

EXPLANATORY STATEMENT

ISSUED BY AUTHORITY OF THE MINISTER FOR FINANCE AND ADMINISTRATION

SUBJECT: FOURTEENTH AMENDING DEED TO THE DEED TO ESTABLISH AN OCCUPATIONAL SUPERANNUATION SCHEME FOR COMMONWEALTH EMPLOYEES AND CERTAIN OTHER PERSONS PURSUANT TO SECTION 5 OF THE SUPERANNUATION ACT 1990

AUTHORITY

The Minister for Finance, for and on behalf of the Commonwealth, established an occupational superannuation scheme to provide benefits for certain of the Commonwealth's employees and for certain other people by Deed dated 21 June 1990 under section 4 of the *Superannuation Act 1990*. In this statement the Deed is called "the Trust Deed". The occupational superannuation scheme is known as the Public Sector Superannuation Scheme (PSS).

2. Section 5 of the *Superannuation Act 1990* (1990 Act) provides that the Minister for Finance and Administration may amend the Trust Deed by signed instrument, subject to obtaining the PSS Board's consent to the amendment where necessary.

3. The Minister has amended the Trust Deed and the Rules for the Administration of the Superannuation Scheme set out in the Schedule to the Trust Deed by the following signed instruments:

Trust Deed	Date
First Amending Deed	21 June 1990
Second Amending Deed	1 July 1991
Third Amending Deed	30 June 1992
Fourth Amending Deed	21 December 1992
Fifth Amending Deed	16 June 1993
Sixth Amending Deed	24 January 1994
Seventh Amending Deed	7 March 1994
Eighth Amending Deed	28 June 1994
Ninth Amending Deed	22 June 1995
Tenth Amending Deed	29 January 1996
Eleventh Amending Deed	10 December 1996
Twelfth Amending Deed	25 March 1998
Thirteenth Amending Deed	5 December 1999

4. On 20 August 2001 the Minister for Finance and Administration amended the Rules for the Administration of the PSS set out in the Schedule to the Trust Deed by signed instrument. That instrument is called the Fourteenth Amending Deed in this statement.

5. Section 5 of the 1990 Act deals with amendments made to the Trust Deed. This section allows the Minister to amend the Trust Deed provided that the PSS Board has consented to the amendment. However, paragraph 5(1A)(b) prescribes a number of exemptions where the PSS Board's consent is not required to an amendment to the Trust Deed.

6. Sub-paragraph 5(1A)(b)(i) exempts an amendment that relates to a payment by an employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act)) that will, after the making of the amendment, be required or permitted to be made under the 1990 Act. Subsection 5(1B) provides that for the purposes of that sub-paragraph a payment under the Trust Deed or the Rules is taken to be a payment by an employer-sponsor.

7. The amendments included in the Fourteenth Amending Deed provide an additional commutation option for those persons who receive pensions from the scheme. As scheme pensions are payable under the PSS Rules, the amendments relate to a payment by an employer-sponsor because of subsection 5(1B). The amendments therefore did not require the consent of the PSS Board.

DATE OF EFFECT OF THE FOURTEENTH AMENDING DEED

8. **Clause 1** specifies that the amendments of the Rules made by the Fourteenth Amending Deed come into effect on the later of:

- (a) the date of gazettal; and
- (b) the time when the *Superannuation Legislation Amendment (Post-retirement Commutations) Act 2001* commences.

AMENDMENTS TO THE RULES

Background

9. The *Superannuation Legislation Amendment (Post-retirement Commutations) Act 2001* (Commutations Act) made changes to pensions payable from the Parliamentary Contributory Superannuation Scheme (PCSS) and the Commonwealth Superannuation Scheme (CSS) in certain circumstances.

10. The Commutations Act provides former PCSS and CSS members with the option to commute sufficient of their scheme pensions to a lump sum to pay all or part of outstanding surcharge assessments, arising from their scheme membership, issued by the Australian Taxation Office (ATO) after they leave the scheme. This option is also available to reversionary beneficiaries (such as a spouse or child of the scheme member) who receive a scheme pension where they become liable to pay a surcharge assessment in respect of a deceased scheme member or former member.

11. Where a person takes up this commutation facility, the commuted amount will be paid directly to the ATO to pay all or part of the surcharge. Those persons will then have their scheme pensions reduced to recover the lump sum commutation amount over the life of the pension.

