

## **EXPLANATORY STATEMENT**

*Issued by authority of the Minister for Finance*

*Superannuation Act 1976*

*Superannuation (CSS) Salary Amendment (Housing Allowance and Rent-free Housing) Regulations 2022 made pursuant to subsection 168(1) of the Superannuation Act 1976.*

The *Superannuation Act 1976* (the Act) established the Commonwealth Superannuation Scheme (CSS) to provide retirement benefits for Commonwealth employees and office holders. The CSS is managed by the Commonwealth Superannuation Corporation (CSC), the corporate trustee and administrator of the scheme.

Subsection 168(1) of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters that are required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 5(1) of the Act broadly prescribes a default salary, which applies unless certain circumstances apply, including where an employee and their employer have agreed that a different annual rate of salary will be the employee's annual rate of salary (alternative salary) for the purposes of the Act. The default salary includes:

- salary or wages (within the ordinary meaning); and
- any allowance, or the value of any allowance, or any fee, that is an allowance or fee of a kind that, under the Regulations, is to be treated as salary for the purpose of the Act

excluding any part of salary or wages that the Regulations specify is not to be treated as salary for the purposes of the Act.

The *Superannuation (CSS) Salary Regulations 1978* (the Regulations), made pursuant to subsection 168(1) of the Act, specify those parts of salary or wages that are not to be treated as salary, and the kinds of allowances that are to be treated as salary for the purposes of the default definition under the Act. The kinds of allowances that are automatically treated as salary include:

- an allowance that is payable to an eligible employee in respect of housing or quarters while the employee holds a particular office or performs particular duties or work (housing allowance); and
- the rent-free use by an eligible employee of premises or quarters made available to them by reason that they hold a particular office or perform particular duties or work (rent-free housing).

The default definition of salary for the CSS flows through to the Public Sector Superannuation Scheme (PSS), established by the *Superannuation Act 1990* and the PSS Trust Deed, and the Public Sector Superannuation Accumulation Plan (PSSAP), established by the *Superannuation Act 2005* and the PSSAP Trust Deed.

### **Superannuation (CSS) Salary Amendment (Housing Allowance and Rent-free Housing) Regulations 2022**

The purpose of the *Superannuation (CSS) Salary Amendment (Housing Allowance and Rent-free Housing) Regulations 2022* (the Amending Regulations) is to amend the Regulations so that the default definition of salary for the purposes of the Act will not include housing allowance or rent-free housing.

Changes are being made to the Regulations as some confusion has arisen regarding the concept of rent-free housing in particular. This has resulted in disagreements between Commonwealth employers and employees over whether accommodation provided in certain instances constitutes rent-free housing within the meaning of the Regulations and is, therefore, superannuable.

The Amending Regulations provide certainty in the future by excluding rent-free housing from the default definition of salary for the purposes of the Act. The change is also consistent with contemporary remuneration practices and community expectations.

For consistency, the Amending Regulations make similar changes to the treatment of housing allowance.

Further details on the Amending Regulations are set out in [Attachment A](#).

### **CSC Approval**

Subsection 168(13) of the Act requires CSC to consent to amendments to the Regulations except in certain circumstances. These circumstances include where the amendments relate to a payment by the Commonwealth as the employer-sponsor of the CSS. The amendments contained in the Amending Regulations relate to such a payment. Accordingly CSC consent to the Amending Regulations is not required.

### ***Legislation Act 2003***

The Amending Regulations are a legislative instrument and are subject to disallowance in accordance with section 42 of the *Legislation Act 2003*.

### **Consultation**

Section 17 of the *Legislation Act 2003* specifies that rule-makers should consult before making legislative instruments.

CSC has been consulted in relation to the commencement of the Amending Regulations.

The Office of Best Practice Regulation was consulted on the arrangements in the Amending Regulations. A Regulation Impact Statement was not prepared, as the Amending Regulations are unlikely to have more than a minor regulatory impact (OBPR21-01144).

### **Commencement**

The Amending Regulations commence on 1 March 2022.

### **Statement of Compatibility with Human Rights**

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

## ATTACHMENT A

**DETAILS OF THE SUPERANNUATION (CSS) SALARY AMENDMENT (HOUSING ALLOWANCE AND RENT-FREE HOUSING) REGULATIONS 2022**

**Name**

1. **Section 1** provides that the name of the instrument is the *Superannuation (CSS) Salary Amendment (Housing Allowance and Rent-free Housing) Regulations 2022*.

**Commencement**

2. **Section 2** provides for commencement of the Amending Regulations. The item in the table in subsection 2(1) provides for commencement of the whole of the Amending Regulations on 1 March 2022. The note at the end of the table in subsection 2(1) 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**

3. **Section 3** provides that the Amending Regulations are made under the *Superannuation Act 1976* (the Act).

