

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Australian Securities and Investments Commission Act 2001
Corporations Act 2001
Financial Sector (Transfer and Restructure) Act 1999
Income Tax Assessment Act 1997
National Consumer Credit Protection Act 2009
Products Grants and Benefits Administration Act 2000
Superannuation Industry (Supervision) Act 1993
Taxation Administration Act 1953
Terrorism Insurance Act 2003

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019

Section 251 of the *Australian Securities and Investments Commission Act 2001*, section 1364 of the *Corporations Act 2001*, section 47 of the *Financial Sector (Transfer and Restructure) Act 1999*, section 909-1 of the *Income Tax Assessment Act 1997*, section 329 of the *National Consumer Credit Protection Act 2009*, section 60 of the *Product Grants and Benefits Administration Act 2000*, section 353 of the *Superannuation Industry (Supervision) Act 1993*, section 18 of the *Taxation Administration Act 1953*, and section 43 of the *Terrorism Insurance Act 2003* (the Authorising Acts) provide that the Governor-General may make regulations prescribing matters required or permitted by the Authorising Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Authorising Acts.

The purpose of the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019* (the Regulations) is to make minor and technical amendments to regulations in the Treasury portfolio, including tax laws, corporations laws, superannuation laws and credit laws. The amendments are part of the Government's commitment to the care and maintenance of Treasury portfolio legislation.

Minor and technical amendments are periodically made to Treasury legislation to remove anomalies, correct unintended outcomes and improve the quality of laws. The process was first supported by a recommendation of the 2008 Tax Design Review Panel, which considered ways to improve the quality of tax law changes. It has since been expanded to all Treasury legislation.

The Regulations amend various Treasury portfolio regulations to make minor and technical changes that correct typographical errors and unintended outcomes, increase thresholds and repeal inoperative provisions. These changes ensure that the amended regulations operate in the way intended.

Details of the Regulations are set out in [Attachment A](#).

The Regulations were released for public consultation from 6 September 2019 to 27 September 2019. Twenty-one submissions were received. Separate consultation was undertaken on certain amendments relating to superannuation between 27 February 2019 and 27 March 2019. Eleven submissions were received. Both sets of submissions were supportive of the amendments in the Regulations.

The Authorising Acts specify no conditions that need to be met before the power to make the Regulations may be exercised.

Part 2 of Schedule 1 to the Regulations commences on the later of the day after the Regulations are registered and the commencement of the related item in the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*. Part 2 of Schedule 5 (innovative income streams) commences immediately after the commencement of the transfer balance account amendments in Part 1 of Schedule 5. All of the other items in the Regulations commence on the day after the Regulations are registered.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

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

Details of the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019*

Section 1 – Name of Regulations

Section 1 of the Regulations sets out that the instrument is called the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2019*.

Section 2 – Commencement

Section 2 of the Regulations sets out the commencement information for the Regulations. Sections 1 to 4, Part 1 of Schedule 1, Schedules 2, 3 and 4, and Parts 1, 3, 4 and 5 of Schedule 5 commence the day after the instrument is registered on the Federal Register of Legislation.

Part 2 of Schedule 1, which repeals the *Product Grants and Benefits Administration Regulation 2000*, commences the day after the instrument is registered or immediately after the commencement of the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020*, whichever is later. This ensures that the repeal takes effect at the same time as related amendments to the *Product Grants and Benefits Administration Act 2000*.

Part 2 of Schedule 5 commences immediately after the commencement of the transfer balance account amendments in Part 1 of Schedule 5.

Section 3 - Authority

Section 3 of the Regulations states that the Regulations are made under the *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, the *Financial Sector (Transfer and Restructure) Act 1999*, the *Income Tax Assessment Act 1997*, the *National Consumer Credit Protection Act 2009*, the *Product Grants and Benefits Administration Act 2000*, the *Superannuation Industry (Supervision) Act 1993*, the *Taxation Administration Act 1953*, and the *Terrorism Insurance Act 2003*.

Section 4 - Schedules

Section 4 of the Regulations states that that items in the Schedules to the Regulations amend or repeal each instrument that is specified in the Schedules, and have effect according to their terms.

Schedule 1 — Amendments

Item 1 – Amendment to the *Australian Securities and Investment Commission Regulations 2001*

Item 1 repeals the note before Part 1 of the *Australian Securities and Investments Commission Regulations 2001* as it is no longer operative. The note referred to a commencement provision that has since been repealed and to numbering used to assist during the transition from the *Australian Securities and Investments Commission*

Regulations 1990 to the Australian Securities and Investments Commission Regulations 2001.

