

EXPLANATORY STATEMENT

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

Superannuation Act 2005

Declaration under subparagraph 13(1)(a)(ii)

*Superannuation (PSSAP) Membership Eligibility (Inclusion) Amendment Declaration 2019
(No. 1)*

The *Superannuation Act 2005* (the 2005 Act) establishes and makes provision for the Public Sector Superannuation Accumulation Plan (PSSAP), a superannuation scheme for public sector employees, and certain other persons, who commence employment on or after 1 July 2005.

Section 13 of the 2005 Act specifies the various persons who are eligible for PSSAP membership. Pursuant to paragraph 13(1)(a), a person is eligible to become a PSSAP member if they are a “public sector employee” under subparagraph 13(1)(a)(i), or if they are declared eligible by the Minister in an instrument under subparagraph 13(1)(a)(ii). The meaning of “public sector employee” is set out in section 5 of the 2005 Act.

The *Superannuation (PSSAP) Membership Eligibility (Inclusion) Declaration 2005* (the Principal Declaration), made under the equivalent power in former paragraph 13(1)(b) of the 2005 Act, identifies those persons who are declared by the Minister as eligible to become PSSAP members. Under item 23 of Schedule 2 to the *Superannuation Legislation (Consequential Amendments and Transitional Provisions) Act 2011*, the Principal Declaration is to be treated as if it were made under subparagraph 13(1)(a)(ii) of the 2005 Act. Subsection 4(2) of the Principal Declaration sets out the circumstances in which persons declared eligible for PSSAP membership cease to be eligible for that membership.

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 (PSSAP) Membership Eligibility (Inclusion) Amendment Declaration 2019 (No.1)* (the Amending Declaration) is to amend the Principal Declaration to continue the PSSAP membership eligibility 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, ASIC staff employed by the Commonwealth who first commenced Commonwealth employment on or after 1 July 2005 will be eligible for PSSAP membership,

as they fall within the definition of “public sector employee” in the 2005 Act by virtue of being employed by the Commonwealth. These ASIC staff will cease to meet this definition on 1 July 2019 when they become employees of ASIC (instead of the Commonwealth).

The Amending Declaration will maintain the PSSAP membership eligibility of ASIC staff who were ordinary employer-sponsored members of the scheme and who were transferred from Commonwealth employment to direct 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 PSSAP membership eligibility as long as they remain continuously employed by ASIC, they remain ordinary employer-sponsored members of PSSAP, and ASIC remains a Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

The Amending Declaration also amends the Principal Declaration to repeal a historical provision relating to ASIC Regional Commissioners that has no continuing application, and makes several minor corrections.

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 13(5) of the 2005 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 PSSAP, 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 (PSSAP) Membership Eligibility (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 subparagraph 13(1)(a)(ii) of the *Superannuation Act 2005* (the 2005 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 (PSSAP) Membership Eligibility (Inclusion) Declaration 2005

5. Schedule 1 makes amendments to the *Superannuation (PSSAP) Membership Eligibility (Inclusion) Declaration 2005* (the Principal Declaration).

6. Section 3 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 “APRA” in section 3. 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. Section 4 of the Principal Declaration deals with the persons eligible to become PSSAP members under section 13 of the 2005 Act. Subsection 4(1) provides the persons listed in Schedule 1 are eligible for PSSAP membership, subject to subsection 4(2), which prescribes when such eligibility ceases.

8. **Items 2 to 6** make minor corrections to subsection 4(2), to address formatting and certain other errors.

9. **Item 2** corrects a formatting error in subparagraph 4(2)(g)(ii), which relates to cessation of membership eligibility for Commonwealth Superannuation Corporation (CSC) employees, by substituting “CSC” with a bolded version of the acronym.

10. **Item 3** corrects a minor error in subparagraph 4(2)(h)(iii) by replacing the full stop at the end of the subparagraph with a semi-colon followed by the word “and”.

