

EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance and the Public Service

Superannuation Act 1990

Declaration under paragraph 6(1)(j)

Superannuation (PSS) Membership Inclusion Amendment Declaration 2019 (No. 1)

The *Superannuation Act 1990* (the 1990 Act) makes provision for and in relation to the Public Sector Superannuation Scheme (PSS) for Australian Government employees and for certain other persons.

Section 6 of the Act specifies the various persons who are members of the PSS. Paragraph 6(1)(j) enables the Minister to declare a person to be a PSS member.

The *Superannuation (PSS) Membership Inclusion Declaration 2006* (the Principal Declaration) details the persons who are declared PSS members under paragraph 6(1)(j). Section 4 of the Principal Declaration also sets out circumstances where persons declared as PSS members cease to be contributory members.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Amending Declaration

The purpose of the *Superannuation (PSS) Membership Inclusion Amendment Declaration 2019 (No.1)* (the Amending Declaration) is to amend the Principal Declaration to continue the PSS contributory membership of certain employees of the Australian Securities and Investments Commission (ASIC) from 1 July 2019.

ASIC currently employs staff on behalf of the Commonwealth under written agreements under subsection 120(3) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and under the *Public Service Act 1999* (PS Act). The *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018* (TLA(EAC) Act) amends the ASIC Act to require ASIC to directly employ staff from 1 July 2019, and to transition ASIC staff employed by the Commonwealth to direct employment by ASIC on that date.

Prior to the transition, some ASIC staff will be PSS contributory members by virtue of their employment by the Commonwealth. The Amending Declaration will maintain the PSS membership of such ASIC staff who were taken to have transferred from Commonwealth employment to be directly employed by ASIC as a result of the amendments made to the ASIC Act by the TLA(EAC) Act. Under the Amending Declaration, persons in this category will maintain PSS membership eligibility as long as they remain continuously employed by ASIC, they remain PSS contributory members in respect of that employment, and ASIC remains a Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

The Amending Declaration also makes amendments to the Principal Declaration to repeal certain historical provisions that have been overtaken by the new PSS membership inclusion arrangements for ASIC staff from 1 July 2019.

The details of the Amending Declaration are at [Attachment A](#).

Legislation Act 2003

The Amending Declaration is a legislative instrument for the purposes of the *Legislation Act 2003*, and is subject to disallowance in accordance with subsection 45(2) of the 1990 Act.

Consultation

Section 17 of the *Legislation Act 2003* specifies that rule-makers should consult before making legislative instruments. Commonwealth Superannuation Corporation, the corporate trustee of the PSS, and ASIC have been consulted on the amendments contained in the Amending Declaration.

The Office of Best Practice Regulation (OBPR) was consulted and assessed that the changes are machinery in nature and do not require a Regulation Impact Statement (OBPR Reference Number 24781).

Commencement

The Amending Declaration commences on 1 July 2019.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights is at [Attachment B](#).

DETAILS OF THE AMENDING DECLARATION

Name

1. **Section 1** provides that the name of the instrument is the *Superannuation (PSS) Membership Inclusion Amendment Declaration 2019 (No. 1)* (the Amending Declaration).

Commencement

2. **Section 2** provides for commencement of the instrument on 1 July 2019. This is the date that certain Australian Securities and Investments Commission (ASIC) staff will be taken to have ceased to be employed by the Commonwealth and become employed directly by ASIC under amendments made to the *Australian Securities and Investments Commission Act 2001* (ASIC Act) by the *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018* (TLA(EAC) Act).

Authority

3. **Section 3** identifies the authority for the instrument as paragraph 6(1)(j) of the *Superannuation Act 1990* (the 1990 Act).

Schedules

4. **Section 4** provides that each instrument specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1—Amendments

Superannuation (PSS) Membership Inclusion Declaration 2006

5. Schedule 1 makes amendments to the *Superannuation (PSS) Membership Inclusion Declaration 2006* (the Principal Declaration).

6. Subsection 3(1) of the Principal Declaration defines terms used in that instrument. **Item 1** of Schedule 1 to the Amending Declaration inserts a new definition of “ASIC” after the definition of “ARPC” in subsection 3(1). Under the new definition, “ASIC” means the Australian Securities and Investments Commission established by the *Australian Securities and Investments Commission Act 1989* and continued in existence by the ASIC Act.

7. The Amending Declaration amends the Principal Declaration to enable certain ASIC staff who move from Commonwealth employment to become employees of ASIC on 1 July 2019, as a result of section 310 or section 311 of the ASIC Act that commence on that day, to maintain their PSS contributory membership. **Item 2** inserts new subsection 4(25), which broadly provides that PSS membership for these persons ceases at the end of the earlier of:

- the day the person ceases to be employed by ASIC;
- the day before the day that the person becomes a member of an alternative superannuation scheme, as defined in the Principal Declaration, in relation to their employment with ASIC; or

- the last day that ASIC is a Commonwealth entity – should it cease to be such an entity with the meaning of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

8. Schedule 1 to the Principal Declaration lists those persons who are declared PSS contributory members for the purposes of section 6 of the 1990 Act. **Items 3 and 4** repeal existing item 1 and item 2 of Schedule 1 to the Principal Declaration. These are historical provisions that apply to certain ASIC staff. The provisions have been overtaken by the new PSS membership inclusion arrangements for ASIC staff from 1 July 2019.

