

***MILITARY SUPERANNUATION AND BENEFITS ACT 1991***

**MILITARY SUPERANNUATION AND BENEFITS AMENDMENT (TRUST DEED – ADF SUPER CONSEQUENTIAL) INSTRUMENT 2015**

**EXPLANATORY STATEMENT**

**Issued by the authority of the Assistant Minister for Defence**

1. The *Australian Defence Force Superannuation Act 2015* (ADF Super Act) gives effect to the Government's announcement to introduce new modern superannuation arrangements for people joining the Australian Defence Force (ADF) on and after 1 July 2016. A new superannuation scheme, to be known as the Australian Defence Force Superannuation Scheme or ADF Super, is being established to come into effect from this date. The scheme will be an accumulation (or defined contribution) scheme.
2. The ADF Super Act is part of a package of three Acts to establish the Australian Defence Force Superannuation Scheme or ADF Super. The other two Acts in the package are:
  - the *Australian Defence Force Cover Act 2015* which provides for standalone statutory death and invalidity cover for members of ADF Super and those ADF personnel who would have been members of ADF Super but for choosing another fund to which Defence is to contribute; and
  - the *Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015* which contains the consequential and transitional arrangements necessary to set up the new ADF Super arrangement. This Bill will also assist with the introduction of the ADF's future workforce model by providing flexible service arrangements for permanent members of the ADF.
3. Also included in the package are the Australian Defence Force Superannuation Trust Deed 2015 and this exposure draft of proposed amendments to the Military Superannuation and Benefits (MSB) Trust Deed to reflect changes consequential to the introduction of the new arrangements.
4. Section 5 of the *Military Superannuation and Benefits Act 1991* (the MSB Act) provides that the Trust Deed may be amended by legislative instrument signed by the Minister, with the consent of the Commonwealth Superannuation Corporation (CSC), the trustees of the Military Superannuation and Benefits Scheme (MSBS).
5. At this stage, CSC has not agreed to the proposed amendments to the MSB Trust Deed, so this amending instrument is included in the package as an exposure draft for completeness.

## **This instrument**

6. **Section 1** provides that the name of the instrument is the *Military Superannuation and Benefits Amendment (Trust Deed – ADF Super Consequentials) Instrument 2015*.

**Section 2** provides for the commencement of this instrument, as set out in the table.

**Subsection 2** provides that each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

7. The first item of the table provides that sections 1 to 4 and anything in the instrument not covered elsewhere by the table commence on the day after the instrument is registered.

8. Item 2 provides for the commencement of Part 1 of Schedule 1 to be the later of the day after registration of this instrument and the commencement of Schedule 1 to the *Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015*. However, the provisions do not start if Schedule 1 to the *Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015* does not commence.

9. Item 3 provides for the commencement of Part 2 of Schedule 1 to be the later of the day after registration of this instrument and the commencement of Schedule 2 to the *Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015*. However, the provisions do not start if Schedule 1 to the *Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015* does not commence.

10. **Section 3** provides the instrument is made under the *Military Superannuation and Benefits Act 1991*.

11. **Section 4** provides that instruments specified in the Schedule are amended or repealed as set out in items in the Schedule and any other item in a Schedule to this instrument has effect according to its terms.

## **Schedule 1**

### **Part 1 – Division 1**

12. **Item 1** amends subrule 2(1) to insert references to ADF Super and ADF Super member which are to be defined in item 1 of Part 1 of Schedule 1 (Glossary).

13. **Item 2** inserts new rule 14A which provides for benefits when a member ceases to be a MSBS member because he or she has chosen to become a member of the new superannuation arrangements (ADF Super) that are being established by the *Australian Defence Force Cover Act 2015* and the Australian Defence Force Superannuation Trust Deed 2015.

14. New rule 14A provides that when a MSBS member chooses to become an ADF Super member, his or her:

- MSB employer benefit; and
- unfunded member account (if there is one – a Defence Force Retirement and Death Benefits (DFRDB) scheme member who elected to become a MSBS member during the election period 1 October 1991 to 30 September 1992 is likely to have an unfunded member account),

is required to be preserved in MSBS. The funded member account and the balance in any MSBS ancillary account will also be preserved in MSBS unless he or she elects to

roll over the balances in those accounts to ADF Super. There is no requirement to roll over amounts. It is up to the person to decide if this is an appropriate course to follow.

