EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance

Superannuation Act 1990

Superannuation Amendment (PSS Trust Deed) Instrument 2019 to amend the Public Sector Superannuation Trust Deed and Rules pursuant to section 5 of the Superannuation Act 1990.

On 21 June 1990 the Minister for Finance, for and on behalf of the Commonwealth, made a deed (the Trust Deed) under section 4 of the *Superannuation Act 1990* (the 1990 Act) to, among other things, establish a superannuation scheme, to be known as the Public Sector Superannuation Scheme (PSS), and the PSS Fund from 1 July 1990. The Schedule to the Trust Deed includes Rules for the administration of the PSS (the Rules).

The PSS was established to provide benefits for certain Commonwealth employees and certain other people. Commonwealth Superannuation Corporation (CSC) is the trustee of the PSS.

Section 5 of the 1990 Act provides that the Minister may amend the Trust Deed by signed instrument, subject to obtaining the consent of CSC to the amendment where necessary.

Amending Deed

The Minister for Finance has amended the Trust Deed by signed instrument. That instrument is called the *Superannuation Amendment (PSS Trust Deed) Instrument 2019*. The instrument is referred to as the Amending Deed in this Explanatory Statement.

The purpose of the Amending Deed is to standardise and modernise provisions relating to eligibility for reversionary superannuation benefits payable in the PSS to or in respect of children.

Details of the Amending Deed are at Attachment A.

CSC Approval

Section 5 of the 1990 Act requires CSC to consent to the amendments proposed by the Minister in most circumstances. CSC has consented to the Amending Deed.

Legislation Act 2003

The Amending Deed is a legislative instrument. The amendments to the Trust Deed are subject to disallowance in accordance with section 45 of the 1990 Act.

Consultation

Section 17 of the *Legislation Act 2003* specifies that rule-makers should consult before making legislative instruments. CSC has been consulted on the amendments contained in the Amending Deed.

The Office of Best Practice Regulation (OBPR) was consulted (OBPR Reference Number 25213). A Regulation Impact Statement was not prepared, as the instrument will not have any regulatory impact on business, individuals or community organisations.

Commencement

Section 2 sets out the commencement provisions for the Amending Deed. Commencement details for specific provisions are included in the table in subsection 2(1) as follows:

- Sections 1 to 4 of the Amending Deed come into effect on the day after the instrument is registered on the Federal Register of Legislation (FRL).
- Items 1, 2 and 4 of the Schedule to the Amending Deed commence on 1 January 2020.
- Item 3 of the Schedule commences on the day after the Amending Deed is registered on FRL.

Statement of Compatibility with Human Rights

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

ATTACHMENT A

DETAILS OF THE AMENDING DEED

Name

1. **Section 1** provides that the name of the instrument is the *Superannuation Amendment (PSS Trust Deed) Instrument 2019* (Amending Deed).

Commencement

2. **Section 2** sets out the commencement provision for the amendments made by the Amending Deed.

- Item 1 of the table in subsection 2(1) provides that Sections 1 to 4 and anything in the Amending Deed not covered elsewhere in the table commences on the day after the instrument is registered on the Federal Register of Legislation (FRL).
- Item 2 of the table provides that Items 1, 2 and 4 of the Schedule commence on 1 January 2020.
- Item 3 of the table provides that Item 3 of the Schedule commences on the day after the instrument is registered on the FRL.

3. Subsection 2(2) provides that the information in column 3 of the table is not part of the instrument.

Authority

4. **Section 3** identifies the authority for the instrument as section 5 of the *Superannuation Act 1990* (1990 Act).

Schedules

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

The Schedule—Amendment of the Trust Deed

6. The Public Sector Superannuation Scheme (PSS), in accordance with the Rules set out in the Trust Deed (the Rules), pays benefits to, or in respect of, an "eligible child" or a "partially dependent child" of a deceased scheme member in some circumstances. The benefit may take the form of a higher pension payable to a spouse to recognise the eligible child, or may be payable directly to the child if they do not live with the spouse or if there is no spouse. The definitions of both "eligible child" and "partially dependent child" require that the young person is:

- less than 16 years of age; or
- age 16 or more but is less than the age 25 years and is undertaking full-time study at a school, college or university and is not ordinarily employed or self-employed.

7. These provisions reflected a time when a significant percentage of students left formal education at age 16 and commenced full-time employment. This is no longer the case, with it now being more usual for students to remain in formal education until at least age 18.

8. It is now common for students who undertake further education to work in part-time or casual employment to sustain themselves and meet other education costs while studying, even though they may have some form of parental support. The current legislative requirement that to be an eligible child or a partially dependent child the young person must not ordinarily be in employment does not reflect current trends.

9. The amendments made by the Amending Deed increase the age from which an eligible child and a partially dependent child must be in full-time education from age 16 to age 18 and also remove the restriction relating to not ordinarily being in employment.

10. The *Public Sector Superannuation Legislation Amendment Act 2018* made amendments similar to those made by this Amending Deed to the Australian Government superannuation schemes established under the *Federal Circuit Court of Australia Act 1999*, the *Judges' Pensions Act 1968*, the *Parliamentary Contributory Superannuation Act 1968*, the *Superannuation Act 1922* and the *Superannuation Act 1976*.