11. **Item 4** and **item 5** correct formatting errors in subparagraph 4(2)(i)(ii) and

subparagraph 4(2)(i)(iii) respectively, which relate to cessation of PSSAP membership eligibility of Australian Hearing Services employees. **Item 4** and **item 5** replace, in turn, “alternative superannuation scheme” and “Australian Hearing Services” with a bolded version of these terms.

12. **Item 6** corrects a formatting error in subparagraph 4(2)(j)(ii), which relates to cessation of PSSAP membership eligibility for Australian Prudential Regulation Authority employees, by replacing the word “**immediately**” with an un-bolded version of the term.

13. **Item 7** makes amendments to subparagraph 4(2)(j)(iii) to cater for the insertion of a new paragraph 4(2)(k), dealing with the cessation of PSSAP membership eligibility of certain ASIC employees, by item 8. Specifically, **item 7** amends subparagraph 4(2)(j)(iii) by replacing the full stop at the end of the subparagraph with a semi-colon followed by the word “and”.

14. The Amending Declaration amends the Principal Declaration to make certain persons who become ASIC employees on 1 July 2019, due to the amendments to the ASIC Act that commence on that day, eligible for PSSAP membership (refer to item 10 below). **Item 8** inserts new paragraph 4(2)(k), which broadly provides that this PSSAP membership eligibility ceases at the end of the earlier of:

- the day the person ceases to be an ASIC employee;
- 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;
- the day before the day that the person becomes a member of a superannuation scheme to which ASIC pays contributions solely for the purposes of satisfying the organisation’s obligations under the *Superannuation Guarantee (Administration) Act 1992*; 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).

15. Schedule 1 to the Principal Declaration lists those person declared eligible to become PSSAP members for the purposes of subparagraph 13(1)(a)(ii) of the 2005 Act. **Item 9** repeals existing item 1 of Schedule 1 to the Principal Declaration, which relates to ASIC Regional Commissioners, as the item has no continuing application.

16. **Item 10** inserts new item 15 in Schedule 1 to the Principal Declaration, which describes those persons eligible to become PSSAP members. New item 15 enables ASIC staff who are taken to have transferred from Commonwealth employment under a written agreement under subsection 120(3) of the ASIC Act or under the *Public Service Act 1999* (PS Act) to be directly employed by ASIC from 1 July 2019, due to section 310 or section 311 of the ASIC Act respectively, and who were ordinary employer-sponsored members of PSSAP immediately prior to the changes, to continue that PSSAP membership.

17. The following scenarios illustrate the application of the new PSSAP membership eligibility arrangements to ASIC employees from 1 July 2019.

Scenario 1

Margaret commences Commonwealth employment under the PS Act at ASIC in March 2018, having never previously worked as a public sector employee, and joins PSSAP as an ordinary employer-sponsored member. Margaret subsequently

commences a paid ASIC secondment to the private sector in January 2019. Throughout her secondment, Margaret maintains her PSSAP membership. Margaret returns to ASIC in January 2020. ASIC continues to be a Commonwealth entity under the PGPA Act throughout the period.

Margaret remains eligible for PSSAP membership from 1 July 2019 (when the relevant amendments to the ASIC Act commence) and on her return to ASIC in January 2020, as she meets all of the conditions for PSSAP membership eligibility in new item 15 of Schedule 1 and none of the events ceasing that eligibility in new subparagraph 4(2)(k) have occurred. In particular, Margaret:

- *is taken to have ceased Commonwealth employment under the PS Act to be directly employed by ASIC under the amendments to the ASIC Act – her status as a secondee does not impact on her status as a PS Act employee immediately before the changes;*
- *is an ordinary employer-sponsored member of PSSAP in relation to her employment under the PS Act at ASIC immediately before commencement of the changes to the ASIC Act;*
- *has not ceased employment with ASIC from 1 July 2019 until her return to ASIC in January 2020 – as an ASIC secondee, Margaret remains in ASIC employment;*
- *is not and has never been, in relation to her employment by ASIC from 1 July 2019, a member of an alternative superannuation scheme or a superannuation scheme to which ASIC pays contributions solely to satisfy obligations under the Superannuation Guarantee (Administration) Act 1992 – that is, she has not ceased to be an ordinary employer-sponsored member of PSSAP in relation to her ASIC employment; and*
- *ASIC has not ceased to be a Commonwealth entity for the purposes of the PGPA Act.*