12. The Commutations Act also made changes to the 1990 Act to support the introduction of similar arrangements for the PSS. The Fourteenth Amending Deed amends the PSS Rules to include the proposed pension commutation provisions.

AMENDMENTS TO THE RULES – DETAILED DESCRIPTION

13. Because the PSS is a partially unfunded defined benefit scheme, surcharge assessments may be accumulated along with interest during a person’s period of membership of the scheme. When benefits become payable, the PSS Board as the superannuation provider is required to pay the amount of any surcharge debt to the ATO. The Board may then reduce benefits to recover the liability. Where a benefit is payable as a pension, the Board may determine an annual reduction of that pension which results in the recovery of the amount of the surcharge debt over the period during which the pension is expected to be paid.

14. However, after a person leaves the scheme and a benefit has become payable, there could be at least one surcharge assessment issued after the benefits have commenced to be paid. In this case the responsibility for payment of the surcharge debt to the ATO is transferred from the Board to the former member.

15. Similarly, a surcharge assessment may be made after the payment of a reversionary benefit has commenced on the death of a member or a former member. This may happen after the death of a person while still a PSS member or after the death of a former member to whom benefits have already commenced to be paid.

16. The amendments included in the Fourteenth Amending Deed provide a facility to allow a former member, or the reversionary beneficiary of a deceased former member, to commute all or part of the pension to a lump sum to pay all or part of the assessed surcharge liability. The pension is then reduced to recover the lump sum over the period during which the pension is payable.

Words and phrases used in the Rules

17. Division 2 of Part 1 defines words and phrases and some concepts used in the Rules.

18. **Subclauses 2.1 and 2.2** insert the definitions of “assessment”, “surcharge” and “surchargeable contributions”, which are used in the new Part 15 of the Rules. These definitions ensure, among other things, that the new provisions may only be used to satisfy a surcharge liability arising from benefits accrued under the Rules.

Apportioning Pensions

19. Division 3 of Part 9 of the Rules provides for the payment of reversionary benefits on the death of members or former members of the PSS to eligible spouses and children. Where there is more than one eligible spouse or where there are eligible children who do not ordinarily live with an eligible spouse, the available benefit may be split between those spouses or a portion of the benefit may be attributed as being only in respect of those children.

20. Division 4 of Part 9 of the Rules gives the PSS Board the discretion to apportion the available benefit in those circumstances. This Division also allows the Board to re-apportion the benefit where necessary. However, the Board may not allocate or attribute more than an applicable percentage as provided under Division 3 of Part 9 of the Rules.

21. Where a reversionary beneficiary becomes liable to pay a surcharge assessment the pension payable to that beneficiary will be reduced if he or she makes an election under Division 2 of new Part 15 of the Rules to commute part of their pension in order to meet the surcharge assessment.

22. **Subclause 2.3** inserts a new Rule 9.4.3 to ensure that, when apportioning or re-apportioning pensions between eligible beneficiaries, the PSS Board must disregard any reduction in pension that results from an election to commute part of a spouse’s or child’s benefit. The PSS Board may also not apportion, or re-apportion, the amount of the pension commuted in order to increase the benefits payable to other reversionary beneficiaries.

Cancelling a commutation election

23. Division 1 of Part 12 of the Rules contains various provisions relating to choosing benefit options.

24. **Subclause 2.4** inserts a new Rule 12.1.6 to provide that the PSS Board may accept the cancellation of an election made under new Rules 15.1.1, 15.2.1 or 15.3.1 where no payment has been made to the ATO.

Commutation of pension: Payment of Surcharge Liability

25. **Subclause 2.5** inserts a new Part 15 of the Rules to provide for the commutation of certain pensions and the payment of a surcharge liability.

Commutation of former member's pension

26. New Division 1 of Part 15 allows for the post-retirement commutation of a former PSS member's pension in order to discharge a liability arising from a surcharge assessment made after the pension becomes payable.

27. New Rule 15.1.1 provides for an election or elections to be made to commute a pension or pensions in order to be able to discharge a surcharge liability. An election or elections must be made within three months after the assessment was made, or such longer period as the Board allows.

28. New paragraphs 15.1.1(a), (b) and (c) describe a person who is able to make an election under the Rule. Rule 15.1.1 also specifies that such a person may elect by notice in writing to commute a portion of the pension to a lump sum which must be specified in the election.

