



Superannuation Industry (Supervision) Amendment Regulations 2004 (No. 6)¹

Statutory Rules 2004 No. 153²

I, PHILIP MICHAEL JEFFERY, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Superannuation Industry (Supervision) Act 1993*.

Dated 24 June 2004

P. M. JEFFERY
Governor-General

By His Excellency's Command

HELEN COONAN
Minister for Revenue and Assistant Treasurer

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1 Name of Regulations

These Regulations are the *Superannuation Industry (Supervision) Amendment Regulations 2004 (No. 6)*.

2 Commencement

These Regulations commence as follows:

- (a) on the date of the notification of these Regulations in the *Gazette* — regulations 1 to 3 and Schedule 1;
- (b) on 1 July 2004 — Schedule 2.

3 Amendment of *Superannuation Industry (Supervision) Regulations 1994*

- (1) Schedule 1 amends the *Superannuation Industry (Supervision) Regulations 1994*.
- (2) Schedule 2 amends the *Superannuation Industry (Supervision) Regulations 1994*, as amended by the *Superannuation Industry (Supervision) Amendment Regulations 2003 (No. 5)*.

Schedule 1 Amendments commencing on gazettal

(regulation 3)

[1] Subregulation 1.03 (1), definition of *transferable benefits*, subparagraph (c) (i)

omit

for an entitlement in respect of an accumulation interest —

insert

for an entitlement, in respect of an accumulation interest that is not a partially vested accumulation interest, to which subparagraph (ii) does not apply —

[2] Subregulation 1.03 (1), definition of *transferable benefits*, subparagraph (c) (i)

omit

determined in accordance with

insert

determined in the way in which a court would determine an amount in accordance with

[3] Subregulation 1.03 (1), definition of *transferable benefits*, subparagraph (c) (iii)

omit

determined in accordance with

insert

determined in the way in which a court would determine an amount in accordance with

[4] Subregulation 1.04AAA (5)

omit

Part 7A.1A

insert

Division 7A.1A

[5] After subregulation 2.36E (2)

insert

(2A) If:

- (a) the member spouse lodges a notice, or makes a request of a trustee, which would bind the trustee to pay death benefits to a particular beneficiary or beneficiaries; and
 - (b) a payment made in accordance with the notice or request would not be a splittable payment because of the identity or characteristics of that beneficiary or those beneficiaries;
- the trustee must inform the non-member spouse that the member spouse has lodged the notice or made the request.

[6] Subregulation 2.36E (3)

after

subregulation (2)

insert

or (2A)

[7] Paragraph 3.01 (f)

substitute

- (f) a non-member spouse for whom an interest has been created in the fund, if the original interest of the member spouse was an interest in that fund; or

[8] Subregulation 6.17 (1)

omit

the standard set out in subregulation (2) is

insert

the standards set out in subregulations (2), (2A) and (2B) are

[9] Subregulation 6.17 (2)

substitute

- (2) A member's benefits in a fund:
- (a) may be paid:
 - (i) by being cashed in accordance with Division 6.3; or
 - (ii) by being rolled over or transferred in accordance with Division 6.4; and
 - (b) must not be paid in that way except when, and to the extent that, the fund is required or permitted under this Part to pay them; and
 - (c) must be paid in that way when, and to the extent that, the fund is required under this Part to pay them.
- (2A) A member's benefits in a fund:
- (a) may be paid:
 - (i) by being cashed in accordance with Part 7A; or
 - (ii) by being rolled over or transferred in accordance with Part 7A; and
 - (b) must not be paid in that way except when, and to the extent that, the fund is required or permitted under Part 7A to pay them; and
 - (c) must be paid in that way when, and to the extent that, the fund is required under Part 7A to pay them.
- (2B) A member's benefits in a fund:
- (a) may be paid in a way:
 - (i) that is not described in subregulations (2) and (2A); and
 - (ii) that satisfies regulation 14G or 14N of the *Family Law (Superannuation) Regulations 2001*; and

- (b) must not be paid in that way except when, and to the extent that, the fund would be required or permitted under those Regulations to pay them; and
- (c) must be paid in that way when, and to the extent that, the fund would be required under those regulations to pay them.