Scenario 2

Tim transfers from Commonwealth employment under the PS Act at the Treasury to Commonwealth employment under the PS Act at ASIC in January 2018. He was previously an ordinary employer-sponsored member of PSSAP in relation to his employment at the Treasury for more than 12 months and initially maintains that membership at ASIC. In September 2018, Tim joins the ABC Fund and ASIC commences making employer contributions of 15.4% of superannuation salary to that fund. Tim does not resume membership of PSSAP in respect of his employment with ASIC before the changes to the organisation's employment framework take effect on 1 July 2019.

Tim will not maintain eligibility for PSSAP membership from 1 July 2019 under the changes made to the Principal Declaration by the Amending Declaration, as he does not satisfy all of the conditions for membership eligibility in new item 15 of Schedule 1. Importantly, Tim was not an ordinary employer-sponsored member of PSSAP in relation to his employment under the PS Act at ASIC immediately before the amendments to the ASIC Act commenced on 1 July 2019.

Note: Although Tim is not eligible for PSSAP membership under the changes made to the Principal Declaration by the Amending Declaration, he could choose to resume membership of PSSAP as a former ordinary employer-sponsored member of the scheme, provided he has a PSSAP preserved benefit. This is because he has the

necessary qualifying service for this category of membership set out in subsection 18(7) of the 2005 Act.

Scenario 3

Roger is a PSSAP member in respect of employment at the Treasury under the PS Act. He resigns from the APS to take up employment at ASIC on 1 August 2019 – that is, following commencement of the amendments to the ASIC Act.

Roger is not eligible for PSSAP membership under the changes made to the Principal Declaration by the Amending Declaration, as he was not taken to have transferred from Commonwealth employment under the PS Act to be directly employed by ASIC on 1 July 2019 by section 311 of the ASIC Act.

Note: Roger may be able to resume PSSAP membership as a former ordinary employer-sponsored member of ASIC, if he has a preserved PSSAP benefit in the scheme and the necessary qualifying service for this category of membership set out in subsection 18(7) of the 2005 Act. The PSSAP legislation does not specify an employer contribution rate for those with this category of membership, unlike employers of other ordinary employer-sponsored members of PSSAP who must make employer contributions of 15.4% of superannuation salary in respect of such members.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Superannuation (PSSAP) Membership Eligibility (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 (PSSAP) Membership Eligibility (Inclusion) Amendment Declaration 2019 (No.1)* (the Amending Declaration) is to amend the *Superannuation (PSSAP) Membership Eligibility (Inclusion) Declaration 2005* (the Principal Declaration) to continue the eligibility of certain employees of the Australian Securities and Investments Commission (ASIC) to membership of the Public Sector Superannuation Accumulation Plan (PSSAP) 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, those ASIC staff employed by the Commonwealth who first commenced Commonwealth employment on or after 1 July 2005 will be eligible for PSSAP membership, as they fall within the definition of "public sector employee" in the *Superannuation Act 2005* that establishes PSSAP. These ASIC staff will cease to meet this definition on 1 July 2019 when they become directly employed by ASIC.

The Amending Declaration will maintain the PSSAP membership eligibility for ASIC staff who were ordinary employer-sponsored members of the scheme and who are 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 PSSAP membership eligibility as long as they remain continuously employed by ASIC, they remain ordinary employer-sponsored members of PSSAP, and ASIC remains a Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

The Amending Declaration also amends the Principal Declaration to repeal a historical provision that has no continuing application, and makes several minor corrections.

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