Treasury's retirement income modelling.
	(p.15) ASFA seeks clarification about the reason why a non-member spouse who has satisfied a condition of release in their own right must have the benefit cashed from the receiving fund.	[See Mercers r.7A.17] We will give further consideration to an amendment to r.7A.17(1) of the SIS Regns to replace 'must' with 'may' - so that a trustee is able to retain a non-member spouse (if he or she wishes) in the fund if the non-member spouse has satisfied a condition of release in his or her own right when a splittable payment has become payable.
	(p.15) ASFA asks whether if a new interest is created in the member's fund for the non-member spouse, do the ordinary cashing rules and the fund governing rules apply?	The ordinary cashing rules and the fund governing rules will apply to the new interest created for the non-member spouse in the fund.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.15) ASFA recommends that the definition of "prescribed class" be amended to preserve the standard employer status of the fund when a new interest is created for a non-member spouse is not a standard employer sponsored member.	We will give further consideration to the proposal that an appropriate amendment be made to the SIS Regns to ensure that a payment split does not cause the status of an employer fund to be changed to a public offer fund.
	(p.15) ASFA states that it would be useful if it was made clear in the legislation that the requirement (in r.106 of the FL Regns) that the member spouse, with an option to take his or her superannuation benefit as one or more lump sums, first take a lump sum sufficient to pay the non-member spouse does not apply where the member has a power to commute a pension.	Regulation 106 of the FL Regns will only apply when the member spouse has a choice to take a benefit in the form of a lump sum at the time the splittable payment becomes payable. Where the member has the power to commute a pension to a lump sum at the time that the splittable payment becomes payable, the member will have the choice to take the benefit in the form of a lump sum.
	(p.15) ASFA recommends that the whole of the FL Regns dealing with the payment of pensions in the payment phase be subject to review. ASFA is not convinced that the provisions work.	We are developing a simpler method for dealing with payment of pensions in the payment phase, in consultation with the Australian Government Actuary and based on suggestions made by the Institute of Actuaries.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.16) A pension paid to the non-member spouse calculated under Subdivision 6.5.4 of the FL Regns appears to be something very like a fixed term annuity, the term of annuity based on the member spouse's life expectancy. It ceases when the member dies unless there is a new spouse with a reversionary benefit. Would not the non-member spouse be better off taking a lump sum and buying his or her own annuity or pension?	[See JFIMA Recs. 16, 19 and 20] To permit the non-member spouse to take a lump sum to buy his or her own pension or annuity may, in the case of a lifetime pension payable to the member spouse, be an acquisition of property other than on just terms contrary to s.51(xxxi) of the Constitution (eg. such an acquisition would occur if the member spouse died before the time when he or she had received by way of pension payments the amount of the lump sum sufficient to pay out the non-member spouse).
	(p.16) ASFA is unsure about the intent and operation of the provisions (in Subdivision 6.5.4 of the FL Regns) relating to commutation of pensions: -Is payment in pension obligatory for the non-member spouse if that is how the member spouse is going to be paid? - Does the non-member spouse get paid out first if the member spouse commutes part of the pension only? - Does the non-member spouse continue to receive their interest as a pension if the member spouse commutes the entire pension? If so, how will the fund know whether the non-member spouse is dead, and that payment should cease? - Can the non-member spouse cause the exercise of any commutation rights that the member spouse has in relation to payment of a pension, so that a clean break can be achieved?	We are developing a simpler method for dealing with payment of pensions in the payment phase, in consultation with the Australian Government Actuary and based on suggestions made by the Institute of Actuaries.
ASFA	(p.17) It is ASFA's understanding that the intent of the	We propose to include a provision in Subdivision

(cont.)	legislation is to provide for the underlying account balance of an allocated pension to be split, but this is not clear from the legislation.	6.5.3 of the FL Regns to provide that where the splittable payment is a payment in respect of an allocated pension, the amount of the adjusted base amount is payable to the non-member spouse out of underlying account balance of the allocated pension.
	(p.17) ASFA has asked its members to comment on the requirements in r.7A.05 of the SIS Regns (which requires that the non-member be given 'a copy of information' given to the member but not 'personal information if, in the circumstances, disclosure would be unreasonable' or 'information in relation to which the trustee owes the member a duty of non-disclosure') and whether it would be preferable to prescribe what should be disclosed in order to protect fund trustees. (Testimony p.47) Trustees in this area would rather just be told what they have to do than try to make it up as they go along.	[See also JFIMA Rec. 5) We will give further consideration to the proposal that Division 7.2A be amended as proposed by Jacques Martin.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.17) It is ASFA's view that once a trustee has acted on a payment splitting agreement or a Court order it would be inappropriate to allow the parties to change their minds and provide for a different split of the interest. That is, the parties or the Court should not be able to change the payment split during the waiting period after the operative time is established (ie. in the case of a payment split under a superannuation agreement, during the period commencing at the beginning of the 4th working day after the day on which the agreement is served on the trustee until the splittable payment is payable).	We will give further consideration to the proposal that s.90J of the Family Law Act be amended to provide that the parties to a financial agreement can not make an agreement terminating any part of the agreement dealing with superannuation interests after the agreement has entered into force. In relation to Court orders varying a payment split, we will give further consideration to the proposal that: - an amendment be made to s.79A(1A) of the Family Law Act, which permits the Court by consent to vary or set aside a property settlement order under s.79, so that such an application cannot be made in relation to a s.79 order in relation to a superannuation interest; - provisions be included in sections 79A and 90K of the Act to provide that an order setting aside a s.79 order or a financial agreement in relation to a superannuation interest does not affect any interest created in a superannuation fund as a result of the member spouse notifying the trustee of the fund in which the superannuation interest is held under r.7A.07(2) of the SIS Regns or the non-member spouse notifying that trustee under r.7A.09(2) of the SIS Regns.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.17) ASFA is unclear of intent or effect of s.90MZA of the Bill (Waiver of rights under payment split).	[See Mercers r.118 of the FL Regns] A waiver notice will be used by a trustee of a non-SIS regulated fund who prefers to 'buy out' the non-member's entitlement rather than to continue to make payments pursuant to a payment split. Neither the member nor the non-member will be giving up anything when a waiver notice is served. The trustee would be paying out the non-member's entitlement from the entitlement of the member. Hence, the amount by which the member's entitlement is reduced is retained by the trustee of the superannuation fund. We will give further consideration to an amendment to the Bill to include an example to explain the situations in which s.90MZA will operate.
	(p.19) (Testimony p.47) ASFA is not convinced that the legislation identifies all costs and provides for their recovery, or that the amount of $100 will be sufficient to cover those cost currently identified in the legislation or identified.	Prescribed fees being reconsidered.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.19) (Testimony p.47) ASFA is not convinced that the legislation achieves its objective of ensuring that no member protection is required following payment splitting.	[See Mercers Division 7A.4 and 7A.5 of the SIS Regns] Treasury is considering the amendment of 7A.07 and 7A.09 of the SIS Regulations so that the Non Member Spouse will not be able to be transferred out or have a new interest created in the fund if the amount transferred out, the amount remaining in the fund for the member or the value of the new interest created is less than $1,000. That is, Treasury will examine the issue to ensure that the proposed Regulations do not allow amounts below a certain threshold to be split.
	(p.19) ASFA supports the proposals for taxation relating to amendments to Family Law and superannuation. There are, however, some unresolved issues in relation to RBL's split after assessment.	ATO intends to seek further clarification from ASFA about what the unresolved issues are.
	(p.20) (Testimony p.47-48) ASFA has identified the following problems to leave any surcharge liability with the member following payment split: - if the non-member spouse has taken a large part of the member's interest, there may not be enough left to pay the surcharge; - there is no provision for the valuation to be net of surcharge; - the trustee may not know the surcharge debt at the date the split becomes operable.	The amendments to the surcharge legislation are still being developed and these issues will be taken into account in drafting the necessary amendments. The Australian Taxation Office intends to consult with industry in developing these amendments.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.20) (Testimony p.47) ASFA supports CGT relief where a payment is made from a superannuation fund is made to a non-member spouse under the payment splitting arrangements.	Proposals are being considered to ensure that capital gains tax would not apply to payments made from a superannuation fund to a non-member spouse under the payment splitting arrangements.
	(p.20) ASFA supports rollover relief for in-specie transfers between funds with fewer than five members resulting from a payment split.	Proposals are also being considered to provide roll-over relief for in-specie transfers between funds with fewer than five members resulting from a payment split.
	(p.21) (Testimony p.49) ASFA supports the policy decision to preserve the non-member spouse's superannuation interests that have been subject to a split. - AFSA has some concerns that one or both parties may be left in financial difficulty if marriage breakdown takes place close to retirement age (while the normal financial hardship provisions could be applied, this would in its view add quite inappropriately to the emotional burden of the situation); - ASFA has examined the possibility of proportional splitting of the categories of benefits (unrestricted non-preserved, restricted non-preserved and preserved benefits). It says that some funds would find this difficult but not impossible; - ASFA understands the decision to bring about a measure of equity between the parties in preservation.	Noted.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
ASFA (cont.)	(p.21) (Testimony p.49-50) ASFA states that the financial situation of couples whose marriages break down close to retirement age should be considered as part of a general review of payment and contribution standards after age 60, which should be given priority and have the objective of allowing greater flexibility for those in transition to full retirement.	Noted.
	(p.22) ASFA suggests that the Commonwealth could play a role in encouraging the States and Territories to address property issues relating to the breakdown of de facto and same sex relationships on a uniform and national basis.	The issue of the division of superannuation interests of parties to a de facto relationship is before the Standing Committee of Attorneys-General.
Small Independent Superannuation Funds Association Ltd (SISFA) (Submission 20)	[p.1] endorse the policy and don't think that the draft legislation needs any major amendments.	Noted.
	[p.1] priority of division of benefits should be reversed, or at least proportioned.	Consistent with recent changes to preservation rules under which all new contributions and all fund earnings are treated as preserved, we intend to retain the existing order of deduction for the payment of the non-member spouse's entitlements from the member's benefits.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
SISFA (cont.)	[p.1] CGT rollover relief should be available for funds that have to transfer property in order to satisfy a superannuation split.	Proposals are being considered to ensure that capital gains tax would not apply to payments made from a superannuation fund to a non-member spouse under the payment splitting arrangements. Proposals are also being considered to provide roll-over relief for in-specie transfers between funds with fewer than five members resulting from a payment split.
	[p.1] need to consider how transfers of property to satisfy a superannuation split will be treated under the rules relating to acquisitions of assets by funds from related parties (see SLAB (No. 4) 1999)	Treasury is examining this issue.
	[p.1] need to clarify the obligations of the trustees relating to minimum benefits.	Treasury is examining the issues surrounding minimum benefits.
	[p.2] general concern that the trustees actions will be governed by both the FL Bill and the SIS Regns.	The FL Bill covers all superannuation funds, not just those regulated by SIS, which is why the main provisions relating to the division of superannuation interests are located there.
	[p.2] SISFA is of the view that the benefits that will be introduced by the Bill outweigh any increased administration and disclosure obligations on trustees of funds and increased costs.	Noted.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia- **Family Law Section ('FLS')** (Submission 21)	(p.4) Similar words to s.79(2) of the Family Law Act - the just and equitable requirement - be imported into Division 3 of Part VIIIB of the Bill. (p.4) The words 'or in proceedings under this Division where no proceedings under section 79 are possible' before the first comma in s.90MS(1) of the Bill. (p.5) The words 'or under Part VIIB in respect of a superannuation interest' be inserted at the end of s.75(2)(n) of the Family Law Act. (p.6) The words 'Division 3 of the Part' should replace 'section 79' in s.90MO(1) of the Bill. (p.7) The words 'or an order in relation to superannuation interests of the spouses made under Division 3 of Part VIIIB' be inserted after 'under section 79' in the two places where they occur in s.79A(1) of the Family Law Act.	The intention is that the order splitting a superannuation interest of a party to a marriage would be made under s.79 of the Act (that is, that the 'just and equitable' requirement and the setting aside provisions would apply to the order). However, we will raise the comments of the Law Council, which are supported by the Family Court, with the drafter with a view to whether this could be clearer.
	(p.5) There should be a specific reference in s.79(4) to make it clear that after a splitting or flagging order in relation to a superannuation interest, the Court can take that into account in deciding what order to make under s.79	It is not considered necessary to make the amendment, because s.79(4) already requires the Court to take into account any other order made under the Act affecting a party to a marriage or a child of the marriage.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia- Family Law Section (cont.)	(p.7) That a "breakdown declaration" be renamed a "separation declaration"	We will give further consideration to the proposal that the Bill be amended to rename the declaration as recommended by the FLS.
	(p.8) That s.90MP and 90MQ be removed, so that parties whose superannuation interests exceed the ETP threshold do not have to wait 12 months before they can finalise their property arrangements.	Concessional tax arrangements apply to amounts below the ETP threshold. It is considered that the additional safeguard of parties having satisfied the ground for divorce is necessary to protect the revenue when parties who will benefit from these concessions settle their financial affairs outside the court process.
	(p.9) That s.5 not extend to situations where a Court sets aside orders under s.79A or revokes the approval of an agreement under s.87, so that the new arrangements for splitting superannuation interests are available to parties whose settlement is set aside etc under either provision.	In discussions with the Law Council, it was explained that it was only suggested that the new provisions should apply where the Court had set aside etc the settlement in contested proceedings. We will give further consideration to the proposal that the Bill be amended so that the new provisions will also apply to a marriage if the approval of the s.87 agreement in relation to the marriage has been set aside under s.87(8)(a),(c) or (d) or the s.79 order made in relation to the marriage has been set aside under s.79A(1)

