

EXPLANATORY STATEMENT

Military Superannuation Legislation Amendment (Sustaining the Superannuation Contribution Concession) Instrument 2013

ISSUED BY THE MINISTER FOR DEFENCE SCIENCE AND PERSONNEL

Defence Force (Superannuation)(Productivity Benefit) Determination 1988

Section 52 of the *Defence Act 1903* empowers the Minister to make determinations providing a superannuation productivity benefit in respect of continuous full time service by members of the Australian Defence Force who are contributors to the Defence Force Retirement and Death Benefits (DFRDB) Scheme.

The *Defence Force (Superannuation)(Productivity Benefit) Determination 1988* (the Principal Determination), made under section 52, makes provision for a 3 per cent productivity benefit in line with the Conciliation and Arbitration Commission's June 1986 National Wage decision. It also provides for a superannuation guarantee top-up in circumstances where a DFRDB benefit may not be payable.

The productivity benefit is a notional superannuation benefit accrued by DFRDB scheme members during their service and is paid from the Consolidated Revenue Fund when a member claims a benefit. The productivity benefit becomes part of the DFRDB superannuation unfunded liability. Notional interest is calculated on the benefit.

Military Superannuation and Benefits Trust Deed

Section 4 of the *Military Superannuation and Benefits Act 1991* (the MSB Act) required the making of a deed (the Trust Deed) to establish an occupational superannuation scheme for members of the Australian Defence Force undertaking continuous full-time service. It also sets out the functions and powers of the Military Superannuation and Benefits Board of Trustees No. 1, now the Commonwealth Superannuation Corporation (CSC).

The Schedule to the Trust Deed made under section 4 of the MSB Act contains Rules (the MSB Rules) which deal with various aspects of the scheme, including the benefits to be provided to members of the scheme upon retirement (including for invalidity), or to dependants of deceased members of the scheme. Section 5 of the MSB Act provides that the Trust Deed may be amended by legislative instrument signed by the Minister, with the consent of CSC.

Sustaining the Superannuation Contribution Concession

Schedule 3 to the *Tax and Superannuation Laws Amendment (Increased Concessional Contributions Cap and Other Measures) Act 2013* (the Main Act) amends the income tax and superannuation law and the *Taxation Administration Act 1953* to reduce the tax concession that individuals with income above \$300,000 receive on their concessional superannuation contributions from 30 per cent to 15 per cent by imposing tax under Division 293 of the *Income Tax Assessment Act 1997*.

The amount of Division 293 tax is assessed by the Commissioner of Taxation (Commissioner) and is, generally, either:

- due and payable within 21 days after the notice of assessment is issued, to the extent the tax relates to a superannuation interest that is an accumulation interest;
- deferred for later payment and included in a debt account maintained by the Commissioner to the extent the tax relates to a superannuation interest that is a defined benefit interest; or
- due and payable within 21 days after a superannuation benefit is paid from the defined benefit interest for which a debt account is maintained by the Commissioner.

The Commissioner must issue release authorities to allow amounts to be released. Generally, an amount may only be released from a superannuation interest other than a defined benefit interest (that is, an accumulation interest) to facilitate payment of liabilities for Division 293 tax. However, where the liability for an amount that has been deferred to a debt account (the debt account discharge liability) becomes payable, the Commissioner must issue a release authority to allow an amount to be released from the defined benefit interest to which the deferred liability relates.

The changes to the Principal Determination and to the MSB Rules contained in this Instrument enable CSC to pay a lump sum to the Commissioner from a:

- DFRDB productivity benefit (a defined benefit interest);
- MSB employer benefit (a defined benefit interest); and
- MSB ancillary benefit (an accumulation interest that may be held by both MSB members and members of the Defence Force Retirement and Death Benefits (DFRDB) scheme),

to meet a member's liability for debt account discharge liability (in relation to a defined benefit interest) or a release entitlement (in relation to an accumulation interest). CSC can only pay an amount set out in a release authority if the member or the Commissioner gives a release authority to CSC.

There is no requirement for the member to give CSC a release authority; the member can use other resources to pay a Division 293 tax liability. However, if CSC pays an amount to the Commissioner on the basis of a release authority it is given, it can reduce the member's superannuation benefits to reflect the amount paid to the Commissioner.

Average Weekly Ordinary Time Earnings

In 2012, the Australian Bureau of Statistics (ABS) announced that instead of reporting the Average Weekly Ordinary Time Earnings (AWOTE) survey for each quarter of the year (March, June, September, and December), it will only do so for two quarters of the year (June and December).

This change in frequency took effect during 2012, with the June 2012 period publication being the last quarterly issue and the December 2012 period publication the first produced on a biannual basis, although still determined in respect of that quarter.

Part 6 of the MSB Rules (Rule 55) provides for increases in maximum benefit limits (in particular, the *lump sum maximum benefit multiple* and the *pension maximum benefit multiple*) by referencing AWOTE for a March quarter. The Rule would become inoperative without a change to reflect the changed reporting frequency.

The details of the Determination are explained in Attachment A.