29. New Rules 15.1.2 and 15.1.3 provide that any election made under Rule 15.1.1 must include a request that the specified lump sum be paid to the Commissioner of Taxation to discharge the surcharge assessment and that the amount must be equal to, or less than, the amount of the assessment. This amount would not include any amount of penalty interest that had been applied because of non payment of the liability within the prescribed period. The commutation must not reduce the pension below zero.

30. New Rules 15.1.4 and 15.1.5 provide an entitlement to a lump sum benefit equal to the commutation amount and for that lump sum benefit to be paid to the Commissioner of Taxation and applied towards payment of the surcharge.

31. Where a person has made an election and becomes entitled to a lump sum benefit new Rule 15.1.6 provides for the reduction of the person's pension from the beginning of the day of the election. It is intended that the election or elections take effect from the day of signature. Rule 15.1.6 provides a formula to calculate the amount of the reduction. The definition of "conversion factor" for the purpose of the formula requires the PSS Board to make a determination under new Rule 15.1.9.

32. A pension that has been reduced as a result of new Rule 15.1.6 can still be altered by the other provisions of the Rules, for example, for the purposes of indexation under Rule 9.6.1 or reduction of an invalidity pension under Rule 10.11.9 as a result of earnings from personal exertion.

33. New Rule 15.1.7 provides for a person to be able to make only one election in respect of a particular assessment.

34. Division 6 of Part 9 of the Rules provides for the indexation of pensions payable under the Rules with effect from the first payday in July. New Rule 15.1.8 ensures that, where a person makes an election under Rule 15.1.1 during the first fortnightly payment period in the financial year, the reduction does not take effect until after the indexation provisions have been applied. This ensures that any indexation is applied to the rate of pension before reduction.

35. New Rule 15.1.9 provides that the PSS Board must determine conversion factors for the reduction of a pension where a person has made an election under Rule 15.1.1. The factors are required to determine the yearly amount of reduction of benefit necessary to recover the amount of the surcharge assessment from the relevant pension during the period when the pension is payable. The conversion factors would have to be based on technical actuarial advice and are intended to be unbiased to either the Commonwealth or the former member.

Commutation of spouse's pension

36. New Division 2 of Part 15 provides for the commutation of spouse's pension in order to discharge a liability arising from a surcharge assessment made after the pension becomes payable.

37. New Rule 15.2.1 provides for an election or elections to be made to commute spouse's pension or pensions in order to be able to discharge a surcharge liability. The provision is similar to Rule 15.1.1.

38. New paragraphs 15.2.1(a), (b), (c), (d) and (e) describe a person in receipt of spouse's pension or pensions who is able to make an election under the Rule. Rule 15.2.1 also specifies that such a person may elect by notice in writing to commute a portion of the pension to a lump sum which must be specified in the election.

39. New Rules 15.2.2 and 15.2.3 provide that any election made under Rule 15.2.1 must include a request that the lump sum be paid to the Commissioner of Taxation to discharge the surcharge assessment and that the amount must be equal to, or less than, the amount of the assessment. The amount would not include any amount of penalty interest that had been applied because of non payment of the liability within the prescribed period. The commutation must not reduce the pension below zero.

40. New Rules 15.2.4 and 15.2.5 provide an entitlement to a lump sum benefit equal to the commutation amount and for that lump sum benefit to be paid to the Commissioner of Taxation and applied in payment of the surcharge.

41. Where a spouse has made an election and becomes entitled to a lump sum benefit, new Rule 15.2.6 provides for the reduction of the person's pension from the beginning of the day of the election. It is intended that the election or elections take effect from the day of signature. The pension is to be reduced according to a method determined by the PSS Board under new Rule 15.2.10.

42. A pension that has been reduced as a result of new Rule 15.2.6 can still be altered by the other provisions of the Rules, for example, for the purposes of indexation under Rule 9.6.1.

43. New Rule 15.2.7 provides for a person to only be able to make one election in respect of a particular assessment.

44. Division 6 of Part 9 of the Rules provides for the indexation of pensions payable under the Rules with effect from the first payday in July. New Rule 15.2.8 ensures that where a person makes an election under Rule 15.2.1 during the first fortnightly payment period in the financial year the reduction does not take effect until after the indexation provisions have been applied. This ensures that any indexation is applied to the rate of pension before reduction.