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia- Family Law Section (cont.)	(p.10) CGT rollover relief should be introduced to avoid any unintended CGT consequences occasioned by a superannuation fund that is required to transfer or dispose of assets in order to give effect to the Court orders or superannuation agreement.	Proposals are being considered to ensure that capital gains tax would not apply to payments made from a superannuation fund to a non-member spouse under the payment splitting arrangements. Proposals are also being considered to provide roll-over relief for in-specie transfers between funds with fewer than five members resulting from a payment split.
	(p.11) That s.90MT(2)(a) of the Bill, which requires the court before making a splitting order to determine the overall value of the superannuation interest in accordance with the regulations, so that when consent orders are made the court only need have regard to the overall value or estimate of value of the interest.	We do not think it is appropriate to have a different rule for consent orders. A great number of litigants appear in the Family Court without legal representation, and it is important that they are able to appreciate the true value of any superannuation interest, including where the proceedings are settled by consent. If the proposed amendment to r.93 of the FL Regns (see Jacques Martin Recs. 3 and 36) is implemented, this should reduce any delay in obtaining a value of an accumulation interest.
	(p.13) That the court be given a discretion to admit evidence and/or rely on agreement by the parties as to value enabling the court to find in the special circumstances of a particular case that the overall value of the superannuation interest is different to the value determined in accordance with the regulations. A mechanism should be in place to verify and challenge the information used by the trustee in making a binding valuation on the party.	We are seeking further information from the Australian Government Actuary about this issue.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia- **Family Law Section** (cont.)	(p.13) The Family Law Section does not agree with s.90MH(3) that it says 'will not allow superannuation agreements to be enforced under Part XIIIA of the Family Law Act'. The Court should be given a full range of powers in relation to enforcing superannuation agreements. Section 90MT(b) will make available for orders the well-understood methods of enforcement under the Family Law Rules, which will not be available for agreements.	The Section has misread s.90MH(3). The second sentence of the provision refers to Part VIIIA, not Part XIIIA. The policy intention is that superannuation agreements should be enforced in the same way as financial agreements. Therefore, we will give further consideration to the proposal that: - s.90MH(3) be omitted; - s.90MR be replaced with a reference to s.90KA, which is the dealing with the enforcement of financial agreements, to provide that superannuation agreements are enforced in the same way as financial agreements.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (Submission 23)	Supports the principle of the division of superannuation interests.	Noted.
	[p.1] an education campaign will be needed to ensure that consumers make informed decisions about their superannuation interests.	Noted.
	[p.1] there will be increased costs, including additional staff training, involved with implementing these proposals and dealing with customers.	Noted.
	[p.1] the complexity involved in dividing superannuation interests will add to the uncertainty about superannuation outcomes and may be a disincentive for people to save for their own retirement.	The provisions about accumulation interests, which are the type of interests most usually used by those "saving for their own retirement", are not complex. We are working with the superannuation industry to simplify, as far as possible, the provisions dealing with defined benefit interests.
	[p.2] NRMA recommends that information about the division of superannuation be readily available from the court and practitioners.	We will be working with these groups to ensure that adequate educational materials are available through these, and other, outlets.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (cont.)	[p.2] NRMA recommends that trustees be required to provide the non-member spouse with copies of the current relevant disclosure documentation.	The legislation will provide for the information that the trustees will be required to provide to the non-member spouse. If a new interest is created for the non-member spouse, then that person will become a member in his/her own right and have all the rights and responsibilities of a member. If a new interest is not created for the non-member spouse, then that person will not have the rights and responsibilities of a member and will be entitled only to information about the growth of his/her "base amount".
	[p.2] NRMA seeks clarification as to who has the right to any insurance payments. NRMA also seeks clarification as to how, if insurance premiums are usually paid from the superannuation account, the premiums will be able to be paid if that account is flagged.	A payment made pursuant to an insurance contract between an insurance provider and the insured is not a splittable payment, and will not therefore be subject to an agreement/order under the proposed legislation. The effect of a payment flag is to prevent the trustee from making any splittable payment from the superannuation interest. Insurance premiums are not splittable payments and therefore a payment flag will not prevent the payment of insurance premiums from a superannuation account.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (cont.)	[p.3] NRMA recommends that the "continuation option" be explicitly excluded from splittable rights.	In discussing this recommendation with NRMA, NRMA explained that, under its superannuation arrangements, members have a right when they withdraw their benefits to a 'continuation option' to keep the insurance cover provided by the fund. The Bill and Regulations do not provide for a non-member spouse to obtain any 'share' of the insurance cover enjoyed by the member spouse.
	[p.3] NRMA seeks clarification regarding binding and non-binding death nominations, the trustee's obligations to the non-member's dependents and the rights of the non-member with respect to death benefits.	The policy is that any payment to a reversionary beneficiary is a splittable payment.
	[p.4] NRMA recommends that the Bill provides that if the superannuation provider is provided with inadequate information, the provider is not responsible for any consequences.	The policy intention is that the superannuation provider should not be held liable if insufficient information is provided by either the member or the non-member spouse. We will discuss with the drafter as to whether this needs to be more clearly spelled out in the legislation.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (cont.)	[p.4] NRMA seeks clarification as to whether the non-member spouse can contribute and/or transact on the account and who owns the contributions and subsequent earnings in the split account.	The NRMA appears to have not clearly understood the proposals. If there is a new interest created for the non-member spouse, then that person will become a member in his/her own right and will, therefore, be able to contribute and/or transact on the account in accordance with the fund rules. If there is no new interest created for the non-member spouse, then that person will not be able to contribute and/or transact on the account.
	[p.4] NRMA recommends that the eligible service period should be the same for the member spouse as the non-member spouse when a superannuation interest is split.	For simplicity it was decided to make the ESP for the non-contributing spouse, the date of splitting the superannuation benefit. Note that AFSA (in submission No. 19 p.20 state that this approach 'is a victory for simplicity and [will not] have a significant detrimental impact'. The policy rationale for this position is three fold: • in some cases an ESP is very difficult to determine; • the pre July 1983 component is decreasing over time and could be disadvantageous; and • the overall tax treatment of a split for separation is very generous, providing two ETP tax free thresholds and two Reasonable Benefits Limits.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (cont.)		It should be noted that a non-working spouse may be made worse off if they are given the eligible service period (ESP) from their ex-spouse as the first $100,696 of the post June 1983 component of an ETP received by a person aged over 55 years is exempt from tax.
	[p.4] NRMA recommends that the requirement that any communication sent to one member must be given to the other is far too broad and needs to be narrowed.	We are conscious of the concerns raised about privacy and will give further consideration to the proposal that the Bill be amended to ensure that information is not inappropriately given to either spouse.
	[p.5] increased costs may well exceed the prescribed fees and will need to be distribution across all fund members.	The policy is that the initial start up costs (eg staff training, introducing new administrative and IT systems) are to be borne by the superannuation industry. The issue of the fees that can be charged to individual accounts to process a payment split or the division of a superannuation interest is being reconsidered.
	[p.5] NRMA suggests that minimum reporting standards should be prescribed.	We agree that there should not be over-regulation in relation to reporting requirements imposed on superannuation trustees, and will keep that in mind when the amendments to Division 7A.2 of the SIS Regns [see JFIMA Rec. 5] are prepared.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (cont.)	[p.5] NRMA recommends that the obligation to provide information about a superannuation interest should not arise until both the application and the fee have been received.	We consider that there is merit ih this suggestion and we will give further consideration about whether the Bill should be amended accordingly.
	[p.6] NRMA concerned that the proposals may lead to increased hardship claims because the partner who did not do well out of a property settlement may apply for early access to his/her superannuation on the basis of financial hardship.	This would appear to be an unlikely scenario as the basis on which a member can successfully claim financial hardship will not have altered.
	[p.6] need to clarify which body is the appropriate forum for dispute resolution, and specifically consider what role, if any, the SCT will have in dealing with complaints about the way in which the fund has implemented a court order.	The amendments made to the *Superannuation (Resolution of Complaints) Act* ('Complaints Act') by Schedule 1 of the Bill will provide a regulation making power to enable regulations to be made to provide that a person is to be treated as a member of a superannuation fund or a beneficiary of an approved deposit fund for the purposes of the Complaints Act or specified provisions of that Act. This will enable regulations to be made to give a non-member a right to make a complaint to the Superannuation Complaints Tribunal about a decision made by the trustee in relation to a payment split.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (cont.)	[p.6] tax implications of splitting superannuation need to be clearly understood.	Noted. The consequential tax legislation amendments are being prepared.
	[p.6] NRMA recommends that, for accumulation accounts, a separate interest should be created for the non-member spouse.	[See also Institute of Actuaries No. 9, p.3 and No. 22, p.1 and JMIFA No. 15, recs 1 & 2 and testimony pp. 6-7) The SIS Regulations allow for this to happen at the election of the non-member spouse. We have obtained constitutional advice, since the Senate Committee hearings were held, that a law providing for the trustee (at its option) to create a new interest in a regulation superannuation fund out of a portion of the member spouse'' vested withdrawal benefit is within the corporations power in s.51(xx) of the Constitution and the pensions power in s.51(xxiii) of the Constitution.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NRMA (cont.)		Accordingly, we will give further consideration to amendments to insert an additional division in the SIS Regs to enable the trustee, where the member has a fully vested accumulation interest, to create an interest in the name of the non-member spouse having the value of the base amount (or the adjusted base amount, if applicable), provided that the amount does not exceed the withdrawal benefit of the member spouse at the time the interest is created. The additional Division would permit transfer or roll out of the new interest, at the option of both the trustee and the non-member spouse.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NSW Premier's Department (Submission 24)	[p.2] should consider whether for defined benefit interests accruals in respect of the periods of the marriage and of prospective service could be redefined when needed and an immediate lump sum payment could be made to the non-member spouse with the defined benefit component to the member reduced appropriately.	We have been advised that the marriage and matrimonial causes power, which is the constitutional head of power on which the FL Bill rests, is only sufficient to support a payment splitting regime. Therefore, the Bill establishes a payment splitting regime under which a splittable payment is split, in accordance with the agreement or order, when it becomes payable. The SIS Regns provide for the creation of a new interest out of a member's fully vested accumulation interest. We have further been advised that, because of the just terms requirement in the Constitution, it is not possible to provide for the creation of a new interest out of a partially vested accumulation interest or a defined benefit interest.
	[p.2] differing values of pensions and commuted amounts in some schemes leads to a bias in the split.	[See also JMIFA recommendations 6 – 9] We will give further consideration to the proposal that the rule should be (and that r.7A.06 of the SIS Regs and r.106 of the FL Regs be amended to provide - that the member must take at least enough to satisfy the amount of the non-member's adjusted based amount, subject to a cap of the maximum amount that the member can take without losing the right to take his or her remaining benefits in the form of a pensions.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NSW Premier's Department (cont.)	[p.2] shouldn't use the Treasury bond rate as the inflation figure as it is inconsistent with scheme design, and the principle of discounting based on earnings and salary growth.	We are reconsidering this issue.
	[p.2] concern that the non-member spouse will be exposed to the mortality risk of the member spouse and any subsequent spouses.	In situations where a new interest has not been created, this is unavoidable.
	[p.2] incompatibility of a flat pension payment where pensions in a scheme are indexed.	We are working, in consultation with the Australian Government Actuary, on a redraft of subdivision 6.5.4 to simplify the provisions about the division of pension payments in the payment phase.
	[p.2] exposure of the member spouses to the entire surcharge debt together with delay problems in assessing the extent of that debt.	The treatment of the surcharge debt has been discussed in some detail during consultations. We will give further consideration to the proposal that the policy should be that a superannuation interest should be valued net of surcharge debt, as assessed during the assessment immediately prior to the time of the valuation, and that the legislation should be amended to implement this policy. This will ensure that as at valuation the surcharge debt has been taken into account to the extent practicable.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
NSW Premier's Department (cont.)	[p.2] concern about the effectiveness of the SIS Regs in the context of exempt public sector superannuation schemes.	Treasury is examining these schemes in the light of the proposed Regulations.
	[p.2] if pensions schemes are required to split pensions, it is reasonable to ask whether the pensions which have been split should be subject to charges to recover additional costs.	The issue of prescribed fees is being reconsidered.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Clayton Utz (Submission 28)	[p.2] could amend the SIS Regns to require that the trustees of regulated superannuation funds and approved deposit funds give effect to any splitting agreement or order under the Family Law Act.	We have been advised that there is no constitutional difficulty with this proposal and will give further consideration to the suggested amendment.
	[p.2] concerned that, despite the policy intention that the non-member spouse not become a member of the fund, the governing rules of the fund may have the effect of making the non-member spouse a member by virtue of the fact that the fund is making payments to the non-member spouse.	The policy intention is the non-member spouse should not become a member of the fund simply on receipt of payments from the fund. The difficulty appears to be that there is no express provision in the Bill clearly stating that the non-member spouse does not become a member of the fund by the making of an order or an agreement. If there were an express provision in the Bill, it would clearly prevail over the provisions in trust deeds (section 90MB of the Bill provides that the provisions of new Part VIIIB of the Family Law Act will have effect despite anything to the contrary in a trust deed or other instrument). We will consider whether the Bill should be amended or whether the funds will need to change their governing rules to ensure that this does not happen. Should this be a concern to a fund, they should ensure that they amend their governing rules.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Clayton Utz (cont.)	[p.2] states that the intention of the Bill is that a member's interest in the fund becomes split with the non-member spouse at the time that the order is made by the court and served on the trustee, and that the Bill does not provide for this intention.	Clayton Utz has misunderstood the intention of the Bill, which is to provide for a payment splitting regime.
