

EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance

Superannuation Act 1990

Superannuation Amendment (PSS Trust Deed) Instrument 2021 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 and Rules by signed instrument. That instrument is called the *Superannuation Amendment (PSS Trust Deed) Instrument 2021*. The instrument is referred to as the Amending Deed in this Explanatory Statement.

The main purpose of the Amending Deed is to make consequential amendments to the Rules to support the implementation of superannuation splitting for separating de facto couples in Western Australia, as provided for by the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*.

The Amending Deed also makes amendments to a provision dealing with the Finance Minister's ability to delegate his/her powers under the Trust Deed, to address a matter previously raised by the Senate Standing Committee on Regulations and Ordinances.

Details of the instrument are at [Attachment A](#).

CSC Approval

Section 5 of the 1990 Act requires CSC to consent to 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 and Rules 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 was consulted (OBPR Reference Number 23981). A Regulation Impact Statement was not prepared, as the instrument will have no more than minor impacts on businesses, individuals or community organisations.

Commencement

The commencement of the amendments in the Amending Deed, except for those in Schedule 2, come into effect on the day after registration of the Amending Deed on the Federal Register of Legislation (FRL).

The amendments in Schedule 2 are dependent on the commencement of the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*, which is to be fixed by Proclamation. Therefore, Schedule 2 commences on the later of immediately after commencement of that enactment and the day after the Amending Deed is registered on the FRL. Schedule 2 does not commence at all if the enactment on which it depends does not commence.

Statement of Compatibility with Human Rights

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

DETAILS OF THE AMENDING DEED

Name

1. **Section 1** provides that the name of the instrument is the *Superannuation Amendment (PSS Trust Deed) Instrument 2021*.

Commencement

2. **Section 2** sets out the commencement provision for provisions in 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 commence on the day after registration of the Amending Deed on FRL.
 - Item 2 of the table provides that Schedule 1 commences on the day after registration of the Amending Deed on FRL.
 - Item 3 of the table provides that Schedule 2 commences on the later of immediately after the commencement of the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*, and the day after registration of the Amending Deed on the FRL. Schedule 2 does not commence at all if the former event does not occur.
3. The note at the end of the table clarifies that the table relates only to provisions of the instrument as originally made, and will not be amended to deal with any later amendments of the instrument. 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 1990 Act.

Schedules

5. **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—Amendment of the PSS Trust Deed

6. Schedule 1 makes amendments to the main body of the PSS Trust Deed.
7. Clause 13 of the Trust Deed deals with delegations by the Finance Minister. The *Superannuation Amendment (PSS Trust Deed) Instrument 2018* made amendments to paragraph 13.1(a) to enable the Finance Minister to delegate all or any of his/her powers under the Trust Deed, other than the power of delegation itself, to a member of the staff of CSC. In response to concerns raised by the then Senate Standing Committee on Regulations and Ordinances, in Delegated Legislation Monitor 8 of 2018, about the scope of the delegation power provided by these amendments, the Finance Minister undertook to further amend the provision at the next available opportunity to limit delegation of the relevant powers to CSC staff in senior positions appropriate to the power delegated. Consistent with this undertaking, **Item 1** of Schedule 1 replaces paragraph 13.1(a) to limit delegation of the Finance Minister's relevant powers under the Trust Deed to the chief executive (however described) of CSC. New

paragraph 13.1(a) maintains the ability for the Finance Minister to delegate his/her same powers under the Trust Deed to CSC.

Schedule 2—Amendment of the PSS Rules

8. Schedule 2 makes consequential amendments to the PSS Rules contained in the Schedule to the PSS Trust Deed, in support of the superannuation splitting regime for separating de facto couples in Western Australia provided for by the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*. The *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020* will implement the regime by amending the *Family Law Act 1975* (FLA) to insert a new Part VIIC that largely replicates the existing superannuation splitting provisions and definitions that apply to married and de facto couples in other states and territories, which are located in Part VIIB of the FLA.

9. The consequential amendments made by Schedule 2 update definitions in the Rules to take account of new Part VIIC of the FLA.