[10] Subregulation 6.17A (4)

after

Subject to

insert

subregulation (4A), and

[11] After subregulation 6.17A (4)

insert

- (4A) The trustee is not required to comply with subregulation (4) if the trustee:
 - (a) is subject to a court order that has the effect of restraining or prohibiting the trustee from paying a benefit in respect of the member in accordance with a notice of the kind described in that subregulation; or
 - (b) is aware that the member of the fund is subject to a court order that:
 - (i) requires the member to amend or revoke a notice of that kind that the member has given the trustee; or
 - (ii) has the effect of restraining or prohibiting the member from giving a notice of that kind.

[12] After regulation 7A.01

insert

7A.01A Relevant condition of release

In this Part:

- (a) *relevant condition of release* means a condition of release mentioned in item 101, 102, 103, 106, 201, 202, 203 or 206 of Schedule 1; and
- (b) a non-member spouse satisfies a relevant condition of release if the event specified in the condition has occurred in relation to the non-member spouse; and
- (c) in the application of item 101, 103, 201 or 203 of Schedule 1 to a non-member spouse, a reference to a member in:
 - (i) the definition of *permanent incapacity* in subregulation 6.01 (2); or
 - (ii) the definition of *retirement* in subregulations 6.01 (2) and (7);is taken to be a reference to the non-member spouse.

[13] Division 7A.1A, heading

substitute

Division 7A.1A Options for trustee in relation to interests

[14] Regulation 7A.03A

omit

This Division

insert

- (1) This Division

[15] Regulation 7A.03A*insert*

- (2) Subject to subregulation (3), this Division also applies in relation to a superannuation interest (the *original interest*) in a regulated superannuation fund, if:
- (a) the original interest is subject to a payment split; and
 - (b) the original interest is an accumulation interest in the growth phase; and
 - (c) the trustee:
 - (i) has not received a request under regulation 7A.05, 7A.06 or 7A.07; and
 - (ii) has not taken an action under regulation 7A.10 in relation to the original interest.
- (3) This Division does not apply to an accumulation interest:
- (a) if:
 - (i) the interest is a partially vested accumulation interest; and
 - (ii) the transferable benefits in relation to the accumulation interest would be greater than the withdrawal benefit in relation to the member spouse; or
 - (b) if the interest is determined by reference to a policy of life insurance mentioned in regulation 5.15D.

[16] Subregulation 7A.03B (3)*substitute*

- (3) Subject to subregulation (4), the value of the benefits in the non-member spouse interest must be:
- (a) if:
 - (i) the payment split is a base amount payment split; and

-
- (ii) an adjusted base amount applies in relation to the non-member spouse when the interest is created; the adjusted base amount allocated to the non-member spouse less the amount of any fees payable by the non-member spouse in respect of the payment split; or
- (b) if:
- (i) the payment split is a base amount payment split; and
- (ii) an adjusted base amount does not apply in relation to the non-member spouse when the interest is created; the base amount allocated to the non-member spouse, within the meaning of regulation 45 of the *Family Law (Superannuation) Regulations 2001*, less the amount of any fees payable by the non-member spouse in respect of the payment split; or
- (c) if the payment split is a percentage payment split:
- (i) for an entitlement in respect of an interest in a self-managed superannuation fund — the amount in relation to the interest at the time when the new interest is created, determined by a method that a court might use if the court were acting under paragraph 90MT(2)(b) of the *Family Law Act 1975*, multiplied by the specified percentage, less the amount of any fees payable by the non-member spouse in respect of the payment split; or
- (ii) for an entitlement in respect of an accumulation interest, other than a partially-vested accumulation interest, to which subparagraph (i) does not apply — the amount in relation to the interest at the time when the new interest is created, determined in the way in which a court would determine an amount in accordance with regulation 28 and subregulation 31(2A) of the *Family Law (Superannuation) Regulations 2001*, multiplied by the specified percentage, less the amount of any fees payable by the non-member spouse in respect of the payment split; or

- (iii) for an entitlement in respect of any other interest — the amount in relation to the interest at the time when the new interest is created, determined in the way in which a court would determine an amount in accordance with the relevant method in Part 5 of the *Family Law (Superannuation) Regulations 2001*, multiplied by the specified percentage, less the amount of any fees payable by the non-member spouse in respect of the payment split.

