EXPLANATORY STATEMENT

Issued by the authority of the Acting Group Manager, Pensions, Housing and Homelessness Group of the Department of Social Services

Social Security Act 1991

Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022

Purpose

The *Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022* (the Principles) are made under subparagraphs (a)(iii) and (b)(ii) of the definition of ***partially asset-test exempt income stream*** in subsection 1118(1A) of the *Social Security Act 1991* (the Act).

The Principles remake the *Social Security (Retention of exemption for asset-test exempt income streams) (DSS) Principles 2011* (2011 Principles) before they 'sunset'. The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, sunset on the first 1 April or 1 October falling on or after the 10th anniversary of their registration. The 2011 Principles are scheduled to sunset on 1 April 2022.

The Principles remake the 2011 Principles with only minor amendments to simplify the language and the structure to reflect current drafting practices. The changes do not affect the substantive meaning or operation of the provisions. The purpose of the Principles is to specify circumstances in which certain income streams are fully or partially exempt from the assets test under the Act. In particular, the Principles provide that certain income streams which are 50% and 100% asset-test exempt retain that status where they have been commuted for particular tax, family law, or other purposes.

Background

The below table summarises the effect of the Principles in relation to particular income streams.

Income stream features	**Treatment of the income stream for the purposes of the assets test**
Asset-test exempt income stream that: • is an income stream (other than a defined benefit stream) covered by subsection 9A(1) or (1A), 9B(1) or 9BA(1) of the Act; and • commenced between 20 September 2004 to 19 September 2007 (inclusive); and • is covered by Part 2 of the Principles.	Fully exempt - the income stream is 100% asset-test exempt.

Asset-test exempt income stream that: • is an income stream (other than a defined benefit stream) covered by subsection 9A(1) or (1A), 9B(1) or 9BA(1) of the Act; and • commenced between 20 September 2004 to 19 September 2007 (inclusive); and • is **not** covered by Part 2 of the Principles.	Partially exempt - the income stream is 50% asset-test exempt.
An income stream that: • commences on or after 20 September 2007; and • is covered by Part 3 of the Principles.	Partially exempt - the income stream is 50% asset-test exempt.

Commencement

The Principles commence on the day after they are registered.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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 Determination relies on subsection 33(3) as the basis for revoking the 2011 Principles.

Consultation

The Department of Social Services consulted with the Treasury, Attorney-General's Department, and Services Australia, and sought comments from the Financial Services Council, Australian Institute of Superannuation Trustees, Industry Super Australia, and the Association of Superannuation Funds of Australia. Stakeholders support the making of this instrument.

The Department of Veterans' Affairs was also consulted regarding the making of these Principles because that Department administers legislation which incorporates similar rules relating to the treatment of income streams to those provided by the Act.

Regulatory Impact Analysis

The Office of Best Practice Regulation (OBPR) was consulted and confirmed the Principles are unlikely to have a more than minor regulatory impact and do not require a Regulatory Impact Statement (OBPR Reference: OBPR22-01545).

Availability of independent review

A decision made as informed by this instrument as to whether an income stream is asset-test exempt is reviewable both internally and externally under the Act and Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to disallowance.

Explanation of the Provisions

Section 1 states that the name of the Principles is the *Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022.*

Section 2 sets out that the Principles commence on the day after they are registered on the Federal Register of Legislation.

Section 3 provides that the instrument is made under paragraphs (a) and (b) of the definition of partially asset-test exempt income stream set out in subsection 1118(1A) of the Act

Section 4 provides definitions of terms used in the Principles.

The note makes it clear that words and expressions used in this Determination have the same meaning as those given in the Act.

Section 5 provides for the revocation of the 2011 Principles, which are specified in Schedule 1 to the Determination.

Section 6 sets out the purpose of the Principles.

Paragraph (a) provides that Part 2 specifies the criteria that exclude an income stream from the class of partially asset-test exempt income streams set out in paragraph (a) of the definition of partially asset-test exempt income stream in subsection 1118(1A) of the Act. Paragraph (b) provides that Part 3 specifies the criteria that must be satisfied by an income stream to be covered by paragraph (b) of the definition of partially asset-test exempt income in subsection 1118(1A) of the Act.