Items 2 to 6, and 22 to 24 – Amendments to the *Corporations Regulations 2001*

Item 2 repeals regulation 7.1.06B to the *Corporations Regulations 2001*. This regulation is redundant as it is identical to another regulation (regulation 7.1.05).

Items 3 and 6 correct the spelling of ‘de facto’ in two provisions in the *Corporations Regulations 2001*.

Items 4 and 5 amend the Corporations Regulations so that regulation 7.1.22 (Retail clients and wholesale clients: value of derivatives) does not apply in relation to a derivative that is a contract for difference. Item 4 amends regulation 7.1.22 to subject that regulation to new regulation 7.1.22AA. Item 5 inserts new regulation 7.1.22AA into the Corporations Regulations. This new regulation provides that paragraph 761G(7)(a) of the Corporations Act does not apply to a derivative that is a contract for difference provided by a person who carries on a business of issuing contracts for difference. The effect is that a consumer entering into such a transaction may be a retail client even if the value of the transaction equals or exceeds the threshold which defines the boundary between retail and wholesale investors in regulation 7.1.22 (currently \$500,000).

The \$500,000 threshold does not provide a meaningful boundary between retail investors and wholesale investors for contracts for difference. Wholesale investors are presumed to be more sophisticated investors. However, as contracts for difference are highly volatile, relatively small investments may produce a risk exposure that is greater than \$500,000.

To facilitate its operation, new regulation 7.1.22AA defines ‘contract for difference’. Under this definition, a derivative is a contract for difference if:

- the value of the derivative depends on the change in value of an underlying asset or other thing;
- the derivative is not able to be traded on a licensed market;
- the derivative either does not terminate on a fixed date or is of a kind that is typically terminated before any such date (noting that terminate includes the derivative being closed out);
- the holder has the right to terminate the derivative; and,
- on termination, the obligations of the parties are settled in cash or by set-off between the parties.

Items 22 to 24 add the phrases ‘Aboriginal and Torres Strait Islander Corporation’, ‘Indigenous Corporation’ and ‘Torres Strait Islander and Aboriginal Corporation’ to the list of phrases which require ministerial consent to be used in a company name. This ensures that those phrases are not misused. It also prevents companies from circumventing the existing restrictions on the use of the phrases ‘Aboriginal

Corporation’ and ‘Torres Strait Islander Corporation’ by using a name which includes both of those phrases.

Items 7 to 21 – Various regulations relating to self managed superannuation funds in the *Corporations Regulations 2001*

Items 7 to 21 remove the hyphen in ‘self-managed superannuation fund’ in subregulations 7.6.04(3), 7.8.12A(2), 7.8.14B(3), 7.9.01(1) and 7.9.04(1), subparagraph 7.9.16J(a)(i), regulation 7.9.19, subregulation 7.9.61AA(1) and paragraph 7.9.75(1)(e). This ensures consistency across the statute book and updates the regulations so that they accord with modern drafting conventions.

Item 25 – Amendment to the *Financial Sector (Transfer and Restructure) Regulations 2018*

Item 25 amends regulation 8 of the *Financial Sector (Transfer and Restructure) Regulations 2018* to increase the threshold for when a company is required to seek the Treasurer’s approval to hold ownership interests in a business. The threshold is increased from 15 to 20 per cent. This change is consistent with the changes to analogous thresholds in the *Financial Sector (Shareholdings) Act 1998* made by Schedule 1 to the *Treasury Laws Amendment (Financial Sector Regulation) Act 2018*.

Item 26 – Updating references to Defence determinations in the *Income Tax Assessment Regulations 1997*

Item 26 updates regulation 51-5.01, which specifies a list of defence allowances that are exempt from income tax.

Prior to these amendments, regulation 51-5.01 referred to allowances paid under *Defence Determination 2005/15*, Conditions of Service, made under the *Defence Act 1903*, as in force on 31 May 2005. This reference is now out of date.

These amendments update regulation 51-5.01 to refer to the determinations under which the relevant allowances are currently paid or were previously paid: the *DFRT Determination No. 11 of 2013*, *ADF Allowances*, made under section 58H of the *Defence Act 1903* (the 2013 Determination); the *Defence Determination 2016/19*, *Conditions of service*, made under section 58B of the *Defence Act 1903* (the 2016 Determination); and the *DFRT Determination 21 of 2006*, signed on 28 June 2007 and made under section 58H of the *Defence Act 1903* (2006 Determination).

The 2016 Determination is available on the Federal Register of Legislation. The 2006 Determination and the 2013 Determination are available at drft.gov.au/matters.

The amendments have effect in relation to all allowances paid under the relevant determination, even those paid before the commencement of the Regulations. This addresses any doubt about the treatment of those allowances. While this results in the amendments having retrospective effect, this does not disadvantage any taxpayer – its only effect is to exempt the allowances from income tax.