Amendments relating to children - detail

11. **Items 1 and 2 of the Schedule** amend the definition of "eligible child" and "partially dependent child" in Rule 1.2.1 of the Rules to increase the age from which a child has to be in full-time education from age 16 to age 18 and remove the requirement that they not ordinarily be in employment, in order to be regarded as an eligible child or a partially dependent child.

12. The effect is that a child of a deceased member can still meet the definition of "eligible child" or "partially dependent child" if they are under 18, or are between age 18 and 25 and in full time education, even if they are also employed.

13. **Item 3 of the Schedule** sets out the application provisions for the amendments made by the Schedule. The application provisions cover the following three situations in relation to paying a benefit to or for a young person under the Rules:

- if the benefit is payable for a day occurring on or after 1 January 2020 because of the death of a person that occurred on or after 1 January 2020;
- to the extent that the benefit is payable for a day occurring on or after 1 January 2020 and, on 31 December 2019, the benefit was payable to or for the young person, or to another person in respect of the young person; and
- if the benefit is payable for a day occurring on or after 1 January 2020 in respect of the death of a person that occurred before 1 January 2020.

14. Subparagraph 3(1)(a)(i) provides that the amendments apply to a young person in relation to paying a benefit under the Rules if the benefit is payable for a day occurring on or after 1 January 2020 because of the death of a person that occurred on or after 1 January 2020. This is intended to capture new entitlements that arise after the commencement of the amendments.

Example 1:

Bob is a pension member of the PSS. Bob dies on 21 February 2020. Bob is survived by his spouse Belinda and daughter Sally.

Sally is 17 years old and not in full-time education. Under the amended Rules, the reversionary pension payable is 78% (the reversionary rate for 2 persons, payable to Belinda) of the pension that was being paid to Bob at the time of his death.

Without the changes made by the Schedule, Belinda would have been entitled to a pension at the rate for 1 person (ie 67%) and the additional 11% reversionary pension in relation to Sally would not have been payable as Sally is over 16 years of age and not in full-time education.

15. Subparagraph 3(1)(a)(ii) provides that the amendments apply in respect of an "eligible child" or a "partially dependent child" to the extent that the benefit is payable for a day occurring on or after 1 January 2020 if, on 31 December 2019, a benefit was payable to the young person, or to another person in respect of the young person. This is intended to capture the entitlements to or in relation to young people who were already being paid immediately before commencement of the amendments.

> ***Example 2:***
>
> *Jane was a PSS pension member who died before 1 January 2020. Jane was survived by her son Tom who is 15 years old. As such Tom is receiving a reversionary pension of 45% of the pension that was payable to Jane at the time of her death.*
>
> *Under the changes made by the Schedule, Tom will be able to continue to receive his reversionary pension until at least age 18 regardless of whether or not he is in full-time education.*
>
> *Without the changes made by the Schedule, Tom's reversionary pension would have ceased when he turned 16 years old if he was not in full-time education at the time.*

16. Where a death occurred before 1 January 2020, and no benefit was payable on 31 December 2019 to or in respect of an "eligible child" or "partially dependent child" under the pre-existing definitions, the amendments made by the Schedule apply as set out under paragraph (3)(1)(b). Under this paragraph, a person can request that CSC apply the amendments in respect of a young person who does not, or will not as at 31 December 2019, meet the existing definitions, but will meet the amended definition (eg a person who turns 16 before 31 December 2019). The amendments will apply so that a benefit becomes payable from the later of the commencement day and the day notice is first given as mentioned in subitem 3(2) if the child is an eligible person or a partially dependent child under the amended definitions.

17. **Subitem 3(2)** sets out the day on which a notice can be given for the purposes of paragraph 3(1)(b). Notice can be given on or after the day the instrument is registered on FRL; however, under paragraph 3(1)(b) no benefit would be payable until 1 January 2020. Under subitem 3(2) notice is taken to be given when an application is made to CSC by the young person or by a person for or in respect of the young person. This provision commences before the commencement of the amendments to allow a person to give notice in advance of 1 January 2020 for administrative ease (this ensures the benefit is payable from the earliest possible date, ie 1 January 2020).

18. The requirement for notice under paragraph 3(1)(b) ensures that the changes made by the Schedule can be practically administered. Without receipt of an application for a benefit or request to apply the amendments, CSC has limited, if any, way of identifying or contacting those young persons who may be eligible for benefits because of the changes. This is because at the time of changes no benefit is being paid or payable in respect of the young person. The alternative approach would have been to apply the changes only in respect of deaths that occurred after commencement day. However, this would have meant a young person as covered by subparagraph 3(1)(a)(ii) would have never been able to benefit from the changes.