	[p.2] will comment separately on the bases for valuing defined benefit interests.	Noted – as far as we are aware, no additional comments on this issue have been received.
	[p.2] the legislation is being used as a means of converting non-preserved benefits to preserved benefits, and this is unduly harsh and inequitable.	Consistent with recent changes to Preservation rules, all new contributions and all fund earnings are treated as preserved.
	[p.3] the mandatory payment of benefits to the non-member spouse when s/he reaches a condition of release is unnecessarily harsh as members may elect to leave a benefit in the fund even though they are entitled to be paid the benefit.	We will give further consideration to the proposal that the legislation be amended so that the non-member may elect to leave a benefit in the fund.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Mr Dean Thomas **Chair** **Superannuation Working Group** **Investment & Financial Services Association Ltd (IFSA)** (Testimony) These issues listed in Submission No. 29 from Mr Richard Gilbert Deputy Chief Executive Officer, IFSA	(Testimony, p.65-66) The order in which trustees are required to deduct from components of superannuation (from unrestricted non-preserved benefits, then from restricted non-preserved benefits and then from preserved benefits) is inconsistent with the way other fees and charges are deducted, and reverses the order in which surcharge payments are deducted. IFSA is concerned that the reversal will place an unnecessary burden on administration systems. It also creates a double preservation of benefits.	Consistent with recent changes to preservation rules under which all new contributions and all fund earnings are treated as preserved, we intend to retain the existing order of deduction for the payment of the non-member spouse's entitlements from the member's benefits.
	(Testimony, p.66) The surcharge liability needs to be taken into account in relation to the valuation of the member's benefit prior to the split	[See also Mercers r.92, 93 & 94] We will give further consideration to the proposal that the actuarial method of valuing a defined benefit interest in the FL Regulations be amended to take off the value of the surcharge debt as notified in the most recent member statement. (It should be noted that the method for valuing an accumulation interest - the withdrawal benefit - will already take into account the existence of the surcharge debt).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Mr Dean Thomas (IFSA) (Testimony) (cont.)	(Testimony, p.66-68) Where there is no intention to retain the non-member spouse within the fund, the trustee should be able to transfer a non-member spouse to a fund nominated by the non-member spouse or to an eligible rollover fund without having to create a new interest and then prepare the exit paperwork and exit statements.	We are seeking advice as to whether this would be possible.
	(Testimony p.68-69) It is inappropriate to set a level of fees for payment splits. To avoid excessive fees being charged, trustees have an obligation to ensure they act in an appropriate and prudent manner as a fiduciary. You cannot deduct fees or make a profit from dealing with the assets of another but are entitled to be compensated for expenses that you incur in administering the assets of another person. (Testimony p.69) The requirement to effectively bill a client for fees, rather than being allowed to deduct those fees from members' accounts, is administratively clumsy.	Prescribed fees being reconsidered.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Mr Dean Thomas (IFSA) (Testimony) (cont.)	(Testimony p.69) If the trustee is unable, when a non-member spouse is requesting information from the trustee to determine the value of the member's benefit within the fund, to identify the member from the information that the non-member spouse provides, the trustee should be able to ask the non-member spouse to provide information (eg. member's investment number) to uniquely identify the member.	Currently, the declaration required by s.90MZB(2) to accompany an application for information, prescribed in proposed Form 7 of the FL Regns, requires the applicant to set out the date of birth of the member. If this, with the member's name, is not sufficient to identify the member, the trustee would be quite justified in asking the non-member applicant to provide further information to identify the person about whom information is requested. The trustee will breach a duty of confidentiality if he or she discloses details relating to a superannuation interest of a person of than the member spouse. Accordingly, it would be advisable, in the case of non-member inquiries, for the trustee not to disclose the information unless it is clear that the person about whom the details are being disclosed is the spouse or prospective spouse of the non-member making the inquiry.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Family Court of Australia (Submission 30)	[p.1] concern that the amendments are being made in a vacuum because relevant amendments to sections 75 and 79 are not being proposed.	The Court's concerns in this respect are unwarranted, as conceded by the Chief Justice in testimony. The Court was concerned that it was not clear that orders about the division of superannuation were to be made under section 79 of the Family Law Act. The policy intention is that the Court will treat superannuation as property and, under section 79, is required to make a property settlement that is just and equitable, taking into account the contributions of both parties. We will discuss with the drafting office whether this can be clarified.
	[p.1] Court believes that the legislation should provide the same discretion with regard to superannuation entitlements as it does in relation to other assets.	The legislation does provide this as it provides that a superannuation interest is to be treated in the same manner as other property when the court is deciding what property order to make.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Family Court of Australia (cont.)	[p.1] Court believes that the legislation must provide the capacity to prevent non bona fide attempts to deprive a spouse of their rightful entitlement by setting aside transactions. Court should have the jurisdiction to set aside superannuation agreements as it can as regards other property.	We assume that the court is referring to the setting aside of agreements. A superannuation agreement is, in a sense, a "subset" of a financial agreement and a court will be able to set aside a superannuation agreement in the circumstances provided for in section 90K of the Act, which was inserted by the *Family Law Amendment Act 2000*. The grounds for setting aside contained in the Family Law Amendment Act 2000 were considered by the Senate during the passage of that Act in November 2000.
	[p.2] unclear which courts may deal with superannuation entitlements.	Under the Bill, a superannuation interest will be dealt with under section 79 of the Act. Therefore the jurisdictional limits that apply to section 79 proceedings will apply to proceedings that deal with superannuation interests. It is intended that the monetary limits that apply to the jurisdiction of the Federal Magistrates Service will include the value of any superannuation interest that either party has. We will discuss with the drafting office whether this should be clarified.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Family Court of Australia (cont.)	[p.2] concern that the transitional procedures may impede the ability of the court to exercise jurisdiction in those cases that are dealt with during the 12 month transitional period.	The Court appears to have confused the issue of the commencement of the legislation with the application provision in section 5 – that is who the new legislation will apply to. The current draft of section 5 provides that the legislation will not apply in situations where, before the commencement of the legislation, a section 87 agreement was approved or a final order under section 79 was made. We have written to the court about this application provision and requested further information about whether it may cause difficulties for the court and, if so, whether they could suggest an alternative.
	[p.2] Agree with Family Law Section that s.5 not extend to situations where a Court sets aside orders under s.79A or revokes the approval of an agreement under s.87, so that the new arrangements for splitting superannuation interests are available to parties whose settlement is set aside etc under either provision.	[see FLS Submission, p.9] We will give further consideration to the proposal that the Bill be amended so that the new provisions will also apply to a marriage if the approval of the s.87 agreement in relation to the marriage has been set aside under s.87(8)(a),(c) or (d) or the s.79 order made in relation to the marriage has been set aside under s.79A(1)
	[p.2] agree with the FLS that the "breakdown declaration" should be renamed the "separation declaration".	We will give further consideration to the proposal that the Bill be amended as suggested.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Family Court of Australia (cont.)	[p.2] Agree with FLS' concern that the new Part VIIIB should be linked back to Part VIII of the Act to allow the just and equitable provisions to be incorporated.	The Court's concerns in this respect are unwarranted, as conceded by the Chief Justice in testimony. The Court was concerned that it was not clear that orders about the division of superannuation were to be made under section 79 of the Family Law Act. The policy intention is that the Court will treat superannuation as property and, under section 79, is required to make a property settlement that is just and equitable, taking into account the contributions of both parties. We will discuss with the drafting office whether this can be clarified.
	[p.2] drafting issue about whether paragraph 75(2)(n) should be amended.	We will discuss with the drafter whether this is necessary.
	[p.2] the legal aid implications of the reforms need to be considered.	Noted.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Family Court of Australia (cont.)	[p.2] privacy and violence protocols should apply to the divulging of information from trustees for the protection of more vulnerable parties.	Noted. We have sought advice from the Information Law Branch of the Attorney-General's Department about these issues and will give further consideration to proposed amendments to the Bill and the FL Regulations to ensure that only essential information is provided by a superannuation fund to a party and to provide, in the legislation, that information is not inappropriately disclosed.
	[p.2] there should be power to deal with circumstances where parties order their affairs in order to defeat the legitimate interests of the other party when the arrangements concern superannuation.	The Court appears to be concerned that old sections 84 and 85, which are now sections 106A and 106B, should be available to deal with arrangements concerning superannuation. We are of the view that they will be available, but will check with the drafter whether clarification is required.
	[p.3] early release provisions should be reconsidered to ensure that one party is not unfairly disadvantaged by the need to preserve super monies.	Consistent with recent changes to Preservation rules, all new contributions and all fund earnings are treated as preserved.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Family Court of Australia (cont.)	[p.3] CGT rollover relief should be provided to protect small funds from paying unnecessary tax.	Proposals are being considered to ensure that capital gains tax would not apply to payments made from a superannuation fund to a non-member spouse under the payment splitting arrangements. Proposals are also being considered to provide roll-over relief for in-specie transfers between funds with fewer than five members resulting from a payment split.
	[p.3] circumstances in which superannuation agreements may be set aside are extremely limited.	A superannuation agreement is, in a sense, a "subset" of a financial agreement and a court will be able to set aside a superannuation agreement in the circumstances provided for in section 90K of the Act, which was inserted by the *Family Law Amendment Act 2000*. The grounds for setting aside contained in the Family Law Amendment Act 2000 were considered by the Senate during the passage of that Act in November 2000.
	[p.3] section 90MO(1) prevents the Court from making an order under s.79 with respect to superannuation interests in certain circumstances.	In testimony, this comment was withdrawn and the Court asked that it be deleted from the submission.
	[p.3] section 90KA of the Family Law Act, which deals with the validity, enforceability and effect of agreements, is supported by the Court, subject to clarification of the meaning of paragraph (a).	Paragraph 90KA(a) is in the same terms as existing paragraph 87(11)(a), which has been in the Family Law Act in those terms for many years.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Family Court of Australia (cont.)	[p.3] concern that the Court's discretion in deciding whether to make a flagging order is too constrained.	Section 90MU(2)(a) requires the court to take into account in deciding whether to make a flagging order the likelihood that a splittable payment will soon become payable. The intention of the provision is to provide guidance to the court about the situations in which it might make a flagging order. Section 90MU(2)(b) enables the court to take into account such other matters as it considers relevant.
Law Council of Australia General Practice Section (Submission No. 35)	(No. 35, p.2-4, Testimony p.34 and 41) The relationship between the trustee and the non-member spouse (that is, until (and if) he or she elects to have a separate interest created in the member's fund) should be clarified. The Section suggests that the SIS Regns should specify that the trustee owes a duty of good faith in respect of its dealings which may have an impact upon a non-member spouse.	We will give further consideration to an amendment to the SIS Regns suggested by the Section.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.5) Unless the parties have agreed to how notices are to be given in the resolution of a Family Law dispute, there is a real potential for major conflict to arise with notices given under rr.7A.06, 7A.07 and 7A.09. There is an element of chance in that priority depends on which notice is received first, and there appears to be no method to deal with situations where, for some reason a notice is delayed, or it is inappropriate that the particular notice, because it si first should be given priority.	We will give further consideration to an amendment to r.7A.06 of the SIS Regns, to align it with a revised r.106 of the FL Regns [see JFIMA Recs 6 to 9], will remove the notice provision from r.7A.06. We will consider amendments to r.7A.07 and 7A.08 of the SIS Regns to provide for member spouse initiated creation of a new interest for the non-member spouse [see JFIMA Rec.17] which will have the effect that there will be no significance whether a notice under r.7A.07 or 7A.09 is received first, as they will both provide for creation of a new interest for the non-member spouse.
	(No. 35, p.5 and 10) The timeframes are fairly tight and there are no provisions which would allow the Regulator to extend the time period where, for example, parties have for good reason failed to give a notice but should nevertheless be allowed to do so.	Treasury is considering r.7A.07(5)(a) to enable the trustee to allow a member spouse a longer period than 28 days to make a request that the Non Member Spouse be transferred or rolled out to another fund. (ie the 28 days will be a statutory minimum only).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.6) It is essential that the legislation adequately deal with the common occurrence of the reconstruction and termination of superannuation funds. Two examples are mentioned (an employer conducting an employer sponsored fund deciding to arrange superannuation for its employees through an external provider such as a master trust, and sale or transfer of a business with transfer of employees from an existing employer sponsored fund to the superannuation arrangements of the new employer). Under the proposed legislation it appears to the Section that a payment flag would, in effect, prohibit such a transfer and it is unclear to the Section what may be the position where an order or agreement has been entered into. The Section believes that where such a superannuation transfer can be made, it should be able to be made without the consent of the non-member spouse on the basis that the recipient trustee of the new superannuation arrangements would be bound by the relevant arrangements. Where the new superannuation arrangement is different from the old superannuation arrangement, such transfers should be treated as though they trigger a condition of release for the purpose of making a splittable payment payable.	We are giving consideration to the possibility of providing for transfer of payment splits and payment flags in the situations mentioned by the Section where the transfer of the superannuation arrangements is effected by a bulk transfer of members and each member is given a transfer value in the new fund (that is, where there is not a rollover to the new fund that would trigger a splittable payment under s.90ME1)(b) of the Bill).