Items 27 and 28 – Amendments to the *National Consumer Credit Protection Regulations 2010*

Item 27 corrects an error in the table heading in regulation 86 of the *National Consumer Credit Protection Regulations 2010*. The table relates to ‘default notices’ but the heading mistakenly referred to ‘direct debit default notices’. Item 27 removes the reference to ‘direct debit’.

Item 28 removes the words ‘or comparison rate schedule’ from subsection 99(2) of the *National Consumer Credit Protection Regulations 2010*. Regulation 99 relates only to warnings about comparison rates in a credit advertisement. The reference to a comparison rate in a comparison rate schedule in subsection 99(2) was an error.

Items 29 to 31 – Amendments to the *Taxation Administration Regulations 2017*

Items 29 to 31 give the force of law to treaty obligations relating to the service of documents in Article 17 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention). The Convention was considered by the Joint Standing Committee in Report 127. The Committee supported the action being taken.

Items 29 and 30 allow the Taxation Commissioner (the Commissioner) to make arrangements with the proper officer of the Court to serve a document on a person at an address in a foreign country if the person is absent from Australia and does not have any agent in Australia on whom the document can be served. The Commissioner may also make arrangements to serve a document on a person at an address in a foreign country if the person cannot be found in Australia.

Item 31 gives the Commissioner the power to serve a document on a person at an overseas address if the person has not given the Commissioner an effective address for service, the person is absent from Australia and the person does not have an Australian agent who can take service. The service must be in accordance with an agreement between Australia and the foreign country that deals with the service of documents on tax matters.

Items 32 to 36 – Amendments to the *Terrorism Insurance Regulations 2003*

Items 32 to 36 amend the *Terrorism Insurance Regulations 2003* to ensure that contracts of insurance that cover two or more buildings are subject to the reinsurance cover provided by the *Terrorism Insurance Act 2003* where the total sum-insured value of the buildings is \$50 million or more. These changes apply irrespective of whether any of the buildings covered by the insurance contract are mainly residential buildings.

The *Terrorism Insurance Act 2003* provides insurance cover for losses that are attributable to acts of terrorism. It achieves this by overriding terrorism exclusions in ‘eligible insurance contracts’ for losses attributable to terrorism, and providing reinsurance to the issuers of such contracts.

The definition of ‘eligible insurance contract’ is contained in section 7 of the *Terrorism Insurance Act 2003*. That section allows exceptions to the definition to be prescribed in the Regulations. Schedule 1 to the *Terrorism Insurance Regulations 2003* (through section 5 of the Regulations) lists the types of insurance contracts that are excluded from the definition of ‘eligible insurance contract’. Paragraphs 2(a) and (b) of Schedule 1 refer to contracts of insurance that provide cover for destruction or damage to a ‘mainly residential building’, or the contents of such a building. The effect of these provisions is that such insurance contracts are excluded from the reinsurance cover provided by the *Terrorism Insurance Act 2003*.

The term ‘mainly residential building’ is defined in section 3 of the regulations as a building that is used for residential purposes and that has a sum-insured value of less than \$50 million. The definition does not apply to particular types of buildings (such as hotels or construction sites).

Paragraph 2(d) of Schedule 1 also refers to contracts of insurance that provide cover for loss or damage to personal property that is used for personal, domestic or household purposes, unless the personal property is part of the contents of a ‘residential part of a mixed-use or high-value building’. The term ‘mixed-use or high-value building’ is defined as the residential part of a building that is not mainly a residential building. The effect of paragraph 2(d) is that an insurance contract in respect of personal property in a mainly residential building is excluded from the reinsurance cover provided by the *Terrorism Insurance Act 2003*.

An insurance contract that provides cover for multiple buildings (for example, in respect of a residential strata scheme) and has a sum-insured value of \$50 million or more may be inadvertently excluded from the definition of eligible insurance contract if one or more of the buildings covered by the contract are mainly residential properties. This outcome potentially arises because the criteria for excluding contracts in respect of mainly residential buildings in paragraphs 2(a) and (b) of Schedule 1 may be satisfied if the contract provides cover for a building that is mainly a residential building. A similar outcome may arise in respect of paragraph 2(d) of Schedule 1 through the reliance on the definition of ‘mainly residential building’ in the definition of ‘residential part of a mixed-use or high value building’.

These outcomes are not intended for contracts of insurance that provide total insurance coverage of \$50 million or more for the destruction or damage to two or more buildings. In such cases, the insurance coverage provided for those buildings are intended to be treated in the same way as buildings that are insured for \$50 million or more (which are subject to the reinsurance cover provided by the *Terrorism Insurance Act 2003*).