9. **Item 5** inserts new item 32 in Schedule 1 to the Principal Declaration, which describes those persons who are PSS contributory members by force of section 6 of the 1990 Act. New item 32 of Schedule 1 to the Principal Declaration has the effect that ASIC staff who are taken to transfer from Commonwealth employment under a written agreement under subsection 120(3) of the ASIC Act or under the PS Act to be directly employed by ASIC on and from 1 July 2019, because of section 310 or section 311 of the ASIC Act respectively, and who were PSS contributory members immediately prior to the changes, continue that contributory membership.

10. The following scenarios illustrate the application of the PSS membership arrangements to ASIC employees from 1 July 2019, under the Amending Declaration.

Scenario 1

Robyn is employed under the PS Act at ASIC and has PSS contributory membership in relation to that employment. In March 2019, Robyn commences six months leave without pay (LWOP) from her employment at ASIC. While on LWOP on 1 July 2019, Robyn is taken to have transferred from PS Act employment to direct employment by ASIC under section 311 the ASIC Act. She subsequently resumes duties at ASIC in September 2019. ASIC remains a Commonwealth entity for the purpose of the PGPA Act throughout the period.

Under the changes made to the Principal Declaration by the Amending Declaration, Robyn will maintain PSS contributory membership on 1 July 2019 and throughout her subsequent period of LWOP, as she meets all of the conditions for such membership set out in new item 32 of Schedule 1 and none of the events ceasing that membership, as set out in new subsection 4(25), have occurred. In particular:

- *she is taken to have ceased Commonwealth employment under the PS Act and become directly employed by ASIC on 1 July 2019 as a result of section 311 of the ASIC Act – that Robyn was on LWOP at the time of commencement of the changes is not relevant;*
- *she was a PSS contributory member (referred to as a “member” in the PSS legislation) in respect of her employment at ASIC immediately before she was taken to have transferred from employment under the PS Act to direct employment by ASIC on 1 July 2019;*
- *in relation to her employment at ASIC, Robyn was not on 1 July 2019 or at any time during her subsequent LWOP from ASIC a member of an alternative superannuation scheme (as defined in the Principal Declaration);*
- *she was continuously employed by ASIC during her LWOP from the organisation from 1 July 2019 onwards; and*
- *ASIC was a Commonwealth entity for the purposes of the PGPA Act throughout the relevant period.*

Scenario 2

Michael is a contributing member of the PSS in relation to his employment under the PS Act at the Department of the Treasury (Treasury). He resigns from that employment to take up employment with ASIC in December 2019.

Under new item 32 of Schedule 1 to the Principal Declaration, Michael will not be a contributory PSS member in respect of his employment with ASIC from December 2019, as he does not meet all of the conditions to maintain contributory membership of the scheme. Importantly, Michael did not cease Commonwealth employment at ASIC and become an ASIC employee on 1 July 2019 as a result of section 310 or section 311 of the ASIC Act. Michael will become a PSS former member upon his resignation from the Treasury.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Superannuation (PSS) Membership Inclusion Amendment Declaration 2019 (No. 1)

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 the *Superannuation (PSS) Membership Inclusion Amendment Declaration 2019 (No.1)* (the Amending Declaration) is to amend the *Superannuation (PSS) Membership Inclusion Declaration 2006* (the Principal Declaration) to continue the Public Sector Superannuation Scheme (PSS) contributory membership of certain employees of the Australian Securities and Investments Commission (ASIC) from 1 July 2019.

ASIC currently employs staff on behalf of the Commonwealth under written agreements under subsection 120(3) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and under the *Public Service Act 1999*. The *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018* (TLA(EAC) Act) amends the ASIC Act to require ASIC to directly employ staff from 1 July 2019, and to transition ASIC staff employed by the Commonwealth to direct employment by ASIC on that date.

Prior to the transition, some ASIC staff will be PSS contributory members by virtue of their employment by the Commonwealth. The Amending Declaration will maintain the PSS membership of such ASIC staff who were taken to have transferred from Commonwealth employment to employment by ASIC as a result of the amendments made to the ASIC Act by the TLA(EAC) Act. Under the Amending Declaration, persons in this category will maintain PSS membership eligibility as long as they remain continuously in ASIC employment and PSS contributory members in respect of that employment, and while ASIC remains a Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

The Amending Declaration also makes amendments to the Principal Declaration to repeal certain historical provisions that have been overtaken by the new PSS membership inclusion arrangements for ASIC staff from 1 July 2019.

Human Rights Implications

The 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.

Senator the Hon Mathias Hubert Paul Cormann, Minister for Finance and the Public Service