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.6) (cont.) Consideration needs to be given to how funds should be permitted to deal with non-member spouses who have elected to become a member of the fund. One simple approach would be to require all funds to indicate whether or not they will allow such members to continue as members of the fund, or whether their general policy will be that such members should rollover their benefit into another fund on the basis that if that is not done within a prescribed period, then the benefit can be shifted to an eligible rollover fund.	

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.7) There are some potentially significant costs for some member and non-member spouse as a consequence of the application of these provisions: (a) unrestricted or non-restricted amounts are applied first upon a split and only then preserved amount and upon transfer to the non-member spouse the amounts become preserved; (b) the eligible service period in relation to the amount transferred will operate from the date of the split, benefits from pre 1983 service entitlements will be lost; (c) the member spouse remains liable for the full burden of any surcharge tax and the fact that the non-member may not be liable for surcharge although, presumably, if the non-member spouse elected to have an interest in the fund that may be different although it is unclear;	The proposed provisions on preservation are consistent with overall policy to preserve all contributions and earnings, and ensures equality between parties in terms of rights to access subsequent benefits. In relation to the proposed taxation arrangements, to keep costs and complexity to a minimum it is necessary to ensure that the legislation is as simple as possible. Overall, the proposals would be considered beneficial to the great majority of persons. For example, each party's benefits will be measured against their own RBL and separate ETP thresholds will apply.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.7) (cont.) (d) member spouses with benefits reliant upon transitional RBL's may have the position when split that the higher transitional RBL is not available to the non-member spouse with the consequence that additional tax will become payable. Governments have been careful to grandfather the benefits of tax and other arrangements when making changes to superannuation law. The principle adopted in this case does not seem to follow that.	
	(No. 35, p.8) Defined benefit funds can have many different designs. There appears to have been indications given to some parties that the legislation once introduced in its final form will allow particular defined benefit funds to seek alternate formulas to accommodate their structure but this is not contained in the present legislation.	We will give further consideration to the proposal that the FL Regns be amended to provide for funds to have their own valuation factors approved.
	(No. 35, p.8) The non-member's interest in defined benefit scheme accrues at the long term bond rate which may be at variance with the member spouse's wage increases with the consequence that the member and non-member spouses are taking a risk in relation to movements of the member spouse's wages and the long term bond rate.	[See also Institute of Actuaries No. 9, pp.4-5 and No. 31 p.1-2] Treasury is giving consideration to whether to retain the Treasury bond rate as the growth factor for the adjusted base amount where the interest is held in a defined benefit fund.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.8-9) For many defined benefit funds the benefit is an accumulation benefit up until age 55 and a true defined benefit thereafter. If the benefit is split on the basis of an actuarial reserve, if the member subsequently leaves the fund before age 55 and is only entitled to an accumulation benefit they may receive significantly less than they had assumed, while the non-member still receives their share based on the higher defined benefit calculation.	The possibility that the ultimate benefit payable to a member spouse who has an interest in a defined benefit fund may be less than overall value of the interest determined in accordance with the actuarial method at the time of the order or the service of the agreement on the trustee is a matter that will need to be borne in mind by the parties and their advisers.
	(No. 35, p.9) The Section does not perceive that there is any difficulty in an immediate split of an accumulation fund.	[See also JFIMA Recs 1 and 2, Institute of Actuaries No.9, p.3 and No.22 p.1) We have obtained Constitutional advice since the Senate Committee hearings were held that a law providing for the trustee (at its option) to create a new interest in a regulated superannuation fund out of a portion of the member spouse's vested withdrawal benefit is within the corporations power in s.51(xx) and the pensions powers in s.51(xxiii) of the Constitution. Accordingly, we will give further consideration to amendments to insert an additional Division in the SIS Regns to enable the trustee, where the member has an accumulation interest to create an interest in the name of the non-member spouse having the value of the base amount (or the adjusted base amount, if applicable), provided that that amount does not exceed the withdrawal benefit of the member spouse at the time the interest is created.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.9) Because of the nature of defined benefit funds to achieve both certainty and equity the parties must be given two alternatives for splitting their superannuation. For the non-member spouse to receive the full value of the defined benefit they will need to wait until the benefit becomes payable to, firstly, overcome the constitutional difficulty of unjust terms and secondly to receive the full amount of the benefit which accrued during the time of the marriage but is dependent on the member's salary at the time the benefit is paid. However, if the parties wish to finalise all their property arrangements at any early time or if a non-member spouse wishes to take their benefit and leave the fund then the member's leaving service benefit must be used in the knowledge of both parties that it represents less than the true value of the accrued defined benefit.	To provide that parties who wish to finalise all their property arrangements (or take their benefit and leave the fund) must do so on the basis that an interest either of them has in a defined benefit fund is the 'member's leaving service benefit' would be to undervalue the member's interest and leave the valuable future portion of the defined benefit interest entirely to the member spouse.
	(No. 35, p.10) The fees able to be charged by the trustee are inadequate and in many cases, particularly in the case of defined benefit funds, are likely to be very inadequate in providing proper recompense to the trustee for the work which the trustee must undertake.	Prescribed fees are being reconsidered.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.10) There is an apparent clash between the Bill and the Regulations where the fixed percentage method is used (s.90MJ(4) specifies the identified percentage will be applied to the splittable payment, while the FL Regns specifies that the percentage is to be applied to the overall value of the superannuation interest at the relevant date)	The FL Regns were prepared on the basis that appropriate amendments to the s.90MJ of the Bill would be made to bring it into line with the approach in the Regulations.
	(No. 35, p.11) (Testimony p.39) In relation to disability benefits and, in particular, that part of the benefit which is insured (ie. the benefit over and above the ordinary leaving service benefit) there seems to be a strong argument for the view that that component of the benefit should still be payable to the member spouse (ie,. the person who is insured) and should not be part of the splittable payment. It will be that person who is disabled and presumably the intention of the disability cover is to provide a benefit for that person in those circumstances and not to provide a windfall to a non-member spouse who has not suffered a disability.	As indicated in relation to the Section's comment about the apparent clash between the Act and the Regulations [No. 35, p.10], the FL Regns were prepared on the basis that an agreement providing for the split of a superannuation interest in the accumulation phase using the fixed percentage method will provide that the percentage will be applied to the overall value of the interest at the relevant date (eg. the date the parties settle their financial affairs), and not to the amount of the splittable payment. So the non-member spouse will not be receiving any proportional split of any ultimate benefit (whether it is a disability benefit, insured or otherwise). However, any unpaid portion of the adjusted base amount owing to the non-member spouse may be met out of whatever ultimate benefit is payable to the member spouse.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.12) In relation to death benefits the matter is a little more complicated because the death benefit would normally be paid to the nominated beneficiary and more often the spouse or the child of the member or to the estate of the member. At the very least it may be sensible to allow the parties to enter separate and different arrangements in relation to the insured death benefit component in a fund to take into account such factors as the parties who are responsible for the care of children and the like.	See the comment above in relation to the Section's comment about disability benefits [No.35, p.11; Testimony p.39].
	(No. 35, p.12) Another problem arises with insured death benefits if the member spouse increases the death cover subsequent to the payment split because the member spouse believes that he or she needs additional cover having regard to their new circumstances. This additional cover should not be caught by the payment split.	See the comment above in relation to the Section's comment about disability benefits [No. 35, p.11, Testimony p.39].