The Regulations address these issues by limiting the existing exceptions to the definition of ‘eligible insurance contract’ that are provided in paragraphs 2(a), (b) and (d) of Schedule 1. As a result, those exceptions are now explicitly prevented from applying to a ‘high-value multiple building contract’. The term ‘high value multiple building contract’ is defined as a contract of insurance that provides cover (whether restricted or not) for destruction or damage to two or more buildings if the total sum-insured value of the buildings is \$50 million or more.

The limits to the existing exceptions apply irrespective of whether the contract is also a contract that provides insurance cover in respect of the destruction or damage to a mainly residential building, loss or damage to the contents of a mainly residential building, or loss or damage to personal property that is not part of the contents of a residential part of a mixed-use or high value building.

As the limits to the exceptions are applied at the overall contract level, they do not apply to separate insurance contracts for buildings, or their contents, merely because those buildings are also covered by a high-value multiple building contract. This prevents, for example, an individual contract for insurance over the contents of an apartment building from being subject to the reinsurance cover provided by the *Terrorism Insurance Act 2003* merely because the apartment is separately covered by a high-value multiple building contract.

However, contents or personal property insurance can be covered by the definition of high-value multiple contract if the insurance is provided under the same contract that provides cover for the destruction or damage to buildings that have a total sum-insured value of \$50 million or more.

Item 33 provides that the amendments apply in relation to contracts of insurance made before, at or after the time those items commence. Although the amendments have some retrospective application in respect of existing insurance contracts, this outcome is wholly beneficial to persons affected by the amendments. This is on the basis that the amendments ensure that any exclusions for acts of terrorism contained in affected insurance contracts are overridden, and the providers of such contracts are provided with reinsurance cover under the *Terrorism Insurance Act 2003*.

Item 37 – Repeal of the *Product Grants and Benefits Administration Regulations 2000*

Item 37 effects red-tape reduction by repealing the *Product Grants and Benefits Administration Regulation 2000*. That Regulation contains only one provision and that provision is being moved into the *Product and Benefits Administration Act 2000* by amendments proposed in the Treasury Laws Amendment (2019 Measures No. 3) Bill 2019.

Item 37 commences from the later of the day when the Regulation is registered and the day when the relevant amending item in the *Treasury Laws Amendment (2019 Measures No. 3) Act 2020* commences.

Schedule 2 – Exempt special purpose funding entities

Schedule 2 corrects the misdescribed amendments in the *National Consumer Credit Protection Amendment Regulations 2010 (No. 3)*.

This regulation sought to amend regulations 20 to 24 of the *National Consumer Credit Protection Regulations 2010* to extend many of the exemptions from holding an Australian Credit Licence (credit licence) to certain persons engaging with exempt special purpose funding entities.

The amendments in the *National Consumer Credit Protection Amendment Regulations 2010 (No. 3)* could not be incorporated as there were spelling errors in the text that was to be omitted and substituted. For example, a proposed amendment to paragraph 20(11)(b) sought to replace ‘licensee or registered person’ with ‘licensee, registered person or exempt special purpose funding entity’. However, the words in paragraph 20(11)(b) were ‘licensee and registered person’. As paragraph 20(11)(b) did not contain the words that were to be replaced (‘licensee and registered person’), the amendment could not be made.

Items 1 to 11 correct the errors in the misdescribed amendments in the *National Consumer Credit Protection Amendment Regulations 2010 (No. 3)* so that they can be incorporated.

Once made correctly, the amendments exempt the following persons from holding a credit licence:

- certain organisations that provide services to members and allow their members to apply for, or obtain a benefit under, a particular credit contract or consumer lease offered by an exempt special purpose funding entity (where the other conditions in subregulation 20(11) are satisfied);
- certain debt collectors that are authorised to engage in the activity by an exempt special purpose funding (where the other conditions in subregulation 21(3) are satisfied);
- certain persons disseminating a document approved by an exempt special purpose funding entity (where the other conditions in subregulation 24(6) are satisfied);
- certain persons disseminating a business name, logo or trade mark approved by an exempt special purpose funding entity (where the other conditions in subregulation 24(7) are satisfied); and
- certain persons giving another person information about the cost of a credit contract or a consumer lease offer by an exempt special purpose funding entity (where the other conditions in subregulation 24(8) are satisfied).

Schedule 3 – Credit card contracts

Schedule 3 corrects misdescribed amendments relating to credit card contracts in the *National Consumer Credit Protection Amendment Regulations 2011 (No. 6)*. It also makes other minor amendments to improve the readability of the provisions and ensure that they are consistent with modern drafting conventions.