[17] Subregulation 7A.03B (4)

omit

immediately before the payment split.

insert

immediately before the new interest is created.

[18] Subregulation 7A.03B (6)

substitute

- (6) In creating the new interest:
 - (a) a proportion must be taken from the unrestricted non-preserved benefits, the restricted non-preserved benefits and the preserved benefits of the member spouse; and
 - (b) the proportion taken from each category of benefits must be the same as the category bears to the member spouse's interest immediately before the new interest was created.
- (6A) The benefits held in the non-member spouse interest are:
 - (a) if the original interest is in the growth phase — unrestricted non-preserved benefits, restricted non-preserved benefits or preserved benefits in accordance with the character that they had in the member spouse's interest; and
 - (b) if the original interest is an allocated pension — unrestricted non-preserved benefits.

[19] Regulation 7A.03E

substitute

7A.03E Request for lump sum payment

If:

- (a) the non-member spouse has satisfied a relevant condition of release; or
- (b) the original interest:
 - (i) is an allocated pension; or
 - (ii) comprises only unrestricted non-preserved benefits;the non-member spouse may request the trustee to pay the withdrawal benefit from the non-member spouse interest to the non-member spouse as a lump sum

[20] Subregulation 7A.03G (3)

substitute

- (3) If subparagraph (2) (b) (i) applies in relation to a request, the trustee must:
 - (a) retain the new interest in accordance with the request; or
 - (b) roll over or transfer the withdrawal benefits to:
 - (i) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (ii) an eligible rollover fund.
- (3A) If subparagraph (2) (b) (ii), or paragraph (2) (c), applies in relation to a request, the trustee must roll over or transfer the withdrawal benefits to:
 - (a) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (b) an eligible rollover fund.

[21] Subregulation 7A.03G (4)

after

paragraph (3) (b)

insert

or (3A) (b)

[22] Subregulation 7A.03H (2)

omit

Before rolling over

insert

Subject to subregulation (3A), before rolling over

[23] After subregulation 7A.03H (3)

insert

(3A) If a trustee:

- (a) has made reasonable attempts to obtain sufficient information about a non-member spouse to be able to give a payment split notice; and
- (b) has been unable to obtain sufficient information about the non-member spouse;

the trustee is permitted to act under paragraphs (1) (a) and (b) as if those paragraphs did not require the giving of the payment split notice or the notice under subregulation (2).

Example for paragraph (a)

The trustee may be unable, after reasonable attempts, to identify an address or location of the non-member spouse.

(3B) If a trustee:

- (a) proposes to give a non-member spouse a notice under subregulation (2); and
- (b) has made reasonable attempts to obtain sufficient information about the non-member spouse to be able to give the notice; and

- (c) has been unable to obtain sufficient information about the non-member spouse;

the trustee is not required to give the notice, and is permitted to act under paragraphs (1) (a) and (b) as if those paragraphs did not require the giving of the notice.

Example for paragraph (b)

The trustee may be unable, after reasonable attempts, to identify an address or location of the non-member spouse.

[24] Subregulation 7A.03I (1)

substitute

- (1) This regulation applies:
- (a) if:
- (i) a trustee receives a request under regulation 7A.03C within the time allowed under subregulation 7A.03F (1); and
 - (ii) paragraph 7A.03G (2) (b) does not apply to the request; or
- (b) if:
- (i) a trustee receives a request under regulation 7A.03C within the time allowed under subregulation 7A.03F (1); and
 - (ii) the trustee has, under paragraph 7A.03G (3) (a), retained the new interest in accordance with the request.