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.12) In the case of the non-member spouse, if he or she is not a member of the superannuation fund then, presumably, he or she cannot deal with their benefit in the event of death through the nominated beneficiary regime. It is unclear to the Section how the trustee is then to deal with that benefit when it becomes payable. It would appear to us that it is paid to the estate of the non-member spouse but this may be a totally inappropriate outcome because one of the significant advantages of being able to pay a benefit on death directly to a dependant is that the payment can be made speedily and it does not get trapped in the problems which may be associated with an estate.	The Section is correct in its comment that the benefit is payable to the estate of the non-member spouse (see s.90MZC of the Bill). To have a nominated beneficiary regime in relation to payment of an adjusted base amount, or any portion of that amount outstanding a the death of the non-member spouse, would treat that amount different from amounts due under orders under s.79 of the Act that are outstanding on the death of a spouse (see s.79(1) and 79(8)(c) of the Act).
	(No. 35, p.12-13) (Testimony p.42) The section is concerned about the possibility that orders or agreements may be ambiguous, or difficult or impossible to apply having regard to the terms and conditions of the superannuation fund. There should be an appropriate mechanism to allow the trustees to be able to seek clarification or ultimately directions from the court. The costs involved in this should be borne by the parties and not by the fund.	In relation to court orders, it will be possible for the trustee, in cases where there is actual ambiguity or other problems with an order, to get an order corrected in any enforcement proceedings brought by the parties to comply with the order. To deal with an ambiguity etc. in an agreement served on a trustee, we will give further consideration to an amendment to the Act to ensure that a trustee may apply to the Family Court under s.90KA of the Act, which gives the Family Court the power to grant the same contractual remedies in relation to a financial agreement (including rectification of such an agreement) that the High Court may grant, for rectification of the agreement.