Item 1 – Regulation 28LB

The item adds the words ‘for standard home loans’ at the end of the heading to regulation 28LB to enhance clarity.

Item 2 –Regulations 28LBA to 28LBJ

The *National Consumer Credit Protection Amendment Regulations 2011 (No. 6)* sought to insert various provisions which set out the requirements for Key Facts Sheet for credit card contracts, including:

- the content requirements for Key Fact Sheets (misdescribed regulation 28LBA);
- the requirement for the Key Fact Sheet to be hyperlinked in an application form (misdescribed regulation 28LBB);
- the circumstances in which application forms may include an out-of-date Key Fact Sheet (misdescribed regulation 28LBC); and
- the circumstances in which up-to-date information can be provided otherwise than in a Key Fact Sheet (misdescribed regulation 28LBD).

The *National Consumer Credit Protection Amendment Regulations 2011 (No. 6)* also sought to include various regulations relating to credit limits and fees and charges, namely:

- that a communication which includes a proposed credit limit higher than the consumer's existing limit and suggests that the higher limit may benefit the customer is a 'credit limit increase invitation' and governed by section 133BE of the Credit Act (misdescribed regulation 28LBE);
- a requirement for a licensee to notify a consumer if the consumer exceeds their credit limit (misdescribed regulation 28LBF);
- mandatory requirements for licensees that invite a consumer to consent to fees, charges or a higher interest rate (misdescribed regulation 28LBG);
- a requirement for a licensee to keep a record of when the consumer consented or withdrew their consent to fees, charges or a higher interest rate (misdescribed regulation 28LBH);
- the information that must be provided when a consumer enters into an agreement that allows the licensee to apply certain credit card payments against a particular amount (misdescribed regulation 28LBI).

These amendments never had effect because they were to be inserted after a provision that did not exist at the time.

Item 2 corrects this by inserting provisions 28LBA to 28LBI after regulation 28LB of the *National Consumer Credit Protection Regulations 2010*.

Some of the provisions have been redrafted from the form proposed in the *National Consumer Credit Protection Amendment Regulations 2011 (No. 6)*. These minor changes are designed to increase clarity and ensure that the provisions are consistent with current drafting conventions.

Item 3 – Schedule 5 to the *National Consumer Credit Protection Regulations 2010*

Item 3 adds the words ‘for standard home loans’ at the end of the heading for Schedule 5. This is designed to enhance clarity by differentiating the content in Schedule 5 (Key Facts Sheets for standard home loans) from the content in Schedule 6 (Key Facts Sheets for credit card contracts).

Item 4 – Schedule 6 to the *National Consumer Credit Protection Regulations 2010*

Item 4 amends the note to Schedule 6 so that it instead refers to new provision 28LBA.

Schedule 4 – Small amount credit contracts

Schedule 4 corrects the section numbering in the provisions relating to small amount credit contracts in Part 3.5 of the *National Consumer Credit Protection Regulations 2010*.

Items 1 to 8 and 12 to 16 – Regulations 28LCA to 28LCF

The *National Consumer Credit Protection Amendment Regulation 2012 (No. 4)* inserted regulations 28XXA to 28XXF between regulations 28LC and 28LD. This numbering was inconsistent with the numbering of the surrounding regulations and made it difficult to locate regulations 28XXA to 28XXF.

Items 1 to 8 and 12 to 15 renumber regulations 28LCA to 28LCF and amend any cross-references in the *National Consumer Credit Protection Regulations 2010* or the notes so that they refer to the renumbered sections.

Item 16 amends a reference in the standard form in Schedule 10 to the *National Consumer Credit Protection Regulations 2010* so that it refers to the new regulation number for regulation 28XCCC.

Items 9 to 11 – Regulation 113

Item 11 inserts a savings provision which removes the need for Schedule 10 forms to be amended so that they refer to the new regulation number for regulation 28XCCC. It achieves this by deeming forms in the required form before the commencement of the Regulations to be in the required form after commencement. This new savings provision is inserted into Part 7-11 of the Regulations which contains other savings provisions.

Item 9 generalise the heading to Part 7-11 so that it continues to correctly describe the content of the Part after the addition of the new savings provision. Item 10 divides the Part into two Divisions – one Division for the existing savings provision relating to reliance on State and Territory Consumer Credit Codes and one Division for the new savings provisions relating to Schedule 10 forms.

Schedule 5 - Miscellaneous superannuation amendments

Part 1—Reductions in value of lifetime benefits and annuities

Item 1 of Schedule 5 to the Regulations amends the *Income Tax Assessment Regulations 1997* (ITAR 1997) to prescribe the additional circumstances in which a transfer balance debit arises in an individual's transfer balance account and the amount of the debit.