[25] Subregulation 7A.04 (2)

substitute

- (2) This Division does not apply to an accumulation interest:
- (a) if:
- (i) the interest is a partially vested accumulation interest; and

- (ii) the transferable benefits in relation to the accumulation interest would be greater than the withdrawal benefit in relation to the member spouse; or
- or
- (b) if the interest is determined by reference to a policy of life insurance mentioned in regulation 5.15D.

[26] Subregulation 7A.07 (3)

omit

[27] Subregulation 7A.09 (3)

substitute

- (3) If subparagraph (2) (b) (i) applies in relation to a request, the trustee must:
 - (a) create the new interest in accordance with the request; or
 - (b) roll over or transfer the transferable benefits to:
 - (i) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (ii) an eligible rollover fund.
- (3A) If subparagraph (2) (b) (ii), or paragraph (2) (c), applies in relation to a request, the trustee must roll over or transfer the transferable benefits to:
 - (a) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (b) an eligible rollover fund.

[28] Subregulation 7A.09 (4)

omit

[29] Subregulation 7A.10 (2)*omit*

Before rolling over

insert

Subject to subregulation (4), before rolling over

[30] After subregulation 7A.10 (3)*insert***(4) If a trustee:**

- (a) has made reasonable attempts to obtain sufficient information about a non-member spouse to be able to give a payment split notice; and
- (b) has been unable to obtain sufficient information about the non-member spouse;

the trustee is permitted to act under subregulation (1) as if the subregulation did not require the giving of the payment split notice or the notice under subregulation (2).

Example for paragraph (a)

The trustee may be unable, after reasonable attempts, to identify an address or location of the non-member spouse.

(5) If a trustee:

- (a) proposes to give a non-member spouse a notice under subregulation (2); and
- (b) has made reasonable attempts to obtain sufficient information about the non-member spouse to be able to give the notice; and
- (c) has been unable to obtain sufficient information about the non-member spouse;

the trustee is not required to give the notice, and is permitted to act under paragraphs (1) (b) and (c) as if those paragraphs did not require the giving of the notice.

Example for paragraph (b)

The trustee may be unable, after reasonable attempts, to identify an address or location of the non-member spouse.

[31] Subparagraph 7A.11 (2) (c) (i)*omit*

for an entitlement in respect of an accumulation interest —

insert

for an entitlement, in respect of an accumulation interest that is not a partially vested accumulation interest, to which subparagraph (ii) does not apply —

[32] Subparagraph 7A.11 (2) (c) (i)*omit*

determined in accordance with

insert

determined in the way in which a court would determine an amount in accordance with

[33] Subparagraph 7A.11 (2) (c) (iii)*omit*

determined in accordance with

insert

determined in the way in which a court would determine an amount in accordance with

[34] Subregulation 7A.11 (4)*omit*

immediately before the payment split.

insert

immediately before the new interest is created.

[35] Paragraph 7A.12 (1) (b)

omit

or (c).

insert

or (c); or

[36] After paragraph 7A.12 (1) (b)

insert

(c) under subregulation 7A.09 (3) or (3A).

[37] Paragraph 7A.12 (2) (a)

substitute

(a) the value of:

(i) the transferable benefits; or

(ii) if paragraph (3A) (c) applies — the benefits that are rolled over or transferred; and

[38] Paragraph 7A.12 (3A) (b)

omit

transferred.

insert

transferred; and

[39] After paragraph 7A.12 (3A) (b)

insert

(c) the trustee must ensure that the total amount that is rolled over or transferred does not exceed the withdrawal benefit of the member spouse immediately before that amount is rolled over or transferred.

[40] Subparagraph 7A.12 (5) (c) (ii)

omit

operative time.

insert

operative time; and

[41] After paragraph 7A.12 (5) (c)

insert

(d) if the benefits are rolled over or transferred to an eligible rollover fund — the name and contact details of the fund.

[42] Subparagraph 7A.13 (2) (c) (i)

omit

for an entitlement in respect of an accumulation interest —

insert

for an entitlement, in respect of an accumulation interest that is not a partially vested accumulation interest, to which subparagraph (ii) does not apply —

[43] Subparagraph 7A.13 (2) (c) (i)

omit

determined in accordance with

insert

determined in the way in which a court would determine an amount in accordance with

[44] Subparagraph 7A.13 (2) (c) (iii)

omit

determined in accordance with

insert

determined in the way in which a court would determine an amount in accordance with

[45] Subregulation 7A.13 (4)

omit

immediately before the payment split.

insert

immediately before the lump sum is paid.