**Schedules**

4. **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—Amendments**

***Superannuation (CSS) Salary Regulations 1978***

5. Regulation 3 of the Regulations, comprising subregulations 3(1) and 3(2), deals with the interpretation of terms used in the Regulations. Subregulation 3(1) defines a term that is used throughout the Regulations whereas subregulation 3(2) defines a term that is used in Part 4 (employees on leave of absence) and Part 5 (miscellaneous). **Item 1 of Schedule 1** replaces subregulation 3(1) with an updated provision that defines the additional term “housing allowance” by referring the reader to new subregulation 8AA(3), inserted by Item 3 of Schedule 1 to the Amending Regulations.

6. Regulation 5 specifies the kinds of allowances that are treated as salary under subsection 5(1) of the Act (which applies to determine an eligible employee’s annual rate of salary unless one of the exceptions applies, such as when the employee and their designated employer have agreed to an alternative salary under subsection 5(3AA) of the Act). **Item 2 of Schedule 1** repeals paragraphs 5(d) and 5(e) of regulation 5, so that, from commencement of the Amending Regulations, the kinds of allowances that are treated as salary under the default definition of salary will no longer include:

- an allowance that is payable to an eligible employee in respect of housing or quarters while the employee holds a particular office or performs particular duties or work (paragraph 5(d)); or
- the rent-free use by an eligible employee of premises or quarters made available to them

by reason that they hold a particular office or perform particular duties or work (paragraph 5(e)).

7. The treatment of housing allowance and rent-free housing as salary for superannuation purposes was a practice at the time that the Regulations were made in 1978, however, it does not reflect contemporary remuneration practice or current community expectations. At the time, the allowances were provided to employees in limited cases where they were regarded as a permanent addition to remuneration. The allowances were superannuable as it was considered appropriate for the recipient's retirement benefit to take account of allowances of a permanent nature.

8. The Regulations are being amended as some confusion has arisen regarding the concept of rent-free housing, as evidenced by recent disagreements between Commonwealth employers and employees over whether accommodation provided in specific cases constitutes rent-free housing within the meaning of the Regulations.

9. The Amending Regulations provide certainty to employers and employees in future by excluding rent-free housing from the default definition of salary for the purposes of the Act. For consistency, the Amending Regulations make similar changes to the treatment of housing allowance.

10. **Item 3 of Schedule 1** of the Amending Regulations inserts a new regulation 8AA, dealing with housing allowance, at the end of Part 2 of the Regulations.

11. New subregulation 8AA(1) specifies that the regulation is made for the purposes of subsection 5(1) of the Act, which defines default salary.

12. New subregulation 8AA(2) specifies that any part of the salary or wages of an eligible employee that consists of a housing allowance is not to be treated as salary for the purposes of the Act. Subregulation 8AA(2) is included for the purposes of avoiding doubt as, in some circumstances, there can be uncertainty about whether an allowance paid as a regular cash payment comes within the ordinary meaning of "salary or wages", which forms part of default salary under the Act.

13. New subregulation 8AA(3) defines "housing allowance" as an allowance that is payable to an eligible employee in respect of housing, quarters or other accommodation. The wording of subregulation 8AA(3) makes it clear that an allowance paid to an eligible employee for any form of housing is not treated as default salary for the purposes of the Act. This treatment applies irrespective of, for example, the employee's office, duties or work. The note following subregulation 8AA(3) refers the reader to new regulation 24, inserted by Item 4 of Schedule 1, which deals with rent-free housing.

14. **Item 4 of Schedule 1** of the Amending Regulations inserts new regulation 24 at the end of Part 5, which deals with miscellaneous matters. New regulation 24 concerns rent-free housing and has been included to provide certainty regarding the treatment of the benefit.

15. New sub-regulation 24(1) specifies that the regulation is made for the purposes of subsection 5(1) of the Act, which sets out the default definition of salary.

16. New subregulation 24(2) specifies that the value of rent-free housing of any type is not to be treated as salary for the purposes of the default definition of salary. The note following subregulation 24(2) observes that, in any case, non-monetary benefits are not salary or wages for the purposes of the default definition unless the regulations prescribe that they are to be

treated as salary.

17. Notwithstanding the amendments made by Schedule 1, an employer and employee will continue to be able to agree an alternative superannuation salary in respect of the employee.

**ATTACHMENT B****Statement of Compatibility with Human Rights**

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

**Superannuation (CSS) Salary Amendment (Housing Allowance and Rent-free Housing) Regulations 2022**

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 purpose of the *Superannuation (CSS) Salary Amendment (Housing Allowance and Rent-free Housing) Regulations 2022* (the Amending Regulations) is to amend the *Superannuation (CSS) Salary Regulations 1978* (the Regulations) so that housing allowance and rent-free housing are no longer treated as salary and, therefore, superannuable for the purposes of the default definition in the *Superannuation Act 1976* (the Act).

Changes are being made to the Regulations as some confusion has arisen regarding the concept of rent-free housing, resulting in disagreements between Commonwealth employers and employees over whether accommodation provided in certain instances constitutes rent-free housing within the meaning of the Regulations and is, therefore, superannuable.

The Amending Regulations provide certainty in the future by excluding rent-free housing from the default definition of salary for the purposes of the Act. This change is also consistent with contemporary remuneration practice and community expectations.

For consistency, the Amending Regulations make similar changes to the treatment of housing allowance.

**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**