The section includes a note to the effect that 100% of the value of the assets backing an asset-test exempt income stream (other than a partially asset-test exempt income stream) and 50% of the value of the assets backing a partially asset-test exempt income stream is to be disregarded for the purposes of calculating the value of a person’s assets in respect of the assets test.

Part 2 – Asset-test exempt income streams

A partially asset-test exempt income stream is 50% asset-test exempt (that is, half of the value of the assets backing the income stream is taken into account under the assets test).

The effect of paragraph (a) of the definition of partially asset-test exempt income stream in subsection 1118(1A) of the Act is that an asset-test exempt income stream will be a partially asset-test exempt income stream where it:

(i) is an income stream (other than a defined benefit stream) covered by subsection 9A(1), 9A(1A) or 9B(1) or 9BA(1)); and
(ii) commences between 20 September 2004 and 19 September 2007 inclusive; and
(iii) is not covered by Part 2 of the Principles .

Income streams purchased between 20 September 2004 and 19 September 2007, which would in certain circumstances otherwise lose asset-test exempt status, retain their full (100%) asset-test exemption if they are covered by principles made under subparagraph 1118(1A)(a)(iii).

Part 2 covers certain income streams (the 'new income stream') that are purchased or acquired as the result of the commutation or rollover of an existing 100% asset-test exempt income stream.

If the new income stream commenced between 20 September 2004 and 19 September 2007 inclusive, and the income stream is covered by Part 2 of the Principles, the new income stream will retain the 100% asset test exemption that applied to the original income stream, provided the new income stream was commuted or rolled over from, and retains the features of, the original income stream. The effect of not being covered by Part 2 of the Principles is that these income streams will lose the 100% asset-test exemption and will only be entitled to a 50% asset test exemption (that is, will be 'partially asset-test exempt income streams' rather than being 'fully asset-test exempt income streams'), even if they retain the features of the original income stream.

Part 2 of the Principles, in effect, only applies to those income streams that retained their 100% asset-test exempt status because they were purchased between 20 September 2004 and 19 September 2007 and were covered by the *Social Security (Partially Asset-test Exempt Income Stream – Exemption) (FaHCSIA) Principles 2005* (the 2005 Principles) or *the Social Security (Retention of Exemption for Asset-test Exempt Income Streams) (FaCSIA) Principles 2007* (the 2007 Principles). These income streams must have been commuted or rolled over from 100% asset-test exempt income streams purchased before 20 September 2004 which met the requirements of section 9A or 9B of the Act. Income streams purchased on or after 20 September 2007 which derive from 100% asset-test exempt income streams can retain their 100% asset-test exempt status only if they are determined by the Secretary under subsection 9A(5) or 9B(4) of the Act to be asset-test exempt, having regard to guidelines made under subsection 9A(6) or 9B(5) of the Act respectively. The Secretary has made guidelines under subsections 9A(6) and 9B(5) of the Act, being the *Social Security (Guidelines for Determining Whether Income Stream is Asset-test Exempt) Determination 2022*.

Section 7 sets out that the Principles in Part 2 are those for the purposes of subparagraph (a)(iii) of the definition of ‘partially asset-test exempt income stream’ in subsection 1118(1A) of the Act.

The section includes a note signposting the definition of ‘asset-test exempt income stream’ in subsection 9(1) of the Act.

Section 8 sets out various asset-test exempt income streams that are covered by the Principles and were purchased on or after 20 September 2004 and before 20 September 2007.

Any asset-test exempt income stream covered by section 8 must meet the requirements of **subsection 8(1)** of the Principles: that is, the new asset-test exempt income stream (referred to as the ‘present income stream’) must be covered by section 9A or 9B of the Act and must be purchased by the primary beneficiary from the commutation of an asset-test exempt income stream originally purchased before 20 September 2004 (referred to in the section as the ‘original income stream’). A commutation is a lump sum withdrawal of capital from the assets backing the income stream. Commutations are separate from any regular income payments that are paid from the income stream.