[46] Regulation 7A.14

omit

This Division applies if:

insert

- (1) This Division applies if:

[47] Regulation 7A.14

insert

- (2) However, if an amount under the Act would be a death benefit ETP under the *Income Tax Assessment Act 1936* if it were paid to the non-member spouse, a requirement in this Division:
- (a) to pay the amount; or
 - (b) to roll over or transfer the amount to another regulated superannuation fund, an RSA, an approved deposit fund or an EPSSS, to be held for the benefit of the non-member spouse; or
 - (c) to allocate the amount to an interest that the trustee creates for the non-member spouse in the regulated superannuation fund or approved deposit fund;
- is taken to be a requirement to pay the amount to the non-member spouse in cash.

[48] Regulation 7A.15

omit

[49] Paragraph 7A.16 (1) (a)*omit*

a non-member spouse

insert

the non-member spouse

[50] Paragraph 7A.16 (5) (b)*substitute*

- (b) in the case of a rollover or transfer — believes, on reasonable grounds, that:
- (i) the trustee of the receiving regulated superannuation fund, approved deposit fund or EPSSS; or
 - (ii) the receiving RSA provider;
- has received from the non-member spouse consent to the rollover or transfer;

[51] Subregulation 7A.16 (6)*substitute*

- (6) If the trustee of the transferor fund believes, on reasonable grounds and after making reasonable inquiries, that the non-member spouse has not given a consent mentioned in subregulation (5):
- (a) the trustee must:
 - (i) allocate the amount to an interest that the trustee creates for the non-member spouse in the regulated superannuation fund or approved deposit fund; or
 - (ii) apply, under subsection 243 (2) of the Act, for the issue to the non-member spouse of an interest in an eligible rollover fund that is a regulated superannuation fund; and
 - (b) if subparagraph (a) (ii) applies — the amount must be rolled over or transferred to that fund.

[52] After subregulation 7A.17 (2)

insert

- (3) However, if the amount to be paid to the non-member spouse is a lump sum payable as the result of the commutation of a pension, the non-member spouse may request the trustee:
 - (a) to allocate the amount to an interest that the trustee creates for the non-member spouse in the regulated superannuation fund or approved deposit fund; or
 - (b) to roll over or transfer the amount to another regulated superannuation fund, an RSA, an approved deposit fund or an EPSSS, to be held for the benefit of the non-member spouse.
- (4) The trustee must give effect to the request unless:
 - (a) for a request under paragraph (3) (a):
 - (i) the regulated superannuation fund in which the non-member spouse interest is held has fewer than 5 members; or
 - (ii) the governing rules of the regulated superannuation fund or approved deposit fund in which the original interest is held do not allow a new interest to be created for the non-member spouse in the fund; or
 - (b) for a request under paragraph (3) (b) — the regulated superannuation fund, approved deposit fund, EPSSS or RSA specified in the request does not accept the rollover or transfer of benefits for the non-member spouse.
- (5) If subparagraph (4) (a) (i) applies:
 - (a) the trustee may give effect to the request; or
 - (b) if the trustee does not give effect to the request, the trustee must:
 - (i) if the non-member spouse asks the trustee to pay the amount to which the non-member spouse is entitled to the non-member spouse — pay the amount; or

- (ii) in any other case — roll over or transfer the amount to which the non-member spouse is entitled to:
 - (A) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (B) an eligible rollover fund.
- (6) If subparagraph (4) (a) (ii) or paragraph (4) (b) applies, the trustee must:
 - (a) if the non-member spouse asks the trustee to pay the amount to which the non-member spouse is entitled to the non-member spouse — pay the amount; or
 - (b) in any other case — roll over or transfer the amount to which the non-member spouse is entitled to:
 - (i) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (ii) an eligible rollover fund.