10. **Item 1** amends Rule 1.2.1, which defines words and phrases used throughout the Rules that have a special meaning. In particular, the item amends the definitions of ‘member spouse’ and ‘non-member spouse’ in Rule 1.2.1 to refer to new Part VIIC as well as existing Part VIIB of the FLA. The effect is that the meanings given to the terms ‘member spouse’ and ‘non-member spouse’ in new Part VIIC will need to be taken into consideration when the terms are used throughout the Rules, if a superannuation interest relates to a Western Australian de facto relationship.

11. **Items 2 to 8** make amendments concerning definitions of words and phrases in Part 16 of the Rules, which deals specifically with family law superannuation splitting.

12. **Item 2** replaces Rule 16.1.1 with a new rule and note that refers to new Part VIIC of the FLA as well as existing Part VIIB. New Rule 16.1.1 makes it clear that words and phrases used in Part 16 that are defined in new Part VIIC or existing Part VIIB of the FLA have the same meaning as in the relevant Part of the FLA, unless excluded by the context. Some of these words and phrases are set out, with other words and phrases, in Rule 16.1.2 for convenience. The note at the end of new Rule 16.1.1 clarifies that definitions of terms adopted in Part 16 of the Rules will be the same as those used in either Part VIIB or VIIC, depending on the relationship to which the split applies.

13. **Items 3 and 4** amend the definitions of ‘base amount’ and ‘family law value’ respectively in Rule 16.1.2, both of which are relevant to superannuation splitting orders made by a court. The amendments update the relevant definitions for new Part VIIC of the FLA by including cross-references to relevant provisions contained in that Part. Specifically, **item 3** cross-references new subsection 90YY(5) while **item 4** cross-references new paragraph 90YY(2)(a), in addition to the existing cross-references to equivalent provisions in existing Part VIIB of the FLA.

14. **Item 5** replaces the note at the end of the definition of ‘family law value’ in Rule 16.1.2 with an updated note that cross-references subsection 90YY(1) in new Part VIIC of the FLA, in addition to the equivalent reference in existing Part VIIB of the FLA.

15. **Item 6** amends the definitions of ‘member spouse’, ‘non-member spouse’, ‘operative time’, ‘payment split’, ‘splitting order’ and ‘superannuation interest’ in Rule 16.1.2 to refer to new Part VIIC, in addition to existing Part VIIB of the FLA. **Item 7** makes similar amendments to the definition of ‘splitting agreement’ in Rule 16.1.2.

16. **Item 8** amends the definition of ‘splitting percentage’ in Rule 16.1.2 to cross-reference relevant provisions in new Part VIIC of the FLA, being subparagraph

90YN(1)(c)(iii) in relation to a splitting agreement and subparagraph 90YY(1)(b)(i) in relation to a splitting order, in addition to the existing cross-references to equivalent provisions in existing Part VIIIB of the FLA.

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 2021

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 PSS Trust Deed and Rules by signed instrument called the *Superannuation Amendment (PSS Trust Deed) Instrument 2021* (the Amending Deed).

The main purpose of the Amending Deed is to make consequential amendments to the Rules to support the implementation of superannuation splitting for separating de facto couples in Western Australia, provided for by the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*. The Amending Deed also amends a provision dealing with the Finance Minister's ability to delegate his/her powers under the Trust Deed.

Human rights implications

The Amending Deed engages the:

- rights of equality and non-discrimination in Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR);
- obligation to ensure the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property in Article 16 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); and
- right to freedom from interference with the family and protection of the family in Articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 10 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The Amending Deed will assist in addressing the inequitable treatment of Western Australia de facto couples by supporting their ability to split superannuation, in the same way as de facto couples in other jurisdictions and married couples. This promotes the equal protection of these couples before the law (relevant to Article 26 of the ICCPR).

The Amending Deed will assist in promoting the equality of spouses with respect to the ownership of property following the end of a relationship (relevant to Article 16 of CEDAW), as the current inability of Western Australia de facto couples to split their superannuation disproportionately affects women who, on average, accumulate less superannuation.

The Amending Deed will assist in promoting the right to freedom from interference with the family and protection of the family by supporting a proper and effective system for superannuation splitting agreements for Western Australia de facto couples to take responsibility for their own affairs (relevant to Articles 17 and 23 of the ICCPR and Article 10 of the ICESCR).

Conclusion

This Legislative Instrument is compatible with human rights.

Senator the Hon Simon Birmingham, Minister for Finance