> ***Example 3:***
>
> *Robert was a PSS pensioner. Robert died in March 2019. Robert was survived by his daughter Lilly. Lilly was 16 years and six months old and not in full-time education. Therefore, Lilly was not entitled to a reversionary pension at the time of Robert's death and will not be receiving a pension on 31 December 2019.*
>
> *After the Amending Deed is registered on FRL, Lilly makes a request to CSC before 1 January 2020 to apply the amendments to her.*
>
> *Therefore, Lilly will be eligible for a reversionary pension from 1 January 2020. The reversionary pension will be payable to Lilly until she turns 18.*

Without the changes made by the Schedule, Lilly would never have become eligible for a reversionary pension.

19. The application provisions set out in item 3 do not, of themselves, provide that anyone is, or is not, entitled to a benefit. That is, the young person would still have to actually fall within the provisions of the new definition to be eligible for a benefit. For example, if Lilly in Example 3 above was 20 years old and not in full-time education then she would not be entitled to any benefit because she would not come within the amended definition of “eligible child” or “partially dependent child”.

20. **Item 4** sets out transitional provisions for the amendments made by the Schedule. The purpose of these provisions is to ensure that the amendments set out in the Schedule do not decrease a benefit that is being paid to or for an existing beneficiary immediately before the day that the new beneficiary’s benefit commences.

21. Without this transitional provision, additional children that become eligible children or partially dependent children because of the amendments could cause the pension payable to an existing beneficiary (eg a spouse) to be reduced. The amendments are not intended to negatively affect any existing benefit entitlements. To the extent that the effect of the amendments would otherwise be to reduce the pension of existing beneficiaries, this will be set off against a corresponding reduction in what would otherwise be the new entitlement.

22. **Subitem 4(1)** provides that the provisions in item 4 are to be applied where the amendments in the Schedule would:

- reduce the amount of a benefit (the existing beneficiary’s post-commencement benefit) payable under the Rules to or for a person (the existing beneficiary) that was payable on the day occurring immediately before 1 January 2020; and
- increase the amount of a benefit (the new beneficiary’s post-commencement benefit) payable under the Rules for a day on or after 1 January 2020.

23. **Subitem 4(2)** provides that an existing beneficiary’s benefit for a post-commencement day is to be increased to what it would have been if the Schedule had not been made.

24. **Subitem 4(3)** provides that where there is only one new beneficiary the amount of their benefit is to be reduced by the increase that would apply under subitem 4(2) to an existing beneficiary or beneficiaries.

25. **Subitem 4(4)** provides that where there is more than one beneficiary the amount of the increase that would apply under subitem 4(2) is to be applied to reduce the benefit of each new beneficiary in proportion to his or her share of the total increase.

Example 4:

Angela, a PSS pensioner, dies before 1 January 2020. Angela is survived by her children Emily (16) and Daniel (19). She did not have a spouse at the time of her death.

- *Emily is enrolled in full-time education and is not ordinarily employed.*
- *Daniel is enrolled full-time at university and also works part-time.*

As an eligible child under the current scheme Rules, Emily is entitled to a pension benefit of an amount of 45% of the pension that Angela had been receiving. Daniel is not eligible for a pension benefit under the pre-1 January 2020 rules because he is employed.

As the Amending Deed removes the requirement for an eligible child to not be ordinarily engaged in employment from 1 January 2020, Daniel will be an eligible child from this date. Daniel submits an application for a pension benefit to CSC at a time after the Amending Deed is registered on FRL for payment from 1 January 2020.

Under the scheme Rules, where a PSS member dies leaving no spouse and two eligible children, the total reversionary pension benefit payable to or for the two children is the amount (collectively) of 80% of the *pension that had been payable to Angela. The effect of subitem 4(2) will be that Emily, as the 'existing beneficiary', will continue to receive a pension of 45%. Daniel, as the 'new beneficiary', would receive a residual pension amount of 35% (that is 5% less than the benefit that he would have received if the 80% benefit had been apportioned equally with Emily) – subitem 4(3).*

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Superannuation Amendment (PSS Trust Deed) Instrument 2019

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 Minister for Finance has amended the Public Sector Superannuation Scheme Trust Deed (PSS Trust Deed) by signed instrument called the *Superannuation Amendment (PSS Trust Deed) Instrument 2019* (the Amending Deed).

The purpose of the Amending Deed is to standardise and modernise provisions in the Rules set out in the PSS Trust Deed relating to eligibility for reversionary superannuation benefits payable to or in respect of children.

Human Rights Implications

This Legislative Instrument engages the following human rights:

- the right to social security as recognised in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 26 of the Convention on the Rights of the Child (CRC); and
- the best interests of the child under article 3 of the CRC.

The right to social security is contained in article 9 of the ICESCR and article 26 of the CRC. The right to social security will be engaged when changes are made to retirement pensions and superannuation contributions. The amending instrument promotes the right to social security by modernising the provisions relating to superannuation benefits payable to or in respect of children.

Under article 3 of the CRC, the best interests of the child must be taken into account in all actions of States Parties concerning children. The amending instrument promotes this obligation by having taken the rights of the child into account in modernising the provisions relating to superannuation benefits payable to or in respect of children.

Conclusion

This Legislative Instrument is compatible with human rights as it promotes the rights and best interests of children.

Senator the Hon Mathias Hubert Paul Cormann, Minister for Finance