Submission/Witness	Comment/Recommendation	Departmental Response to Committee
Law Council of Australia **General Practice Section** (cont.)	(No. 35, p.13) It is incumbent on the Attorney-General to be satisfied not only that the legislation is constitutional valid but there is no real arguable basis for suggesting invalidity.	Noted.

SUPERANNUATION VALUATION FACTORS

INDEX

Description of use of factors

Accumulation Schemes – Not fully vested

These factors (f) depend on the period over which vesting occurs. Factors have been developed for vesting periods of 5, 10, 15 and 20 year vesting terms. They assume vesting is uniform over the vesting term, for example, they assume that for a 10 year vesting term the benefit will vest by an additional 10% each year.

Schemes for which the factors are not suitable

Accumulation schemes that have partial vesting but for which none of the sets of factors provided are appropriate should produce factors suitable for the individual circumstances of that scheme and apply to have those factors approved.

The information required to calculate the value of the benefit is:

- The account balance (A) that would apply if the benefit were already fully vested;
- The actual vested benefit (V); and
- The membership term in years and complete months (t = y + m)

The calculation is as follows:

$$\text{Value} = V + (A - V) \times f_{y+m}$$

'f_{y+m}' is obtained by looking up the factors 'f_y' and 'f_{y+1}' and interpolating between them to obtain the factor f_{y+m} as follows

$$f_{y+m} = \frac{f_y \times (12 - m) + f_{y+1} \times m}{12}$$

Defined Benefit Schemes

Defined benefit schemes may pay benefits as lump sums, pensions or a combination of lump sums and pensions. Also, they may have options to pay the benefits as lump sums, pensions or a combination of lump sums and pensions by converting one form to the other in whole or in part. The method of valuing schemes that may pay benefits in these alternate forms is set out in the regulations.

Schemes for which the factors are not suitable

Defined benefit schemes of a type for which the trustees believe the factors provided are not appropriate should produce factors suitable for the individual circumstances of that scheme and apply to have those factors approved.

Lump sum benefits

The valuation of a lump sum benefit requires the determination of the lump sum payable at normal retirement age based on the benefits accrued as at the date of separation and then determining the present value of that lump sum. The valuation factors (f) depend on the period remaining until the benefit becomes payable (assumed to be normal retirement age).

The information required to calculate the value of the benefit is:

- The lump sum benefit (A) accrued at separation date but payable from normal retirement age. This benefit will usually be the product of the accrued benefit multiple and the salary used for determining benefits; and
- The term in years and complete months (t = y + m) remaining until normal retirement age.

The calculation is as follows:

Value = $A \times f_{y+m}$

'f_{y+m}' is obtained by looking up the factors 'f_y' and 'f_{y+1}' and interpolating between them to obtain the factor f_{y+m} as follows

$$f_{y+m} = \frac{f_y \times (12 - m) + f_{y+1} \times m}{12}$$

Pension benefits

The valuation of a pension benefit is a two part process.

1. The first part is to calculate the lump sum value at normal retirement age, of the accrued pension; and
2. The second part is to find the present value of this lump sum in a manner similar to finding the present value of a lump sum benefit (using the lump sum factors referred to above).