15. **Item 3** repeals rule 35 which currently provides for the suspension of a MSBS pension that is being paid as a result of an election by a person to convert at least 50% of his or her MSBS employer benefit to pension on retirement or on reaching 55 and electing to convert at least 50% of his or her preserved employer benefit to pension.

16. This rule is being repealed to ensure consistency of treatment of both DFRDB and MSBS pensions and pensions paid from the Government's superannuation schemes for its civilian employees. DFRDB and MSBS pensioners (other than invalidity pensioners) who return for a further period of service will continue to receive their pensions while undertaking further service. Amendments to the *Defence Force Retirement and Death Benefits Act 1973* by the *Defence Legislation Amendment (Superannuation and ADF Cover) Act 2015* ensure this outcome for DFRDB recipient members.

17. **Item 4** amends rule 51 which provides for the payment of a preserved MSBS employer benefit in specific circumstances before a person with a preserved employer benefit reaches age 55. One of the circumstance is if CSC determines the preserved benefit member is unlikely ever to be able to work again in employment for which the person is reasonable qualified by education, training or experience or for which the person could reasonably be qualified after retraining because of physical or mental incapacity.

18. A person in this circumstance can elect to convert at least 50% of the preserved employer benefit to pension.

19. The amendment to rule 51 (it adds new subrule 51(4)) is made to ensure there is no "double dipping" by MSBS members who choose to become ADF Super members and as a result are required to preserve their employer benefit in MSBS. If a person with a preserved MSBS employer benefit becomes entitled to an invalidity pension under ADF Cover arrangements and potentially, to the preserved MSBS employer benefit, then the MSBS preserved employer benefit can only be taken as a lump sum while the person is under age 60 (that is, it cannot be converted to pension while the person is under age 60, the age when the ADF Cover top-up pension ceases).

20. **Item 5** amends rule 52 which provides for the payment of a preserved MSBS employer benefit to a person who has reached age 55. A person in this situation can convert at least 50% of the employer benefit to pension. The amendment made by this item to insert new subrule 52(2A)) is for the same reasons as the amendment made by item 4.

21. **Item 6** amends rule 57 to remove a reference to rule 35 which is being repealed.

22. **Item 7** amends rule 66 which provides for the payment of benefits in unusual or exceptional circumstances. CSC can only exercise its power under this rule when it considers the rules generally produce a result that is not in the spirit of the rules and the circumstances are unusual or exceptional. When exercising its powers under this rule, CSC is required to have regard to the principles underlying the rules and the need to maintain equity between members.

23. The amendment to paragraph 66(a) excludes from the operation of rule 66 the new subrules 51(4) and 52(2A) being inserted by items 4 and 5 of this instrument. As indicated, the principles surrounding these new subrules is that a MSBS preserved

employer benefit cannot be converted to pension by an ADF Super member who is under age 60 and in receipt of an invalidity top-up pension under ADF Cover arrangements.

24. **Item 8** amends item 1 of Part 1 of Schedule 1 to include definitions of *ADF Super* and *ADF Super member*.

25. **Items 9, 10 and 11** amend the definition of *eligible child* in item 1 of Part 1 of Schedule 1. Some MSBS reversionary pensions are paid on the basis of the number of dependants of deceased members receiving formal education. For this to occur, dependants must prove that they remain in formal education from age 16 and above and that they are not working.

26. This provision reflected a similar provision in the DFRDB Act which was drafted at a time when a significant percentage of students left formal education at age 16 and commenced full time employment. CSC has advised this is currently not the case and that the majority of students do not leave formal education until at least age 18. Item 9 has the effect of increasing the age from which an eligible child must be in full-time education to be able to benefit as the result of the death of a MSBS member or a beneficiary under the scheme from age 16 to age 18.

27. CSC has also indicated that the majority of students that go on to further education generally work in part-time employment to sustain themselves and meet other education costs while studying, even though they may have some form of parental support. The requirement in the MSBS definition that effectively stops a person who would be an eligible child from being classified as such does not reflect current trends and is somewhat anachronistic.

28. The amendment made by item 10 is necessary because item 11 removes the work test from the definition of eligible child. These changes to the definition of *eligible child* remove an administrative burden for CSC and benefit students who were dependent on the deceased member.

### **Part 1 – Division 2**

29. **Item 12** inserts a savings provision into the Trust Deed. New clause 13 of the Trust Deed provides that rule 35 (that is being repealed by item 3 of this instrument) continues to apply to pensions that were suspended for the period of membership for the further period of service being undertaken by the MSBS pension recipient. The suspended pension continues to be indexed in line with increases in the consumer price index while it is suspended under rule 57.