[53] Paragraph 7A.18 (1) (a)

omit

a non-member spouse

insert

the non-member spouse

[54] Subregulations 7A.18 (2) and (3)

substitute

- (2) When the splittable payment becomes payable, the trustee must:
 - (a) pay the amount to which the non-member spouse is entitled; or

-
- (b) if the splittable payment is not a pension payment, and the non-member spouse asks the trustee to allocate the amount to which the non-member spouse is entitled to an interest the trustee is to create for the non-member spouse in the regulated superannuation fund or approved deposit fund in which the original interest is held — give effect to the request unless:
- (i) the regulated superannuation fund in which the non-member spouse interest is held has fewer than 5 members; or
 - (ii) the governing rules of the regulated superannuation fund or approved deposit fund in which the original interest is held do not allow a new interest to be created for the non-member spouse in the fund; or
- (c) if the splittable payment is not a pension payment, and the non-member spouse asks the trustee to roll over or transfer the amount to which the non-member spouse is entitled to another regulated superannuation fund, an RSA, an approved deposit fund or an EPSSS, nominated by the non-member spouse, to be held for the benefit of the non-member spouse — give effect to the request unless the regulated superannuation fund, approved deposit fund, EPSSS or RSA specified in the request does not accept the rollover or transfer of benefits for the non-member spouse.
- (3) If subparagraph (2) (b) (i) applies:
- (a) the trustee may give effect to the request; or
 - (b) if the trustee does not give effect to the request, the trustee must:
 - (i) if the non-member spouse asks the trustee to pay the amount to which the non-member spouse is entitled to the non-member spouse — pay the amount to which the non-member spouse is entitled; or
 - (ii) in any other case — roll over or transfer the amount to which the non-member spouse is entitled to:
 - (A) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (B) an eligible rollover fund.

- (4) If subparagraph (2) (b) (ii) or paragraph (2) (c) applies, the trustee must:
- (a) if the non-member spouse asks the trustee to pay the amount to which the non-member spouse is entitled to the non-member spouse — pay the amount to which the non-member spouse is entitled; or
 - (b) in any other case — roll over or transfer the amount to which the non-member spouse is entitled to:
 - (i) another regulated superannuation fund, approved deposit fund, EPSSS or RSA nominated by the non-member spouse; or
 - (ii) an eligible rollover fund.

Schedule 2 Amendments commencing on 1 July 2004

(regulation 3)

[1] Subregulation 6.30 (3)

after

employer contribution

insert

, or an allocated surplus amount,

[2] After subregulation 6.30 (3)

insert

(4) In this regulation:

allocated surplus amount, in relation to a member of a superannuation fund in relation to a financial year, means an amount that is allocated by the relevant superannuation provider for the benefit of the member in respect of the financial year (other than an amount paid for or by the member to the provider) to the extent to which the allocated amount exceeds an amount that, in the opinion of an eligible actuary according to Australian actuarial practice, is reasonable having regard to:

- (a) the amounts paid by or for the member to the provider; and
- (b) the fund's investment earnings relating to the member's interest in the fund; and
- (c) any other relevant matters.

Notes

1. These Regulations amend Statutory Rules 1994 No. 57, as amended by 1994 Nos. 189 and 432; 1995 Nos. 47, 64, 142, 158, 159, 240, 293, 384 and 430; 1996 Nos. 44, 57, 122 and 344; 1997 Nos. 69, 117, 152, 153, 221, 243, 293, 309, 343 and 415; 1998 Nos. 76, 83, 108, 175, 177, 193, 240 and 312; 1999 Nos. 14, 31, 115, 239, 317 and 356; 2000 Nos. 119, 151, 185, 280 and 281; 2001 Nos. 37, 352 and 353; 2002 Nos. 21, 91, 150, 171, 200 and 353; 2003 Nos. 42, 170, 171, 196 (disallowed by the Senate on 18 September 2003) and 251; 2004 Nos. 12, 84, 113, 148 and 152.
2. Notified in the *Commonwealth of Australia Gazette* on 25 June 2004.