The information required to calculate the value of the benefit is:

- The pension benefit (B) accrued at separation date but payable from normal retirement age;
- The normal retirement age of the spouse member;
- The term in years and complete months (t = y + m) remaining until normal retirement age;
- The age of the spouse member at separation; and
- The reversionary proportion (r), if any, normally applicable to the pension benefit.

The value at normal retirement age of the pension will be the sum of:

- The value of the member pension; and
- to the value of the reversionary pension (if any).

Pension valuation factors (P) for the member spouse have been determined at all normal retirement ages (ra) from 55 to 65, inclusive. Reversion factors (R) have been determined for all member spouse 'ages at separation' (sa).

Value at normal retirement age (VN) $= B \times (P_{ra} + R_{sa} \times r)$

Value at separation $= VN \times f_{y+m}$

ACCUMULATION SCHEMES - PARTIALLY VESTED **MALES**

Completed Length of Service (years)	Vesting Period (years)			
	5	10	15	20
0	0.753	0.658	0.595	0.551
1	0.812	0.714	0.648	0.602
2	0.864	0.763	0.694	0.646
3	0.908	0.805	0.733	0.684
4	0.945	0.839	0.765	0.716
5	1.000	0.865	0.791	0.741
6		0.890	0.815	0.766
7		0.915	0.839	0.790
8		0.938	0.862	0.813
9		0.960	0.884	0.836
10		1.000	0.905	0.858
11			0.925	0.878
12			0.943	0.898
13			0.960	0.916
14			0.975	0.932
15			1.000	0.947
16				0.961
17				0.972
18				0.982
19				0.990
20				1.000

ACCUMULATION SCHEMES - PARTIALLY VESTED **FEMALES**

Completed Length of Service (years)	Vesting Period (years)			
	5	10	15	20
0	0.663	0.534	0.450	0.393
1	0.727	0.588	0.497	0.434
2	0.791	0.642	0.543	0.476
3	0.852	0.693	0.587	0.515
4	0.908	0.738	0.626	0.550
5	1.000	0.776	0.658	0.579
6		0.813	0.691	0.609
7		0.851	0.724	0.639
8		0.889	0.758	0.670
9		0.927	0.791	0.700
10		1.000	0.823	0.730
11			0.855	0.761
12			0.887	0.790
13			0.917	0.819
14			0.946	0.847
15			1.000	0.874
16				0.899
17				0.923
18				0.945
19				0.966
20				1.000

DEFINED BENEFIT SCHEMES – LUMP SUM FACTORS

Years to Retirement	**Unisex Factor**	**Years to Retirement**	Unisex Factor
44	0.3411	20	0.6364
43	0.3497	19	0.6525
42	0.3586	18	0.6689
41	0.3677	17	0.6857
40	0.3771	16	0.7029
39	0.3869	15	0.7204
38	0.3971	14	0.7384
37	0.4077	13	0.7567
36	0.4186	12	0.7755
35	0.4301	11	0.7947
34	0.4419	10	0.8143
33	0.4542	9	0.8345
32	0.4669	8	0.8551
31	0.4800	7	0.8763
30	0.4935	6	0.8981
29	0.5065	5	0.9206
28	0.5197	4	0.9316
27	0.5333	3	0.9446
26	0.5471	2	0.9599
25	0.5612	1	0.9782
24	0.5755	0	1.0000
23	0.5903		
22	0.6053		
21	0.6207		

DEFINED BENEFIT SCHEMES – PENSION VALUATION FACTORS – EXCLUDING REVERSION

Guarantee Period: No guarantee period Indexation Basis: No indexation

Normal Retirement Age	Male	Female
55	12.0764	12.9364
56	11.8886	12.7841
57	11.6943	12.6252
58	11.4934	12.4596
59	11.2862	12.2869
60	11.0730	12.1068
61	10.8540	11.9191
62	10.6295	11.7238
63	10.3997	11.5207
64	10.1653	11.3099
65	9.9265	11.0912

Guarantee Period: No guarantee period Indexation Basis: CPI indexation

Normal Retirement Age	Male	Female
55	15.9424	17.4995
56	15.6096	17.2020
57	15.2707	16.8972
58	14.9259	16.5849
59	14.5758	16.2648
60	14.2209	15.9369
61	13.8618	15.6013
62	13.4989	15.2579
63	13.1329	14.9070
64	12.7646	14.5489
65	12.3944	14.1837

Guarantee Period: No guarantee period Indexation Basis: Wage indexation

Normal Retirement Age	Male	Female
55	19.1987	21.4631
56	18.7201	21.0097
57	18.2377	20.5504
58	17.7522	20.0849
59	17.2640	19.6134
60	16.7740	19.1357
61	16.2830	18.6523
62	15.7916	18.1631
63	15.3006	17.6687
64	14.8108	17.1696
65	14.3230	16.6661

Guarantee Period: 5 year guarantee period Indexation Basis: No indexation

Normal Retirement Age	Male	Female
55	12.1315	12.9696
56	11.9499	12.8204
57	11.7625	12.6651
58	11.5694	12.5032
59	11.3710	12.3346
60	11.1674	12.1591
61	10.9591	11.9766
62	10.7465	11.7870
63	10.5298	11.5903
64	10.3097	11.3867
65	10.0866	11.1761

Guarantee Period: 5 year guarantee period Indexation Basis: CPI indexation

Normal Retirement Age	Male	Female
55	16.0029	17.5359
56	15.6770	17.2420
57	15.3456	16.9410
58	15.0094	16.6327
59	14.6689	16.3172
60	14.3246	15.9944
61	13.9772	15.6644
62	13.6274	15.3273
63	13.2758	14.9835
64	12.9232	14.6332
65	12.5702	14.2769

Guarantee Period: 5 year guarantee period Indexation Basis: Wage indexation

Normal Retirement Age	Male	Female
55	19.2626	21.5015
56	18.7913	21.0519
57	18.3170	20.5966
58	17.8405	20.1355
59	17.3624	19.6688
60	16.8836	19.1965
61	16.4051	18.7189
62	15.9275	18.2364
63	15.4516	17.7495
64	14.9784	17.2587
65	14.5088	16.7646

Guarantee Period: 10 year guarantee period Indexation Basis: No indexation

Normal Retirement Age	Male	Female
55	12.2909	13.0621
56	12.1271	12.9219
57	11.9595	12.7762
58	11.7882	12.6251
59	11.6138	12.4684
60	11.4366	12.3062
61	11.2571	12.1385
62	11.0757	11.9655
63	10.8928	11.7872
64	10.7090	11.6040
65	10.5246	11.4161

Guarantee Period: 10 year guarantee period Indexation Basis: CPI indexation

Normal Retirement Age	Male	Female
55	16.1985	17.6494
56	15.8944	17.3663
57	15.5872	17.0773
58	15.2778	16.7822
59	14.9667	16.4813
60	14.6547	16.1748
61	14.3426	15.8630
62	14.0311	15.5462
63	13.7209	15.2250
64	13.4127	14.8998
65	13.1073	14.5712

Guarantee Period: 10 year guarantee period Indexation Basis: Wage indexation

Normal Retirement Age	Male	Female
55	19.4834	21.6296
56	19.0366	21.1922
57	18.5896	20.7504
58	18.1433	20.3042
59	17.6984	19.8539
60	17.2561	19.4000
61	16.8173	18.9430
62	16.3829	18.4835
63	15.9537	18.0220
64	15.5306	17.5595
65	15.1145	17.0967

DEFINED BENEFIT SCHEMES – REVERSION VALUATION FACTORS

Guarantee Period: No guarantee period Indexation Basis: No indexation

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	1.620	0.690	50	0.720	0.275
41	1.530	0.649	51	0.630	0.234
42	1.440	0.607	52	0.540	0.192
43	1.350	0.566	53	0.450	0.151
44	1.260	0.524	54	0.360	0.109
45	1.170	0.483	55 and over	0.270	0.068
46	1.080	0.441			
47	0.990	0.400			
48	0.900	0.358			
49	0.810	0.317			

Guarantee Period: No guarantee period Indexation Basis: CPI indexation

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	2.830	1.210	50	1.260	0.482
41	2.673	1.137	51	1.103	0.409
42	2.516	1.064	52	0.946	0.336
43	2.359	0.992	53	0.789	0.264
44	2.202	0.919	54	0.632	0.191
45	2.045	0.846	55 and over	0.475	0.118
46	1.888	0.773			
47	1.731	0.700			
48	1.574	0.628			
49	1.417	0.555			

Guarantee Period: No guarantee period Indexation Basis: Wage indexation

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	4.030	1.730	50	1.790	0.690
41	3.806	1.626	51	1.566	0.586
42	3.582	1.522	52	1.342	0.482
43	3.358	1.418	53	1.118	0.378
44	3.134	1.314	54	0.894	0.274
45	2.910	1.210	55 and over	0.670	0.170
46	2.686	1.106			
47	2.462	1.002			
48	2.238	0.898			
49	2.014	0.794			