This change addresses the fact that certain reductions in the value of defined benefit lifetime pensions and annuities are not covered by the transfer balance debit provisions in subsection 294-80(1) of the ITAA 1997 and are therefore not taken into account in working out an individual's transfer balance.

Generally, reductions in value of a superannuation income stream that are not attributable to losses or regular pension payments are attributable to a commutation or partial commutation of the income stream. Such commutations give rise to a transfer balance debit under item 1 of the table in subsection 294-80(1) of the ITAA 1997.

However, the value of certain defined benefit superannuation income streams can be reduced in circumstances that are not captured by the debits currently provided for in subsection 294-80(1). This can arise under the rules of the fund or scheme where the calculation of the superannuation income stream benefit is varied due to a change in the circumstances of the individual recipient, rather than from a commutation of the defined benefit income stream. These reductions occur mainly in respect of public sector superannuation schemes.

Examples of where these reductions can occur include:

- a reversionary defined benefit pension paid to a surviving spouse or a beneficiary. In some cases, the first payment is the full amount of the payment that was made to the deceased, whereas the second and all subsequent payments are a proportion of the full entitlement. As a result, the annualised payment is based on an inflated figure;
- a reversionary defined benefit pension paid to a surviving spouse that is calculated by reference to the deceased's dependent children. In such cases the surviving spouse's entitlement can be reduced as the children cease being dependent (generally at 18 or 25 years depending on their circumstances).

For each of these examples, the fund or scheme rules will determine whether the re-classification simply involves:

- a recalculation of payments (which would not provide a transfer balance debit);
- a partial commutation of the superannuation interest (which would provide a transfer balance debit); or
- the cessation of the original superannuation interest (which would provide a transfer balance debit) and the commencement of a new superannuation income stream (which would give rise to a credit that will be lower than the debit).

Item 1 amends the ITAR 1997 to insert regulation 294-80.01 to ensure a consistent treatment between reductions in the value of lifetime defined benefit income streams. The amendment achieves this by providing individuals with a transfer balance debit where:

- the individual has a superannuation income stream for which they are a retirement phase recipient;
- the superannuation income stream is a lifetime pension or annuity, or a similar superannuation income stream prescribed under regulation 204-130.01 of the ITAR 1997; and
- the individual was entitled to receive a superannuation income stream benefit that is subsequently reduced where the reduction is not attributable to either:
 - circumstances that give rise to another transfer balance debit (either under items 1 to 7 of the table in subsection 294-80(1) of the ITAA 1997 or another regulation made under item 8 in that table); or
 - a Consumer Price Index adjustment.

This amendment ensures that the individual's transfer balance account reflects the decrease in the value of the individual's annual entitlement to superannuation income stream benefits. The amount of the debit arising in the individual's transfer balance account is the special value of the superannuation interest supporting the superannuation income stream just before the earlier time, less the special value of the superannuation interest supporting the superannuation income stream just before the later time. The special value of a lifetime pension or annuity at a particular time is the member's annual entitlement to superannuation income stream benefits multiplied by 16 (subsection 294-135(2) of the ITAA 1997).

Example 1.1: Debit for a reduction in payments from a reversionary defined benefit pension

On 1 July 2017, Anna was receiving fortnightly pension payments equivalent to an annual entitlement of \$100,000. In August 2019, Anna passes away and her husband, Jorge, begins receiving a reversionary defined benefit pension. The rules of the fund provide for the first payment to the reversionary beneficiary (Jorge) to equal the previous entitlement from the original recipient, however all subsequent payments are reduced to $\frac{3}{4}$ of that previous entitlement.

The rules of the fund make it clear that it is the same pension payable to the reversionary beneficiary and that it is merely the amount of the periodic payments that have changed.

A credit arises in Jorge's transfer balance account of \$1.6 million (being the special value of the defined benefit pension when he receives it). This is based on the amount of the first superannuation income stream benefit that Jorge is entitled to receive.

The next fortnightly payment that Jorge is paid is reduced, and is equivalent to an annual entitlement of \$75,000. This annual entitlement equates to a special value of \$1.2 million.

A debit arises in Jorge's transfer balance account and is calculated as the difference between the special value based on the earlier annual entitlement and the special value based on the later annual entitlement (i.e. \$1.6 million less \$1.2 million = \$400,000).

Part 2 - Innovative income streams

The product standards for deferred superannuation income streams were enacted by Schedule 1 to the *Treasury Laws Amendment (2017 Measures No. 1) Regulations 2017*. Income streams that do not immediately pay a superannuation income stream benefit can still be a superannuation income stream that is in the retirement phase if an individual to whom superannuation income stream benefits will be payable has met a specified condition of release (see subsection 307-80(2)). This means that a provider of such a product is able to claim an earnings tax exemption prior to the time that amounts are paid to the member.

