

EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance

Superannuation Act 2005

Superannuation (PSSAP) Membership Eligibility (Exclusion) Amendment (Judges) Declaration 2021 made under paragraph 13(2)(h) 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.

Paragraph 13(2)(h) of the 2005 Act provides that the Minister may, by legislative instrument, determine a class of persons that are ineligible to become a member of PSSAP. The *Superannuation (PSSAP) Membership Eligibility (Exclusion) Declaration 2005* (Principal Declaration) is such an instrument made by the Minister for Finance.

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 declaration under paragraph 13(2)(h) of the 2005 Act to amend the Principal Declaration, being the *Superannuation (PSSAP) Membership Eligibility (Exclusion) Amendment (Judges) Declaration 2021* (Amending Declaration).

Amending Declaration

Item 10 of Schedule 1 of the Principal Declaration specifies that persons that hold the office of Federal Magistrate (including the Chief Federal Magistrate) under the *Federal Magistrates Act 1999* as a class of ineligible persons. On 12 April 2013 this Act became the *Federal Circuit Court of Australia Act 1999*. Judges appointed to the Federal Circuit Court of Australia under this Act are an excluded class of persons under Item 10 through the operation of paragraph 25B(1)(a) of the *Acts Interpretation Act 1901*.

On 1 September 2021, the Federal Circuit Court of Australia (the Federal Circuit Court) and the Family Court of Australia (the Family Court) 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:

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

The Amending Declaration replaces the exclusion applying to Federal Magistrates in the Principal Declaration with an exclusion that applies to Judges of the FCFC (Division 2) to provide that these judicial officers to ensure that these officers continue to be excluded from eligibility to become a new member of the PSSAP under section 13 of the 2005 Act in respect of their position.

In addition, an FCFC (Division 2) Judge who had already become a member of PSSAP prior to their appointment will not be eligible to be an ordinary employer-sponsored member under subsection 18(2), (3) or (5) of the 2005 Act during their tenure and therefore will not be permitted to have superannuation contributions paid into their PSSAP account.

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

The Minister for Finance has also made an instrument, the *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Amendment (Judges) Determination 2021* under subsection 18(10) of the 2005 Act. This instrument amends the *Superannuation (PSSAP—Ordinary Employer-Sponsored Member Exclusion) Determination 2020* to exclude FCFC (Division 2) Judges from eligibility to be an ordinary employer-sponsored member under subsections 18(7) and (8A) of the 2005 Act.

Legislation Act 2003

The Amending Declaration 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 Declaration is subject to disallowance in accordance with subsection 13(5) 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 Declaration 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 Declaration 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 DECLARATION

Name

1. **Section 1** provides that the name of the instrument is the *Superannuation (PSSAP) Membership Eligibility (Exclusion) Amendment (Judges) Declaration 2021*.

Commencement

2. **Section 2** sets out the commencement provision for the amendments contained in the Amending Declaration. 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 Declaration 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 Declaration 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 Declaration as originally made and that it will not be amended to deal with any later amendments to the Amending Declaration.

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 paragraph 13(2)(h) of the *Superannuation Act 2005*.

6. **Section 4** provides that each instrument that is specified in a Schedule to this instrument 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 this instrument has effect according to its terms.

Schedule 1 – Amendments

7. **Item 1** repeals the definition of ‘Federal Magistrate’ in section 3 as it will not be required following the amendments made by Item 2.

8. **Item 2** repeals Item 10 of Schedule 1 and inserts a new Item 10 in its place. This replaces the existing membership eligibility exclusion in respect of Federal Magistrates, which also applies to Judges of the Federal Circuit Court of Australia through the operation of paragraph 25B(1)(a) of the *Acts Interpretation Act 1901*, 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) Membership Eligibility (Exclusion) Amendment (Judges) Declaration 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) Membership Eligibility (Exclusion) Declaration 2005* (Principal Declaration) by signed instrument called the *Superannuation (PSSAP) Membership Eligibility (Exclusion) Amendment (Judges) Declaration 2021* (Amending Declaration).

Prior to these amendments, under the Principal Determination, Judges of the Federal Circuit Court were excluded from eligibility to become a member of the Public Sector Superannuation Accumulation Plan or to be a contributory member scheme under subsections 18(2), (3) or (5) 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) ('FCFC (Division 2)').

The Amending Declaration updates references to Judges of the Federal Circuit Court in the Principal Declaration with references to Judges of the FCFC (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