

## **EXPLANATORY STATEMENT**

*Issued by authority of the Minister for Superannuation and Corporate Law acting for and on behalf of the Minister for Finance and Deregulation*

*Superannuation Act 1990*

*Thirty-second Amending Deed to the Trust Deed to establish an occupational superannuation scheme for Australian Government employees and certain other persons pursuant to section 5 of the Superannuation Act 1990 (1990 Act).*

An occupational superannuation scheme to provide benefits for certain of the Commonwealth's employees and for certain other people was established by Trust Deed dated 21 June 1990, under section 4 of the 1990 Act. The occupational superannuation scheme is called the Public Sector Superannuation Scheme (PSS).

Section 5 of the 1990 Act provides that the Minister may amend the Trust Deed by signed instrument, subject to obtaining the consent of the Australian Reward Investment Alliance (ARIA) to the amendment where necessary. ARIA is the trustee for the PSS.

### **Thirty-second Amending Deed**

On 16 December 2008 the Minister for Superannuation and Corporate Law, acting for and on behalf of the Minister, amended the Rules for the PSS set out in the Schedule to the Trust Deed by signed instrument. That instrument is called the Thirty-second Amending Deed in this statement.

The purpose of the Thirty-second Amending Deed is to amend the Rules to eliminate discrimination against same-sex couples and the children of same-sex relationships in the provision of reversionary superannuation benefits payable upon the death of a scheme member. It will also expand the current provisions regarding the payment of contributions during a period of unpaid maternity or parental leave to cover the birth of a child who is a child of the member within the meaning of the *Family Law Act 1975*. Background information on the changes and the details of the Thirty-second Amending Deed are set out in the [Attachment](#).

### **Approval by ARIA**

Section 5 of the 1990 Act deals with amendments made to the Trust Deed. That section allows the Minister to amend the Trust Deed provided that, in respect of certain amendments, ARIA has consented to those amendments. ARIA's consent is not required where the amendment relates to a payment by an employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) that will, after the making of the amendment, be required or permitted to be made under the 1990 Act.

None of the amendments included in the Thirty-second Amending Deed require the consent of ARIA, as the amendments relate to payments by an employer-sponsor.

### **Legislative Instruments Act 2003**

The Amending Deed is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA). Although section 44 of the LIA exempts superannuation instruments from disallowance, the Amending Deed is subject to possible disallowance in accordance with section 45 of the 1990 Act.

Section 17 of the LIA specifies that rule-makers should consult before making legislative instruments. ComSuper, which administers the PSS on behalf of ARIA, was consulted on the administrative application of the changes in the Amending Deed.

**Commencement**

Unless otherwise provided, the amendments in the Deed come into effect on the day after the Deed is registered on the Federal Register of Legislative Instruments.

The amendments in relation to the payment of reversionary superannuation death benefits come into effect immediately after Schedule 1 to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* commences.

## ATTACHMENT

**BACKGROUND TO AND DETAILS OF THE THIRTY-SECOND AMENDING DEED****Background**

The PSS has been closed to new members since 1 July 2005. The scheme is a defined benefit superannuation scheme under which benefits are paid to former employees of the Australian Government and certain other persons.

***Payment of reversionary death benefits***

2. The PSS provides for reversionary death benefits to be paid to a spouse with additional amounts for eligible children or partially dependent children of the deceased contributor, preserved benefit member or pensioner.
3. Currently, reversionary death benefits can be paid from the scheme only to a legally married spouse or an opposite-sex de facto spouse of a deceased scheme member. Where there is no spouse who is eligible to receive the benefit, benefits can be paid to eligible children of the member and to partially dependent children.

***Payment of contributions on unpaid maternity or parental leave***

4. Currently, the PSS allows a scheme member who on a period of maternity or parental leave without pay for greater than 12 weeks taken into relation to the birth of a child to choose to continue to make contributions to the scheme.
5. The Thirty-second Amending Deed will amend relevant Rules:
  - to enable reversionary death benefits to be conferred on de facto same-sex partners and children of a same-sex relationship where they currently have no entitlement. These changes give effect to the underlying intention to remove same-sex discrimination, while ensuring that there are no changes or re-defining of other *indicia* of a relationship and preserving the current treatment of married or opposite sex de facto couples; and
  - to enable a scheme member to choose to continue to make contributions during a period of maternity or parental leave in relation to the birth of a child who is a child of the member for the purposes of *Family Law Act 1975*.
6. The amendments made by the Deed are consistent with changes made to the Commonwealth Superannuation Scheme by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation Act) 2008* and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.

**Details of the Amending Deed****Commencement**

7. **Clause 1** specifies the commencement date for the amendments to the Rules made by the Deed.

**Context**

8. **Clause 2** indicates that, unless a contrary intention appears, a word or phrase in the Amending Deed has the same meaning that it has in the Trust Deed.