In addition, the original income stream must meet the more specific requirements of one of subsections 8(2) to (5).

Subsection 8(2) sets out that the subsection applies to an original income stream if it is covered by subsection 9A(1) or (1A) or section 9B of the Act, and if:

- the income stream was purchased for the benefit of the primary beneficiary and a reversionary beneficiary; and
- payments under the original income stream were based on the reversionary beneficiary’s life expectancy; and
- that reversionary beneficiary has died before the primary beneficiary (that is, the primary beneficiary purchases a lifetime income stream and specifies that it must revert to the reversionary beneficiary who has a longer life expectancy at the time of purchase but predeceases the person who purchased the income stream).

Subsection 8(3) sets out that the subsection applies to an original income stream if it is covered by subsection 9A(1) or (1A) or section 9B of the Act and is not covered by section 10 or 11 of the Principles (payment splits and Family Court Orders). The original income stream must also have been purchased by the primary beneficiary for the benefit of both the primary beneficiary and a reversionary beneficiary who are members of a couple at the time of the purchase, but who subsequently part.

Subsection 8(4) sets out that the subsection applies to an original income stream which is a defined benefit pension covered by section 9A or 9B, that is provided by a regulated superannuation fund and in relation to which the Secretary is not satisfied as required by paragraph 9A(1)(b) or 9B(1A)(b) (that is, the Secretary is not satisfied that there is in place a current actuarial certificate setting out that in the actuary's opinion there is high probability that the income stream's provider will be able to pay the income stream as required under the income stream's contract or governing rules).

Subsection 8(5) sets out that the subsection applies to an original income stream which is an immediate annuity under a statutory fund established by a life company, or under a benefit fund, and the original income stream is either:

- an income stream to which the Secretary is not satisfied as required by paragraph 9A(1)(b) or 9B(1A)(b) of the Act (that is, the Secretary is not satisfied that there is in place a current actuarial certificate setting out that in the actuary's opinion there is high probability that the income stream's provider will be able to pay the income stream as required under the income stream's contract or governing rules); or
- the income stream fails to satisfy the relevant standards published by the Australian Prudential Regulation Authority about minimum surrender values and paid up values.

Sections 9 to 16 of the Principles deal with the commutation of an 'original income stream' (as defined in each section) that was purchased before 20 September 2004 or was covered by the 2005 Principles, the 2007 Principles, the 2011 Principles or by these Principles.

The fundamental difference between section 8 of the Principles and sections 9 to 16, is that the 'original income stream' can be commuted and rolled over only once under the Principles specified in section 8, that is, the 'original income stream' will not have been sourced from a previous income stream created after 20 September 2004. By contrast, under sections 9 to 16, the 'original income stream' may be one of a succession of intermediate income streams that itself has been sourced from the commutation and rollover of a previous 'original income stream' under any one of the Principles specified in those sections. While the first of the succession of income streams must have commenced before 20 September 2004, subsequent income streams may have commenced after that date provided they satisfy the Principles specified in sections 9 to 16.

In these circumstances, the full (100%) exemption from the assets test would carry through to the new income stream. A further requirement of these sections is that the capital used to source the intermediate income stream and the new income stream must have originated only from the previous commuted income stream, that is, it would not be permissible to increase this capital with assets from elsewhere, thus increasing the purchase price of the new income stream.

For a new income stream to be covered by any of sections 9 to 16 of the Principles, it must be covered by either section 9A or 9B of the Act and have been purchased on or after 20 September 2004. The original income stream, and any prior succession of income streams, which are the source of the new income stream, must also have been covered by either section 9A or 9B of the Act.

Section 9 of the Principles covers an asset-test exempt income stream where it results from the transfer of the original income stream to a successor fund on or after 20 September 2004. ('Successor fund' is defined in subregulation 1.03(1) of the *Superannuation Industry (Supervision) Regulations 1994* (the SIS Regulations).) The original income stream must have been provided by a regulated superannuation fund. ('Regulated superannuation fund' is defined in section 19 of the *Superannuation Industry (Supervision) Act 1993)*.) This section excludes self-managed superannuation funds and small APRA funds.