45. New Rule 15.2.9 puts beyond doubt that, where a spouse is in receipt of part of a pension because of the operation of Division 4 of Part 9, an election under Rule 15.2.1 can only have effect on the part of the pension payable to that person.

46. New Rule 15.2.10 provides that, where a spouse has made an election under new Rule 15.2.1, the PSS Board must determine the method by which the pension is reduced in order to recover the amount of the lump sum over the period during which the pension is payable.

Commutation of child's pension

47. New Division 3 of Part 15 allows for the commutation of child's pension in order to discharge a liability arising from a surcharge assessment made after the pension becomes payable.

48. New Rule 15.3.1 provides for an election to be made to commute children's pension or pensions in order to be able to discharge a surcharge liability. The Rule is similar to new Rules 15.1.1 and 15.2.1.

49. New Rule 15.3.1 provides that a person may elect by notice in writing to commute a portion of the pension to a lump sum which must be specified in the election. New paragraphs 15.3.1(a), (b), (c), (d) and (e) describe a person in receipt of children's pension who is able to make an election under the Rule.

50. New Rules 15.3.2 and 15.3.3 provide that an election made under Rule 15.3.1 must include a request that the lump sum be paid to the Commissioner of Taxation to discharge the surcharge assessment and that the amount must be equal to, or less than, the amount of the assessment. The amount would not include any amount of penalty interest that had been applied because of non payment of the liability within the prescribed period. The commutation must not reduce the pension below zero.

51. New Rules 15.3.4 and 15.3.5 provide an entitlement to a lump sum benefit equal to the commutation amount and for that lump sum benefit to be paid to the Commissioner of Taxation and applied in payment of the surcharge.

52. Where a child has made an election and becomes entitled to a lump sum benefit new Rule 15.3.6 provides for the reduction of the pension from the beginning of the day of the election. It is intended that the election take effect from the day of signature. The pension is to be reduced according to a method determined by the PSS Board under new Rule 15.3.10.

53. A pension that has been reduced as a result of new Rule 15.3.6 can still be altered by the other provisions of the Rules, for example, for the purposes of indexation under Rule 9.6.1.

54. New Rule 15.3.7 provides for a person to be able to make only one election in respect of a particular assessment.

55. Division 6 of Part 9 of the Rules provides for the indexation of pensions payable under the Rules with effect from the first payday in July. New Rule 15.3.8 ensures that where a person makes an election under Rule 15.3.1 during the first fortnightly payment period in the financial year that the reduction does not take effect until after the indexation provisions have been applied. This ensures that any indexation is applied to the rate of pension before reduction.

56. New Rule 15.3.9 puts beyond doubt that, where an child is in receipt of part of a pension because of the operation of Division 4 of Part 9, an election under Rule 15.3.1 can only have effect on the part of the pension payable to that person.

57. New Rule 15.3.10 provides that, where a child has made an election under new Rule 15.3.1, the PSS Board must determine a method for the reduction of the pension in order to recover the amount of the lump sum over the period during which the pension is payable.

Application provisions

58. **Clause 3** provides that Rules 15.1.1 to 15.1.8, Rules 15.2.1 to 15.2.9 and Rules 15.3.1 to 15.3.9 may apply to an assessment made prior to the commencement of this clause.

59. **Clause 4** provides that Rules 15.2.1 and 15.3.1 may apply to a death that occurred prior to the commencement of this clause.

60. The Australian Government Solicitor has confirmed that clauses 3 and 4 are not retrospective in effect. They merely provide for the future operation of the PSS Rules based on past events. They do not create any right, duty or obligation that pre-dates the making of the amendments. Rather, the clauses create a right of commutation for the benefit of (and at the election of) PSS pensioners.

Transitional provision

61. **Clause 5** provides that the first set of determinations made under Rule 15.1.9, 15.2.10 or 15.3.10 of the Rules may be expressed to have taken effect at the commencement of the Rule concerned.

62. The Australian Government Solicitor has confirmed that clause 5 is not retrospective in effect. It is a necessary transitional provision as the determinations will naturally have to occur a short time after the commencement of the amendments. It is required so that all the matters needed to be in place for the operation of the commutation provisions are taken to be in place from the commencement of the amendments. The transitional provision does not have any effect that pre-dates the making of the amendments.