

EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance

Superannuation Act 2005

Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Amendment (Judges) Determination 2021 made under subsection 18(10) of the Superannuation Act 2005

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

Subsection 18(10) of the 2005 Act provides that the Minister may, by legislative instrument, determine a class of persons that are excluded from contributory membership of PSSAP as an ordinary employer-sponsored member under subsection 18(7) or 18(8A) of the 2005 Act. The *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Determination 2020* (the Principal Determination) is such an instrument made under subsection 18(10).

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.

The Minister for Finance has made an amending determination under subsection 18(10) of the 2005 Act to amend the Principal Determination, being the *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Amendment (Judges) Determination 2021* (the Amending Determination).

Amending Determination

Section 18 of the 2005 Act sets out the situations in which a person who is a member of PSSAP falls within the category of ‘ordinary employer-sponsored member’. Members within this category are permitted to make eligible superannuation contributions to the scheme either by themselves or by another person or entity on their behalf in accordance with the scheme rules. The five situations in which a person is an ordinary employer-sponsored member of PSSAP are provided by subsections 18(2), (3), (5), (7) and (8A) of the 2005 Act.

Under the Principal Determination, Judges of the Federal Circuit Court are excluded from being an ordinary employer-sponsored member of PSSAP under subsections 18(7) and 18(8A) of the 2005 Act for the duration of their tenure.

On 1 September 2021, the Federal Circuit Court and the Family Court of Australia will be brought together under the *Federal Circuit and Family Court of Australia Act 2021* into a combined administrative structure to be known as the Federal Circuit and Family Court of Australia (FCFC). The FCFC will comprise two divisions:

- the Federal Circuit and Family Court of Australia (Division 1) – a continuation of the Family Court; and
- the Federal Circuit and Family Court of Australia (Division 2) (‘FCFC (Division 2)’) – a continuation of the Federal Circuit Court.

The Amending Determination updates references to Judges of the Federal Circuit Court in the Principal Determination with references to Judges of the FCFC (Division 2) to ensure that the exclusion in respect of these officers continues under the new arrangements.

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

The Minister for Finance has also made an instrument under subsection 13(2)(h) of the 2005 Act to exclude FCFC (Division 2) Judges from eligibility to be an ordinary employer-sponsored member under subsections 18(2), (3) and (5) of the 2005 Act. That instrument, the *Superannuation (PSSAP) Membership Eligibility (Exclusion) Amendment (Judges) Declaration 2021* amends the *Superannuation (PSSAP) Membership Eligibility (Exclusion) Declaration 2005*.

Legislation Act 2003

The Amending Determination is a legislative instrument. Although regulations made for the purpose of paragraph 44(2)(b) of the *Legislation Act 2003* exempt superannuation instruments from disallowance, the Amending Determination is subject to disallowance in accordance with subsection 18(11) of the 2005 Act.

Consultation

The Office of Best Practice Regulation (OBPR) was consulted (OBPR ID 44179). A Regulation Impact Statement was not prepared as the instrument is machinery in nature.

Commencement

Sections 1 to 4 and anything else in the Amending Determination not elsewhere covered by the table set out in section 2 of that instrument commences the day after that instrument is registered. Schedule 1 of the Amending Determination commences immediately after the commencement of section 2 of the *Federal Circuit and Family Court of Australia Act 2021*.

Statement of Compatibility with Human Rights

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

DETAILS OF THE AMENDING DETERMINATION

Name

1. **Section 1** provides that the name of the instrument is the *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Amendment (Judges) Determination 2021*.

Commencement

2. **Section 2** sets out the commencement provision for the amendments contained in the Amending Determination. Item 1 of the table set out in subsection 2(1) provides that sections 1 to 4 and anything in the instrument not elsewhere covered by the table commences the day after the Amending Determination is registered on the Federal Register of Legislation. Item 2 of the table set out in subsection 2(1) provides that Schedule 1 of the Amending Determination commences immediately after the commencement of section 2 of the *Federal Circuit and Family Court of Australia Act 2021*.

3. The note under the table indicates that the table relates only to the provision of the Amending Determination as originally made and that it will not be amended to deal with any later amendments to the Amending Determination.

4. Subsection 2(2) provides that any information in column 3 of the table is not part of the instrument and that information may be inserted in this column, or information in it may be edited, in any published version of the instrument.

Authority

5. **Section 3** identifies the authority for the instrument as subsection 18(10) of the *Superannuation Act 2005* (2005 Act).

Schedules

6. **Section 4** provides that each instrument that is specified in a Schedule to the Amending Determination is amended or repealed as set out in the applicable items in the relevant Schedule. It also provides that any other item in a Schedule to the Amending Determination has effect according to its terms.

Schedule 1 - Amendments

7. **Item 1** repeals paragraph 5(b) of the *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Determination 2020* and substitutes a new paragraph 5(b). This replaces the existing exclusion in respect of Judges of the Federal Circuit Court of Australia with an exclusion applying to Judges of the Federal Circuit and Family Court of Australia (Division 2).

Statement of Compatibility with Human Rights

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

Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Amendment (Judges) Determination 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 *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Determination 2020* (Principle Determination) by signed instrument called the *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Amendment (Judges) Determination 2021* (Amending Determination).

Prior to these amendments, under the Principal Determination, Judges of the Federal Circuit Court were excluded from being an ordinary employer-sponsored member of the Public Sector Superannuation Accumulation Plan under subsections 18(7) and 18(8A) of the *Superannuation Act 2005* for the duration of their tenure.

On 1 September 2021, the Federal Circuit Court and the Family Court of Australia will be brought together into a combined administrative structure to be known as the Federal Circuit and Family Court of Australia. Federal Circuit Court Judges will become Judges of the Federal Circuit and Family Court of Australia (Division 2).

The Amending Determination updates references to Judges of the Federal Circuit Court in the Principal Determination with references to Judges of the Federal Circuit and Family Court of Australia (Division 2) to ensure that the exclusion in respect of these officers continues under the new arrangements. These judicial officers are instead provided with occupation-specific superannuation arrangements.

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.

Senator the Hon Simon Birmingham, Minister for Finance