### **Part 2 – Flexible service**

30. At present, Defence legislation provides for two types of service for members of the ADF: permanent and reserve service. All members of the permanent force serve on a continuous full-time basis.

31. Under current arrangements, members of the permanent force who are MSBS members and who wish to work other than full-time are required to take part-time leave without pay. The period of part-time leave without pay cannot exceed 21 days for any particular period without having adverse superannuation consequences by creating a break in service (if the member does not contribute, then Defence is not required to make productivity contributions). This constrains the flexibility available to permanent ADF members and the Chiefs of Service who are responsible for providing capability.

32. Amendments to the *Defence Act 1903*, the *Naval Defence Act 1910* and the *Air Force Act 1923* are being made to introduce a new contemporary concept of Defence service, effectively removing the need for any member of the permanent force to take part-time leave without pay if they wish to render flexible service. It is not necessary to provide similar arrangements for members of the Reserves who already have access to flexible service through the use of Reserve service days (in lieu of undertaking continuous full-time service).

33. This category of service will provide greater flexibility for permanent ADF members in line with contemporary community standards of employment. It will also give the Chiefs of Service greater flexibility in dealing with capability.

## **Part 2 – Division 1**

34. **Item 13** amends subrule 2(1) to insert a reference to flexible service which is to be defined in item 1 of Part 1 of Schedule 1 (Glossary).

35. **Item 14** repeals subrule 4(1), which provides that the MSBS member contribution is to be a percentage (not less than 5%) of the salary paid to the member in a fortnight and substitutes a new subrule 4(1).

36. **New subrule 4(1)** provides that the salary upon which the member's contribution is based is either the salary paid in the fortnight or, for a member rendering flexible service, is the salary that would have been paid in the fortnight as of the member had not been rendering flexible service (that is, on the member's salary for the rank held, higher duties allowance of any and any service allowance – Part 10 of Schedule 1 defines *salary* for the purposes of the MSBS).

37. **Item 15** removes a reference to contributions being calculated as if the member was on full pay in rule 6 (which deals with contributions while on maternity/paternity leave without pay). The amendment inserts a reference to rule 8 which sets out general conditions that apply to persons impacted by rule 6 and rule 7 (which deals with contributions while on other leave without pay).

38. **Item 16** repeals subparagraph 7(2)(a)(i) which is not required in a situation where there is now no requirement for permanent members of the ADF to take leave without pay if they want to render flexible service.

39. Rule 7 sets out circumstances in which a member on leave without pay for greater than 21 days for reasons other than maternity/paternity leave without pay may continue to pay member contributions. In particular, subparagraph 7(2)(a)(i) provides that a member who has been granted a period of leave without pay for more than 21 days to engage in officially approved full-time employment with an outside employer can, with the approval of CSC, continue to contribute for all or part of that period.

40. Rule 7 works in conjunction with Rule 10 which requires Defence to make a productivity benefit contribution whenever a member contributes. Paragraph 10(2)(a) provides that, irrespective of whether the member who is on approved leave without pay contributes, Defence does not have to contribute unless the outside employer pays an amount to the Commonwealth that is equal to the amount the Commonwealth would have had to pay had MSBS been a fully funded scheme (this would not be an employer contribution to MSBS as the outside employer cannot make contributions to MSBS).

41. If MSBS was a fully funded scheme, an outside employer would be required to make a payment to the Commonwealth (to Consolidated Revenue) that represented

the notional employer contribution rate that is calculated by the Australian Government Actuary. Currently, that rate is in the order of 31.4% of a member's ordinary time earnings. In addition to this payment to the Commonwealth, the outside employer would also be required to contribute 9.5% of the person's ordinary time earnings to a superannuation scheme of the member's choice (other than MSBS) to avoid incurring a superannuation guarantee charge.

42. Subparagraph 7(2)(a)(i) and paragraph 10(2)(a) are representations of similar clauses in the Government's superannuation schemes for its civilian employees. They were primarily designed to allow Commonwealth employers to be "loaned" to State and Territory Governments without the Commonwealth having to bear the cost of, or the member losing continuity of service with, their Commonwealth superannuation scheme. It was brought in at a time when State and Commonwealth employees were normally covered by defined benefit schemes. This is now not the case, with most State and Commonwealth defined benefit schemes being closed to new members.