However, there are currently two issues that arise in respect of the way that deferred superannuation income streams are accounted for under the transfer balance cap.

The first issue arises because transfer balance credits are generally based on the value of a superannuation income stream at the time that it enters the retirement phase (see the table in subsection 294-25(1) of the ITAA 1997).

This means that any subsequent instalment payments that are made for a deferred income stream will not give rise to a transfer balance credit. As these instalments represent a transfer that increases the value of an individual's retirement phase interest, a failure to receive a credit for the transfer means that their transfer balance account is understated. This issue does not arise for other superannuation income stream products as the ability to make instalment payments after a superannuation income stream has commenced is unique to deferred superannuation income streams.

Item 2 of Part 2 of Schedule 5 to the Regulations amends the ITAR 1997 to correct this anomalous outcome. It achieves this through new regulation 294-25.01, which causes a transfer balance credit to arise in an individual's transfer balance account where an amount of consideration is paid for the interest for a 'deferred superannuation income stream' after the time that the income stream enters the retirement phase. The amount of the credit is the amount of the consideration and the credit arises at the time the consideration is paid.

The focus on amounts of consideration paid for the interest is broadly consistent with the way the special valuation rule for deferred superannuation income streams takes into account instalment payments under subsection 307-205.02C(1) of the ITAR 1997.

The second issue that arises is that the special valuation rule for deferred income streams overvalues those income streams when calculating a transfer balance debit under items 5 and 6 of the table in subsection 294-80(1) of the ITAA 1997.

Items 5 and 6 of the table in subsection 294-80(1) of the ITAA 1997 provide an individual with a debit for the value of the superannuation interest that supports an income stream that stops being in the retirement phase. This can occur where the provider of the income stream fails to comply with a commutation authority, or where the income stream does not conform with the pension or annuity standards that are applicable to it.

The valuation rule in regulation 307-205.02C of the ITAR 1997 takes the greater of the sum of indexed consideration paid for the superannuation interest and the amount that would become payable if the individual voluntarily ceased to hold the superannuation interest. Because of this, the transfer balance debit that would arise under items 5 or 6 of the table in subsection 294-80(1) for a deferred superannuation income stream would always be at least equal to the amount of the indexed consideration paid for the interest for the income stream.

This outcome is inappropriate because the transfer balance debit would not reflect the value of the superannuation interest supporting the income stream at the time when superannuation income stream benefits have commenced to be paid (thereby reducing the value of the superannuation interest). Further, it would not reflect the limitations on amounts that could be commuted applying the capital access schedule.

In such circumstances, applying the higher value of the indexed consideration paid would neutralise the transfer balance credit that originally arose for the deferred superannuation income stream, without recognising that the individual is not entitled to be paid that full amount.

Item 2 of Part 2 of Schedule 5 to the Regulations amends the ITAR 1997 to correct this anomalous outcome by including two provisions in the ITAR 1997. The first provision, regulation 294-80.02, introduces a new rule for working out the transfer balance account debit where a deferred income stream ceases to be in the retirement stage. The second provision, regulation 294-80.03 provides that items 5 and 6 of the table set out in subsection 294-80(1) of the ITAA 1997 do not apply to deferred superannuation income streams that are covered by this new rule.

As a result of these two provisions, the value of the transfer balance account debit that arises when a deferred superannuation income stream ceases to be in the retirement phase is simply the amount that the individual would be entitled to if they voluntarily ceased to hold the interest. The indexed consideration paid for the interest is no longer relevant.

Part 3—Successor fund transfers

A successor fund transfer occurs where a fund (the original fund), as part of a superannuation fund merger or acquisition, transfers its members' interests to a successor fund. A critical feature of a successor fund transfer is that, unlike an ordinary rollover or transfer, it is normally undertaken without the consent of the member.

In a circumstance where an original fund is paying a capped defined benefit income stream as set out in the table in subsection 294-130(1) of ITAA 1997 to an individual, the successor fund transfer will result in the original fund ceasing the superannuation income stream and the successor fund commencing to pay an equivalent superannuation income stream to the individual.

Under paragraph 294-130(1)(b) of the ITAA 1997, a superannuation income stream covered by items 2 to 7 of the table is not a capped defined benefit income stream where the income stream commences to be in retirement phase on or after 1 July 2017. Accordingly, where the successor fund transfer occurs on or after 1 July 2017, the superannuation income stream paid to the member by the successor fund will not be a capped defined benefit income stream for the purposes of the transfer balance cap. This in turn has the potential to give rise to adverse consequences under the transfer balance cap.