A Statement of Compatibility with Human Rights is at Attachment B.

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Individual amendments

Section 1. Name of determination

This section is formal and names the amending Instrument that amends both the Principal Determination and the MSB Rules.

Section 2. Commencement

This section sets out the commencement date as the day after the Instrument is registered.

Section 3. Authority

This section identifies the *Defence Act 1903* as the authority for amending the *Defence Force (Superannuation)(Productivity Benefit) Determination 1988* and the *Military Superannuation and Benefits Act 1991* as the authority for amending the Schedule to the Military Superannuation and Benefits Trust Deed.

Section 4. Schedule(s)

This section provides that the Schedule to this amending instrument either amends and/or repeals and replaces items in the Principal Determination and the Schedule to the Military Superannuation and Benefits Trust Deed and is formal.

Schedule 1 Amendments to commence on registration

Defence Force (Superannuation)(Productivity Benefit) Determination 1988 (the Determination)

Item 1 Clause 3, definition of *debt account discharge liability*

This item inserts a new definition in the Determination to identify the superannuation interest for which the Commissioner keeps a debt account and for which a release authority can be issued by the Commissioner when the defined benefit productivity end benefit becomes payable.

Item 2 Clause 3, definition of *productivity benefit*

This item repeals and substitutes a new definition to make it clear that an amount paid to the Commissioner based on a release authority forms part of the productivity benefit payable under the Determination.

Item 3 Clause 3B, very high income individuals

Clause 3B is inserted into the Principal Determination to facilitate the payment of a debt account discharge liability in relation to the productivity benefit when a DFRDB member gives a release authority to CSC. When CSC pays the liability, it must ensure the productivity benefit is reduced to reflect the payment of the liability to the Commissioner.

The productivity benefit to be reduced is the net benefit after taking account of any surcharge deduction amount identified in Clause 3A (if any) and/or any reduction resulting from a payment split for the purposes of Part VIII B of the *Family Law Act 1975* (if any).

Military Superannuation and Benefits Trust Deed

Items 4 and 5 Subrule 2(1) inserts references

Subrule 2(1) of the MSB Rules identifies expressions that are defined or interpreted in the Glossary in Schedule 1 of the MSB Rules. Items 4 and 5 insert the expressions *debt account discharge liability* and *release entitlement* respectively into the subrule as these expressions are defined in the Glossary by virtue of items 21 and 22 respectively.

Items 6 to 12 substituting a reference

Part 3 of the MSB Rules deals with MSB members' benefits on retirement before age 55, on retirement for redundancy, retrenchment, on completion of limited tenure appointment or on reaching retiring age of less than 55 and on retirement on or after attaining 55 years of age, including invalidity benefits. In addition to the possibility that those members' benefits may be affected by a Family Law superannuation payment split, there is a potential that they may also be impacted by a surcharge deduction amount provided for in Part 10.

A surcharge deduction amount is taken into account before a final benefit is paid to the member. Item 20 of this Instrument inserts a new Part 10A which has the effect of reducing a high income member's benefits in circumstances where that member has given a release authority to CSC and CSC has paid an amount to the Commissioner.

As a consequence, the qualification 'subject to Part 10' in subrule 12(2) and in paragraphs 13(4)(b), 14(1)(d), 14(3)(b), 14(3)(c), 27(1)(b) and 28(1)(b) is changed to ensure that any benefit is also subject to the arrangements in new Part 10A.

Item 13 substituting a reference

Part 4 of the MSB Rules deals with benefits payable to the spouse(s) and child/children of a deceased member or a deceased retirement pensioner. In particular, Rule 40 deals with the payment of a deceased member's employer benefit, in respect of which the Commissioner may issue a release authority for a debt account discharge liability. If the release authority is given to CSC and CSC pays an amount to the Commissioner, it is appropriate to reduce the employer benefit to

reflect that payment. Subrule 40(1) is changed to ensure that any benefit is also subject to the arrangements in new Part 10A.

Items 14 to 16 substituting a reference

Part 5 of the MSB Rules deals with the payment of preserved benefits. As with the previous changes to take account of a payment CSC may make to the Commissioner after CSC is given a release authority, it is appropriate to reduce the amount of the preserved benefit to reflect that payment. Subrules 51(1), 52(1) and 53(1) are changed to ensure that any preserved benefit is also subject to the arrangements in new Part 10A.

Items 17 to 19 changes to the frequency of average weekly ordinary time earnings reporting

Amendments to Rule 55 will ensure that maximum benefit multiple thresholds that reference the March AWOTE quarter instead reference the preceding December AWOTE quarter. Replacing the March quarter with the preceding December quarter ensures the relevant thresholds that apply (for example, the increase to maximum benefit limits that are to take effect on 1 July 2013 will be determined by reference to the December 2011 AWOTE figure and the December 2012 AWOTE figure). This allows for a full 12 month period of increases, albeit a different 12 month period than is currently the case.

Paragraph 55(1)(c) is changed to refer to the December quarter immediately preceding 1 July (for example, for calculating the change in maximum benefit multiples that is to have effect from 1 July 2013, the reference will now be to the index number for the December 2012 quarter).