Guarantee Period: 5 year guarantee period **Indexation Basis: No indexation**

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	1.550	0.660	50	0.700	0.260
41	1.465	0.620	51	0.615	0.220
42	1.380	0.580	52	0.530	0.180
43	1.295	0.540	53	0.445	0.140
44	1.210	0.500	54	0.360	0.100
45	1.125	0.460	55 and over	0.275	0.060
46	1.040	0.420			
47	0.955	0.380			
48	0.870	0.340			
49	0.785	0.300			

Guarantee Period: 5 year guarantee period **Indexation Basis: CPI indexation**

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	2.755	1.180	50	1.225	0.470
41	2.602	1.109	51	1.072	0.399
42	2.449	1.038	52	0.919	0.328
43	2.296	0.967	53	0.766	0.257
44	2.143	0.896	54	0.613	0.186
45	1.990	0.825	55 and over	0.460	0.115
46	1.837	0.754			
47	1.684	0.683			
48	1.531	0.612			
49	1.378	0.541			

Guarantee Period: 5 year guarantee period **Indexation Basis: Wage indexation**

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	3.950	1.700	50	1.750	0.680
41	3.730	1.598	51	1.530	0.578
42	3.510	1.496	52	1.310	0.476
43	3.290	1.394	53	1.090	0.374
44	3.070	1.292	54	0.870	0.272
45	2.850	1.190	55 and over	0.650	0.170
46	2.630	1.088			
47	2.410	0.986			
48	2.190	0.884			
49	1.970	0.782			

Guarantee Period: 10 year guarantee period **Indexation Basis: No indexation**

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	1.400	0.600	50	0.620	0.240
41	1.322	0.564	51	0.542	0.204
42	1.244	0.528	52	0.464	0.168
43	1.166	0.492	53	0.386	0.132
44	1.088	0.456	54	0.308	0.096
45	1.010	0.420	55 and over	0.230	0.060
46	0.932	0.384			
47	0.854	0.348			
48	0.776	0.312			
49	0.698	0.276			

Guarantee Period: 10 year guarantee period **Indexation Basis: CPI indexation**

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	2.570	1.110	50	1.140	0.442
41	2.427	1.043	51	0.997	0.375
42	2.284	0.976	52	0.854	0.308
43	2.141	0.910	53	0.711	0.242
44	1.998	0.843	54	0.568	0.175
45	1.855	0.776	55 and over	0.425	0.108
46	1.712	0.709			
47	1.569	0.642			
48	1.426	0.576			
49	1.283	0.509			

Guarantee Period: 10 year guarantee period **Indexation Basis: Wage indexation**

Age at Separation	Member Male	Member Female	Age at Separation	Member Male	Member Female
Up to 40	3.740	1.620	50	1.660	0.648
41	3.532	1.523	51	1.452	0.551
42	3.324	1.426	52	1.244	0.454
43	3.116	1.328	53	1.036	0.356
44	2.908	1.231	54	0.828	0.259
45	2.700	1.134	55 and over	0.620	0.162
46	2.492	1.037			
47	2.284	0.940			
48	2.076	0.842			
49	1.868	0.745			

APPENDIX 4

ATTORNEY-GENERAL'S & TREASURY'S RESPONSE TO SUPPLEMENTARY SUBMISSIONS BY MR COLIN GRENFELL AND THE FAMILY COURT OF AUSTRALIA (SUBMISSION NO. 48)

00/12355

February 2001

Ms Sue Morton
Secretary
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Ms Morton

FAMILY LAW LEGISLATION AMENDMENT (SUPERANNUATION) BILL 2000

I am writing about the supplementary submissions received from Mr Colin Grenfell (Submission No. 40) and from the Family Court of Australia (Submission No. 41) on the Family Law Legislation Amendment (Superannuation) Bill 2000.

Mr Colin Grenfell (Submission No. 40)

Mr Grenfell has recommended to the Committee that the Bill be amended to provide that the value of a superannuation interest in an accumulation plan and a defined benefit plan should be equal to the benefit payable to the member on retrenchment, unless the trustee of the plan has sought and obtained the approval of the Australian Government Actuary that the plan's retrenchment benefit would produce an unfair or unreasonable value.

The Institute of Actuaries of Australia, in its first submission to the Committee (Submission No. 9), in referring to the approaches that might be adopted to valuing a superannuation interest - ranging from the vested benefit to which the member is entitled on leaving a fund (which while appropriate where there are no contingent benefits ignores any benefits which are accruing but are not fully vested) through to the member's normal retirement benefit (which is inappropriate as there is no certainty that the retirement benefit will ultimately be paid) - stated that in a minority of plans the benefit payable on retrenchment to the member may be considered to represent or approximate the value of all contingent benefits accrued to date. The Institute concluded that the retrenchment benefit for valuing superannuation interests in the majority of superannuation plans is inappropriate as in the vast majority of plans there is no specific retrenchment benefit that is higher than the member's vested benefit.

Also, as Mr Deeves mentioned, additional payments to retrenched employees can be made outside the superannuation system. Most employees would find it attractive to have any amounts payable on retrenchment paid in this form, for otherwise the retrenchment payments would be subject to the standards on to the preservation of benefits in the SIS Regulations.

Family Court of Australia (Submission No. 41)

Several of the Family Court's comments in its earlier submission (Submission No. 30) related to the integration of proposed new Part VIIIB with the existing provisions of the Act, including with the provisions then in Part VIII, including s.79, of the Act.

We mentioned, in our response, in relation to the difficulties that the Court had with:

- setting aside superannuation agreements;
- which courts deal with superannuation entitlements;
- the need to 'link back' the provisions in Part VIIIB with Part VIII to allow the 'just and equitable' provisions in Part VIII to apply; and
- the applicability of the anti-avoidance provisions (now in ss.106A and 106B of the Act) to superannuation entitlements;

that we would discuss with the drafting office whether there was a need to clarify the legislation. We think, and the Court seems in its supplementary submission to agree, that these difficulties will be overcome if it could be made clearer that superannuation splitting orders will be made under s.79 of the Act.

We also mentioned, in relation to privacy issues, in our letter of 22 December 2000 to the Committee (Submission No. 38), that we would consider an amendment to the Bill to make it clear that the address of a spouse must not be disclosed when a request for information is made to a trustee under s.90MZB of the Bill. We also mentioned in that letter that we would raise with the drafter whether it is necessary to amend s.90MZB to ensure that there is power to set out in regulations the information that the trustee must not disclose when a request is made under s.90MZB.

Several other suggestions made by the Court in Submission No. 41 were also suggested in its earlier submission.

We agreed, in our response to the Committee, to consider amendments to the Act to rename 'breakdown declarations' as 'separation declarations' and to apply the new provisions on superannuation where parties had had a s.87 agreement or a s.79 order set aside (otherwise than by consent). We also noted that the legal aid implications of the reforms would need to be considered to ensure that, in particular, women, who in the past have often suffered because of an omission or undervaluing of superannuation interest, can access the legal system.

Having considered the other suggestions made by the Court again in its supplementary submission, we will also consider further amendments to:

- s.5 of the Act to disapply the new provisions only where a s.87 agreement or a s.79 order had been made prior to the Bill receiving Royal Assent; and
- to change 'must' in s.90MU(2) to 'may' to resolve the concerns the Family Court has about when the Court may be able to make a flagging order.

Finally in relation to matters raised in both the Court's submissions, we do not propose to amend s.90 of the Act to include the further ground suggested by the Court for setting aside financial agreements. The grounds for setting aside a financial agreement were only recently considered by the Senate during the passage of the *Family Law Amendment Act 2000* in November 2000.

In its recent submission, the Family Court also takes up the suggestion of the Family Law Section of the Law Council of Australia for a discretion in relation to the valuation of superannuation interests.

The Court states that, while it would support the application of a formula for valuation for the majority of cases, it should have a discretion to depart from the formula where it is satisfied that its application is likely to cause injustice to a party.

We are giving the possibility of inclusion of a discretion to depart from the valuation rules in the Regulations further consideration.

The Family Court raised one further new issue in Submission No. 41.

The Court is concerned about the effect that the prescription of a payment as one that is not splittable might have on the exercise of its discretion to make an order in relation to other property under s.79 of the Act. It may be argued in proceedings for a s.79 order that any such payment made in the past should not be taken into account by the Court because if the payment was made after the order were made it would be a payment that is not splittable.

We think that such an argument would be unlikely to be accepted if put in proceedings. We will, however, give consideration to an amendment to s.75 of the Act to make it clear that the Court must take into account, to the extent it is relevant, any payment received by a party in respect of a superannuation interest which, if it were received after the making of an order, would be a payment that is not splittable.

Yours sincerely

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