43. With the repeal of subparagraph 7(2)(a)(i), there is no need for the limiting words "in the case of subparagraph (ii), (iii) or (iv) in subparagraph 7(2)(a)". **Item 17** removes those words.

44. **Item 18** removes a reference to contributions being calculated as if the member was on full pay in subrule 7(2) (which deals with member contributions while on leave without pay for other reasons), subrule 7(2A) (which deals with member contributions while on leave without pay on compassionate grounds) and subrule 7(3) (which deals with member contributions while a member is on leave without pay to accompany a spouse who is also a member on a posting). The amendment inserts a reference to rule 8 (similar to item 15 above).

45. **Item 19** repeals subclause 8(1) and inserts an amended subclause 8(1) to ensure that a member who elects to contribute while on leave without pay and a member rendering flexible service pays member contributions on the salary and allowances they would have been paid had they not been on leave without pay or not rendering that flexible service.

46. **Item 20** repeals paragraph 10(2)(a) as a result of the repeal effected by item 16.

47. **Item 21** repeals subrule 10(4) as a result of the repeal effected by items 16 and 20.

48. **Item 22** inserts a definition of *flexible service* in item 1 of Part 1 of Schedule 1.

## **Part 2 – Division 2**

49. **Item 23** inserts an application provision into the Trust Deed. New clause 14 of the Trust Deed provides that the amendments of paragraph 7(2)(a) and rule 10 apply to leave without pay granted on and after the commencement of Part 2 Division 1.

50. It also provides that a member who was granted leave without pay for the purposes of engaging in full time employment with an outside employer (referred to in subparagraph 7(2)(a)(i)) before the repeal of that subparagraph can still elect to make contributions before that period of leave is completed as if the repeal had not happened.

CSC and Defence Legal have been consulted in relation to these amendments. The CSC Board has not as yet agreed with the amendments reflected in this instrument.

A regulation impact statement is not required as these are clarifying and minor administrative amendments to facilitate ease of administration.

Authority: Section 5 of the  
*Military  
Superannuation  
and Benefits Act  
1991*

# Statement of Compatibility with Human Rights

## Military Superannuation and Benefits Amendment (Trust Deed—ADF Super Consequential) Instrument 2015

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

This 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 Instrument

The Military Superannuation and Benefits Amendment (Trust Deed—ADF Super Consequential) Instrument 2015 is made under the Military Superannuation and Benefits Act 1991. It is part of a package of legislation to establish the Australian Defence Force Superannuation Scheme (ADF Super) and facilitate the introduction of the Australian Defence Force's future workforce model by providing flexible service conditions for permanent members of the Australian Defence Force (ADF)

### Human Rights Implications

#### **The Instrument promotes the following rights:**

- Article 7, International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to just and favourable conditions of work;
- Article 9, ICESCR, the right to social security;
- Article 11, ICESCR, the right to an adequate standard of living;
- Article 2(2), ICESCR, the right to equality and non-discrimination; and
- Article 26, International Covenant on Civil and Political Rights (ICCPR), the right to equality and non-discrimination.

This Instrument is consequential to legislation which introduces new and modern superannuation arrangements which provide just and favourable conditions of work for ADF members. The employer contributions will exceed the minimum requirement under the *Superannuation Guarantee (Administration) Act 1992*. There is no compulsion for the ADF member to make additional contributions, however, they can elect to do so to improve their circumstances. This will provide an enhanced standard of living and social security environment.

The legislation also proposes to provide a military specific statutory death and invalidity scheme and all ADF Superannuation members will have access to this insurance without any employee contributions. These premiums will be contributed from a specific Government consolidated appropriation. These measures promote the right to social security and an enhanced living standard.

The legislation further proposes to introduce flexible service arrangements which provide just and favourable conditions of work for ADF members. The flexible service arrangements will allow ADF members to better balance their military careers and their personal lives. Members on flexible service arrangements will have

consistent comparative benefits to other ADF members, including access to death and invalidity and superannuation benefits. This promotes the right to equality and non-discrimination. The introduction of flexible service arrangements in legislation is consistent with the *Review into the Treatment of Women in the Australian Defence Force* conducted by Elizabeth Broderick, in her role as the Sex Discrimination Commissioner. This measure promotes the right to equality and non-discrimination.

**Conclusion:**

The Military Superannuation and Benefits Amendment (Trust Deed—ADF Super Consequential) Instrument 2015 is compatible with human rights. It advances the protection of human rights.