Paragraph 55(1)(d) is changed to refer to the previous December quarter to ensure that a full 12 month period of increases is used for calculating changes to maximum benefit limits (for example, the divisor for calculating the increase that has effect from 1 July 2013 will be the index number for the December 2011 quarter).

The change to subrule 55(2) reflects the change to the frequency of the reporting of AWOTE.

Item 20 Provisions for very high income individuals

Part 10A is inserted into the MSB Rules to facilitate the payment of a debt account discharge liability and a release entitlement.

New Rule 81A applies to a release authority in relation to a debt account discharge liability in relation to the defined benefit MSB employer benefit. If a MSB member gives a release authority to CSC in relation to a debt account discharge liability, CSC must pay the amount set out in the release authority to the Commissioner. When CSC pays the liability, it must ensure the MSB employer benefit is reduced to reflect the payment of the liability to the Commissioner.

The MSB employer benefit to be reduced is the net benefit after taking account of any surcharge deduction amount identified in Part 10 (if any) and/or any reduction resulting from a payment split for the purposes of Part VIII B of the *Family Law Act 1975* (if any).

New Rule 81B is inserted to provide for the payment of a ***release entitlement*** in relation to an accumulation interest in the MSB scheme. Both MSB contributing members and members of the DFRDB scheme may have ancillary accounts in the MSB scheme that may be subject to the Division 293 tax.

A Division 293 tax liability in relation to an accumulation interest is payable within 21 days of assessment and the Commissioner is required to issue a release authority in relation to an assessment. When the Commissioner issues a release authority for an accumulation interest to the member, the member has a ***release entitlement*** for the amount set out in the release authority.

If the members gives CSC the release authority, then CSC is required to pay the ***release entitlement*** to the Commissioner immediately (that is, the Division 293 liability is not deferred as it is with a defined benefit interest). CSC is required to reduce the ancillary benefit by the amount of any release entitlement it pays to the Commissioner.

The ancillary benefit to be reduced is the net benefit after taking account of any surcharge deduction amount identified in Part 10 (if any) and/or any reduction resulting from a payment split for the purposes of Part VIII B of the *Family Law Act 1975* (if any).

Items 21 and 22 Item 1 of Part 1 of Schedule 1 to the Schedule to the MSB Trust Deed

Definitions of ***debt account discharge liability*** and ***release entitlement*** respectively are inserted into Schedule 1.

Legislative Instrument Act 2003

This Instrument is a legislative instrument and is not subject to sunseting in accordance with item 42 of the table in subsection 54(2) of the LIA.

This Instrument is subject to disallowance as provided in:

Defence Act 1903 Part IIIA—Superannuation benefit section 52 Determination of benefit:

(4) Determinations are legislative instruments for the purposes of the Legislative Instruments Act 2003.

(4A) Paragraph 14(1)(a) of the Legislative Instruments Act 2003 applies as if the reference to disallowable legislative instruments included a reference to instruments made under section 58B or 58H of the Defence Act 1903; and

Military Superannuation and Benefits Act 1991

Section 49 Amendments to Trust Deed disallowable under the Legislative Instruments Act 2003 despite section 44 of the Legislative Instruments Act 2003,

section 42 of that Act applies to an instrument amending the Trust Deed.

The Board of the Commonwealth Superannuation Corporation has consented to the amendments to the MSB Rules.

The First Assistant Secretary Resource and Assurance in the Chief Finance Officer Group has no issue with the consequential amendments in this Instrument because there is no additional cost impact for Defence in implementing the arrangements. There is no change to the quantum of productivity benefit or MSB scheme benefit; the consequential amendments simply facilitate the reallocation of part of the end benefit payable to a high income individual to the Commissioner if the individual gives CSC a release authority.

ComSuper, the administrator of the arrangements set out in the Principal Determination and the MSB scheme, Defence Legal, Department of Finance and Deregulation, Treasury and the Office of Parliamentary Counsel have also been consulted during the course of the preparation of this Instrument.

A regulation impact statement is not required.

Statement of Compatibility with Human Rights

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

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This Legislative Instrument 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*.

Overview of the Legislative Instrument

The purpose of this Legislative Instrument is to amend the *Defence Force (Superannuation) (Productivity Benefit) Determination 1988* (Principal Determination) and the Schedule to the Military Superannuation and Benefits Trust Deed to make consequential changes as a result of the sustaining the superannuation contribution concession. The changes enable the Commonwealth Superannuation Corporation to pay amounts from the scheme established under the Principal Determination and from the Military Superannuation and Benefits scheme and to adjust respective benefits to reflect those payments.

The Instrument also makes a technical adjustment to the Schedule to the Military Superannuation and Benefits Trust Deed to reflect changes to the reporting frequency of average weekly ordinary time earnings by the Australian Bureau of Statistics.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Warren Snowdon
Minister for Defence Science and Personnel

Authority:

Section 52 of the *Defence Act 1903*
Section 5 of the *Military Superannuation and Benefits Act 1991*