

EXPLANATORY STATEMENT

Veterans' Entitlements Income (Exempt Lump Sum – Commonwealth Bank Officers Superannuation Corporation Pty Limited – OSF DB Rectification Project Payment) Determination

Instrument No. R26/2012

Paragraph 5H(12)(c) of the Veterans' Entitlements Act 1986

The Purpose and Operation of the Attached Instrument

A payment is deemed not to be ordinary income for means-testing under the *Veterans' Entitlements Act 1986* (VEA) once it is stated to be an exempt lump sum by a determination under paragraph 5H(12)(c) of the VEA. The amount specified in the Determination at Part 2 of the Schedule as an exempt lump sum is an exempt lump sum for the purposes of the definition of 'ordinary income' in subsection 5H(1) of the VEA.

The attached instrument provides for the exemption of these payments from the income assessment of the person's or the person's partner's service pension or income support supplement (collectively referred to as "income support payment").

Background

The Commonwealth Government introduced, with effect from 1 July 2007, legislative reforms to the taxation of superannuation benefits. These reforms included:

- a revised method of calculating the tax free component for defined benefit superannuation income streams which commenced on or after 1 July 2007;
- different calculations to determine the tax free component for pensions commencing on or after 1 July 2004 and before 1 July 2007 according to whether the recipient of the pension was over or under the age of 60 years as at 30 July 2007; and
- changes to the definition of "deductible amount" in section 5J of the VEA for the purpose of determining whether a person's VEA income support payment is payable. The VEA definition of deductible amount refers to the sum of tax free components worked out under the *Income Tax Assessment Act 1997* which is used to determine assessable income for defined benefit income streams. Under the VEA income test, assessable income is determined by reducing the gross annual income by the deductible amount. The effect of any increase in the tax free component under the tax amendments resulted in a potentially higher income support payment for certain pensioners, depending on the income support recipient's assets and other income.

Following a review by CBOSC it became apparent that some pensioners who have an OSF DB income stream may not have claimed an income support payment or may have incorrectly received a reduced rate of payment under the VEA. Partners or financial dependants of pensioners with one of these income streams, who are also income support recipients, may have also incorrectly received a reduced rate of their income support payment.

The underpayments of income support arose either:

- solely as a result of reliance by the Department of Veterans' Affairs (DVA) on an incorrect tax free component calculation provided by CBOSC on or after 1 July 2007 in respect of the relevant OSF DB income stream, where the OSF DB pensioner has provided DVA with all such information provided by CBOSC; or
- because no tax free component calculation was provided to DVA or the pensioner in respect of an OSF DB income stream, and this is solely due to CBOSC's implementation of the 2007 legislative reforms.

Also, in some circumstances, certain people were overpaid income support payments after 1 July 2007, solely as a result of reliance by DVA on an incorrect tax free component calculation provided by CBOSC on or after that date. These people include current or former (including those now deceased) OSF DB pensioners, together with partners and/or financial dependants (where applicable, including those now deceased) of OSF DB pensioners who were in receipt of an OSF DB income stream at 1 July 2007 (or whose OSF DB pension commenced after that date).

CBOSC formally established the OSF Rectification Project to review and arrange, in conjunction with relevant Government agencies, rectification of both underpaid and overpaid income support payments relating to affected OSF DB pensioners, their partners and financial dependants (where applicable, including those now deceased). CBOSC proposes to offer those whose income support payments have been underpaid in these circumstances, an ex gratia lump sum through the OSF DB Rectification Project in respect of lost income support payments.

Further, the Commonwealth Bank of Australia (CBA) proposes to offer through the OSF DB Rectification Project ex gratia lump sum payments to, or on behalf of, those who have been overpaid income support payments after 1 July 2007, in the form of a lump sum payment of the debt raised by DVA in respect of the overpayment of income support payments.

Under the VEA, money earned, derived or received for a person's own use or benefit, is generally assessable as income. However, some amounts that would otherwise be income, are specifically exempted from the VEA income test. Paragraph 5H(12)(c) of the VEA allows the Repatriation Commission to determine that an amount, or class of amounts, is an exempt lump sum for the purposes of the VEA. An exempt lump sum is excluded from the definition of "ordinary income" under subsection 5H(1) of the VEA. As a result, any such amount is not to be taken into account under the VEA income test.

The effect of this instrument is that a payment made to OSF DB pensioners, their partners or dependants (where applicable, including those who are deceased), under the OSF DB Rectification Project, will not be regarded as income for the purposes of the VEA income test.

Consultation

The Department has worked closely with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to ensure that this instrument has the same effect as a similar instrument proposed to be executed under the social security law. The nature of consultation with FaHCSIA was an exchange of emails.

This instrument is beneficial to customers because it exempts ex gratia payments under the OSF DB Rectification Project from the VEA income test. Public consultation was therefore regarded as unnecessary.

Regulatory Impact Analysis

The Determination is not regulatory in nature, will not impact on business activity, and will have no, or minimal, compliance costs or competition impact.

Overview of the Legislative Instrument

The Determination is a class determination under paragraph 5H(12)(c) of the *Veterans' Entitlements Act 1986* (the VEA) to assist in the effective rectification of incorrect income support payments made by DVA, as a result of incorrect calculations by CBOSC, or where no tax free component calculation was provided to DVA for some members of the bank's OSF DB schemes. The Determination will ensure that ex gratia OSF DB Rectification Project Payments made in relation to those incorrect income support payments will not be assessed as income for VEA income test purposes thereby ensuring that recipients retain the full value of the ex gratia payments.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

The Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Human rights implications

The Determination engages the following human right:

Right to income support (social security)

The right to social security requires, among other things, the right to a minimum essential level of benefits for all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

The attached legislative instrument ensures that the ex gratia payment provided by certain financial institutions to certain DVA pensioners, because of financial loss those pensioners sustained as a result of incorrect financial calculations made by those institutions, is not included in the VEA income test which would ensure that an income support payment to a pensioner in question is not reduced.

An income support payment is intended to enable people with limited means to continue to have adequate access to essential services. Accordingly the attached legislative instrument, which maintains the level of the relevant income support payment by ensuring it is not reduced by the ex gratia payment in question, would be in accordance with Australia's social security obligations under the International Covenant on Economic, Social and Cultural Rights.

The UN Committee on Economic Social and Cultural Rights has stated that qualifying conditions for benefits must be reasonable, proportionate and transparent.

There are conditions on the ex gratia payment being deemed to be an exempt lump sum, namely that the recipient or the recipient's partner must be in receipt of a service pension or income support supplement but these conditions are not discretionary or intended to limit benefits, rather they merely identify the income support payments that are subject to the VEA income test.

Conclusion

The Determination under paragraph 5H(12)(c) of the VEA ensures affected OSF DB pensioners receive their correct entitlements under the VEA and are not penalised for issues beyond their control. The Determination supports their human right to income support.

The Repatriation Commission (by its delegate).