- If the capped defined benefit income stream is the only superannuation income stream the member has that is in the retirement phase, and its special value exceeded their transfer balance cap just before the successor fund transfer, the member will not have an excess transfer balance before the transfer (see section 294-140 of the ITAA 1997). However, as the new superannuation income stream paid by the successor fund is not a capped defined benefit income stream, the member may (depending on the value of the superannuation interest supporting the income stream) have an excess transfer balance immediately after the transfer.
- Due to commutation restrictions on such superannuation income streams if the member finds themselves in excess of their transfer balance cap, they will not be able to reduce their transfer balance under their transfer balance cap by commuting part of their new income stream.

These outcomes are inconsistent with the policy intent.

Items 3 and 4 of Part 5 of Schedule 5 to the Regulations amend regulation 294-130.01 of the ITAR 1997 to prescribe a superannuation income stream to be a capped defined benefit income stream under subsection 294-130(2) of the ITAA 1997 where:

- it would be a capped defined benefit income stream if it had started on or before 1 July 2017; and
- it arises as a direct result of the payment of an involuntary roll-over superannuation fund to a successor fund.

The special value of a lifetime annuity started under a successor fund transfer is the individual's annual entitlement to superannuation income stream benefits multiplied by 16. This is achieved under current regulation 294-135.01 of the ITAR 1997.

Items 5 and 6 of Part 3 to the Regulations amend regulation 294-135.01 of the ITAR 1997 to prescribe special values for other superannuation income streams—life expectancy or market linked pensions or annuities—created under a successor fund transfer. The special value is the individual's annual entitlement to superannuation income stream benefits multiplied by the remaining term of the income stream.

Items 7 and 8 of Part 3 amend regulation 294-145.01 of the ITAR 1997 to prescribe rules for working out the debit value of other superannuation income streams—life expectancy or market linked pensions or annuities— created as a result of a successor fund transfer. The debit value of these superannuation interests is the debit value of the interest under subsections 294-145.01(6) and (6A) of the ITAA 1997.

Part 4—Life expectancy periods in a leap year

Regulation 1.06A of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) sets out the standards for innovative superannuation income streams. These income streams are required to meet certain standards including a cap on the maximum commutation amount of a benefit.

The maximum commutation amount for the income stream is worked out with reference to the beneficiary's life expectancy calculated as the remaining years of the beneficiary's life expectancy multiplied by 365 days.

However, converting the remaining years of the beneficiary's life expectancy to days by multiplying by 365 does not deliver the intended outcome for innovative superannuation income stream products that rely on an anniversary date, such as life annuities.

For example, if an investment was made in a life annuity on 15 January 2018, the life annuity's anniversary date (which is also the annuity's payment date) will always be 15 January, regardless of leap years. As such, the life annuity's anniversary date is not specifically a multiple of 365 days after the investment date, but the calendar anniversary of the investment date.

If a beneficiary has a life expectancy period that includes a leap year, the beneficiary's annuity anniversary date and the end life expectancy period date will be different. The annuity anniversary date will always be a later date than the life expectancy period date. There is a mismatch of the actual number of days of the life expectancy period and the annuity anniversary date.

Item 9 amends the definition of life expectancy in subregulation 1.03(1) of the SIS Regulations to correct this mismatch. The amended definition ensures that the life expectancy period accounts for leap years by converting the years to the actual number of days remaining to the end of the life expectancy period.

Part 5—Application provisions

Item 10 provides that the amendments in relation to:

- reductions in the value of defined benefit pensions and annuities; and
- successor fund transfers,

apply to reductions in value and successor fund transfers that occur on or after 1 July 2017. While these amendments have retrospective effect, they are beneficial for affected taxpayers. The effect of the amendments is to prevent affected individuals from potentially having a perpetual excess transfer balance where a capped defined benefit income stream that benefits from grandfathering arrangements is the subject of a successor fund transfer. Instead, the amendments ensure that such defined benefit income streams are appropriately valued and continue to benefit from the grandfathering.

Item 10 also provides that the amendments in relation to innovative income streams apply to credits and debits arising on or after the day the amendments commence (the day after they are registered).

Item 11 provides that the amendments in relation to life expectancy period and leap years apply to working out an individual's maximum commutation amount on or after 1 July 2017. While these amendments have retrospective effect, they are wholly beneficial to affected taxpayers – they increase the maximum commutation amount for an income stream.

Statement of Compatibility with Human Rights

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

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 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 Legislative Instrument makes minor and technical amendments to regulations in the Treasury portfolio, including tax laws, corporations laws, superannuation laws and competition and consumer laws. The amendments are part of the Government's commitment for the care and maintenance of Treasury portfolio legislation.

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.