**Application of the Amendments – payment of reversionary death benefits**

9. **Clause 3** provides that the amendments to the Rules made by clause 5 of the Deed

only apply in respect of benefits payable as a result of the death of a ‘*member*’ ‘*preserved benefit member*’ or ‘*pensioner*’ that occurs on or after the relevant Rules are amended. These terms are defined in the Rules.

### **Application of the Amendments – payment of reversionary death benefits**

10. **Clause 4** provides that the amendments to the Rules made by clause 6 of the Deed only apply in relation to leave commencing on or after the relevant Rules are amended.

### **Amendments to the Rules**

#### **Clause 5: Amendments – payment of reversionary death benefits**

11. **Subclause 5.1** repeals the definition **marital relationship** and replaces it with the new definition **marital or couple relationship**. Under the new definition, a person living with another person as their **partner**, as well as a person living with another person as their husband or wife, can be considered to be in a **marital or couple relationship**.

12. Under the new definition, the evidence that may be relevant for determining whether a person in a relationship of less than 3 years duration ordinarily lived with the other person as husband or wife or as a **partner** has been expanded to include:

- whether the persons’ relationship is registered under a law of a State or Territory prescribed for the purposes of section 22B of the *Acts Interpretation Act 1901*, as a kind of relationship prescribed for the purposes of that section; and
- whether there is a child of both of the persons within the meaning of the *Family Law Act 1975*.

13. This will assist ARIA in determining whether two persons, particularly where they are of the same-sex, had a **marital or couple relationship**, where the relationship was for a period of less than 3 years.

14. **Subclause 5.2** and **subclause 5.4** replace the current definitions of **eligible child** and **partially dependent child** respectively. Under the new definitions, the categories of children that can be considered to be an **eligible child** or **partially dependent child** have been expanded to include a child of a former scheme member within the meaning of the *Family Law Act 1975*.

15. The meaning of ‘child’ in the *Family Law Act 1975* includes children:

- born to a woman as the result of an artificial conception procedure while that woman was married to, or was a de facto partner of, another person (whether of the same or opposite sex); and
- who are children of a person because of an order of a State or Territory court made under a State or Territory law prescribed for the purposes of section 60HB of the *Family Law Act 1975*, giving effect to a surrogacy agreement.

16. **Subclause 5.3** and **subclause 5.5** insert a note under the definition of **eligible child** and **partially dependent child** respectively, to indicate that new Rule 1.2.6 (as being inserted by subclause 5.8) is relevant to determining if a child is a step-child for the purposes of the definition of **eligible child** and **partially dependent child**.

17. **Subclause 5.6** inserts a definition of **partner**. This amendment is related to the amendment being made by subclause 5.1. This will extend the range of persons who can be considered to be eligible for death benefits to include a person in a same-sex relationship with a scheme member.

18. **Subclause 5.7** replaces the current definition of **spouse** with a new definition of **spouse** as a consequence of the amendments made by subclause 5.1 to replace the current definition **marital relationship** with the new definition **marital or couple relationship**.

19. **Subclause 5.8** inserts a new Rule 1.2.6 to extend the range of persons who can be considered to be a person's step-child for the purposes of the Rules to include someone who would be considered the step-child of a person but for the fact that the person and their partner are not married. The term step-child is referred to in the definitions of **eligible child** and **partially dependent child** respectively in Rule 1.2.1.

20. The amendment made by subclause 5.8 addresses the fact that the ordinary meaning of 'step-child' is a 'child of a husband or wife by a former union'. As same-sex couples cannot marry, the child of one member of the couple by a former relationship cannot be considered to be the other member of the couple's step-child. This is also the case for children of opposite-sex de facto partners by a former relationship.

21. **Subclause 5.9** and **subclause 5.11** amend Rule 9.3.11 (including the note following the Rule) and Rule 9.3.12 respectively as a consequence of the amendments made by subclause 5.1 to replace the current definition **marital relationship** with the new definition **marital or couple relationship**.

22. **Subclause 5.10** amends Rule 9.3.11 by inserting a new subparagraph (b)(i)(AB) to include a reference to a child within the meaning of the *Family Law Act 1975*. Paragraph (b) of Rule 9.3.11 relates to the payment of reversionary death benefits in the case of an **eligible child or partially dependent child** arising from a **marital or couple relationship** where the relationship began after the scheme member became a pensioner and after the member had reached age 60, and the relationship commenced less than 3 years before the scheme member's death.

#### **Clause 6: Amendment – payment of contributions on unpaid maternity or parental leave**

23. **Subclause 6.1** inserts a new Rule 4.2.4A to provide that the reference to the birth of a child of a person in Rule 4.2.4 includes the birth of a child who is a child within the meaning of the *Family Law Act 1975*.