

EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance

Superannuation Act 1990

Superannuation (PSS) Membership Exclusion Amendment (Judges) Declaration 2021 made under paragraph 6(2)(c) of the Superannuation Act 1990

The *Superannuation Act 1990* (the 1990 Act) establishes and makes provisions for, and in relation to, the Public Sector Superannuation Scheme (PSS) for Australian Government employees and certain other persons.

Part 3 of the 1990 Act establishes the membership eligibility arrangements for the PSS. Paragraph 6(2)(c) of that Part provides that the Minister may, by legislative instrument, determine persons that cannot be a member of the PSS by force of subsection 6(1) of the 1990 Act. The *Superannuation (PSS) Membership Exclusion Declaration 1995* (Principal Declaration) is an instrument made under paragraph 6(2)(c) of the 1990 Act.

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 instrument to amend the Principal Declaration, being the *Superannuation (PSS) Membership Exclusion Amendment (Judges) Declaration 2021*. This instrument is referred to as the Amending Declaration in this Statement.

Amending Declaration

The Principal Declaration provides for the exclusion of Federal Magistrates of the Federal Magistrates Court from eligibility to be a member of the PSS in respect of their appointment. On 12 April 2013 the Federal Magistrates Court was renamed the Federal Circuit Court of Australia under the *Federal Circuit Court of Australia Act 1999*, and judicial officers of this court became Judges of the Federal Circuit Court. The Principal Declaration applies to Judges of the Federal Circuit Court 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:

- 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 Declaration updates the Principal Declaration by replacing references to Judges of the Federal Circuit Court 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 Declaration are at [Attachment A](#).

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 Amending Declaration is subject to disallowance in accordance with subsection 45(2) of the 1990 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 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 (PSS) Membership Exclusion (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 6(2)(c) of the *Superannuation Act 1990*.

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 Item 41 and substitutes a new Item 41 in its place. This replaces the existing exclusion of Federal Magistrates of the Federal Magistrates Court 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 (PSS) Membership Exclusion (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 (PSS) Membership Exclusion Declaration 1995* (Principal Declaration) by signed instrument called the *Superannuation (PSS) Membership Exclusion (Judges) Declaration 2021* (Amending Declaration).

Prior to these amendments, under the Principal Declaration, Judges of the Federal Circuit Court were excluded from being a member of the Public Sector Superannuation Scheme in respect of their judicial office.

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 Declaration updates references to Judges of the Federal Circuit Court in the Principal Declaration 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