Sections 10 and 11 of the Principles cover various asset-test exempt income streams that are commuted because of the operation of the *Family Law Act 1975* (the Family Law Act). The purpose of these sections is to ensure that the full exemption from the assets test is carried through to any new income streams sourced from the commutation of an original income stream, because of the operation of the Family Law Act.

Section 10 covers an asset-test exempt income stream that has been purchased or acquired by the primary beneficiary or his or her partner or former partner on or after 20 September 2004, and the income stream results from the original income stream being commuted as a result of a payment split under Part VIIIB of the Family Law Act.

Section 11 covers an asset-test exempt income stream that has been purchased or acquired by the primary beneficiary or his or her partner or former partner on or after 20 September 2004, and the income stream results from the original income stream being commuted as a result of:

- an order made under either section 79, 90SM, 90SS or 114 of the Family Law Act; or
- an injunction that has been granted under either section 90SS or 114 of that Act that is binding on a third party (such as the income stream provider) under Part VIIIAA of that Act; or
- any other order or injunction under the Family Law Act that relates specifically to the original income stream.

Section 12 of the Principles covers an asset-test exempt income stream that has been purchased by the primary beneficiary on or after 20 September 2004, and which results from the commutation of the original income stream to pay a superannuation contributions surcharge debt.

Section 13 covers an asset-test exempt income stream that has been purchased by the primary beneficiary on or after 20 September 2004, and which results from the commutation of the original income stream to pay an amount to give effect to a release authority given for the benefit of the primary beneficiary under former section 292-415 of the *Income Tax Assessment Act 1997* or section 292-80C of the *Income Tax (Transitional Provisions) Act 1997*, that is, to pay the primary beneficiary's excess contributions tax liability.

Section 14 of the Principles covers an income stream that has been purchased by the primary beneficiary and results from the commutation of the original income stream to pay a hardship amount, which is defined in subsection 9A(7) of the Act.

Section 15 of the Principles covers an income stream which was not sourced from a self-managed superannuation fund, has been purchased by the primary beneficiary, and results from the original income stream (sourced from a self-managed superannuation fund) being commuted due to the closure of the self-managed superannuation fund because:

- a member of the fund supporting the original income stream has died; or
- the administrative responsibilities of the fund supporting the original income stream have become too onerous due to the age or incapacity of a trustee.

Section 16 of the Principles covers an income stream which has been purchased by the primary beneficiary on or after 1 July 2007 and results from the original income stream being commuted or rolled over to a new income stream that is compliant with subregulation 6.21(2A) of the SIS Regulations.

Section 17 covers an asset-test exempt income stream that is a family law affected income stream, whose contract or governing rules do not meet the requirements of subsection 9A(2) or 9B(2), if:

- either:
  - as long as the income stream meets the requirements of those provisions other than those that are not met because of the operation of an order under Part VIIIAA or a payment split under Part VIIIB of the Family Law Act, relating to the income stream; or
  - as a result of the operation of one or more orders under Part VIIIAA or one or more payment splits under Part VIIIB of the Family Law Act, the income stream was derived from an income stream that is an asset-test exempt income stream to which subsection 9A(1A) or 9B(1B) of the Act applied at the time of the relevant order or payment split, or of the last of them; and
- the income steam is derived from an original family affected income stream:
  - as a result of the operation of one or more orders under Part VIIIAA or one or more payment splits under Part VIIIB of the Family Law Act; and

- the original family law affected income stream was purchased before 20 September 2004.

This provision ensures that income streams created from an original income stream as a consequence of a payment split that results in lower payments from the new income stream(s), do not necessarily cause a loss of the income stream's asset-test exempt status.

Additionally, income streams that are an immediate annuity under a statutory fund established by a life company, or under a benefit fund, must satisfy the standards published by the Australian Prudential Regulation Authority about minimum surrender values and paid up values that apply to the annuity. All other income streams must meet the requirements of **subsection 17(2)**.

When the Secretary is considering whether or not the contract or governing rules of the primary family law affected income stream in question would have met the requirements of subsection 9A(2) or 9B(2), but for the operation of a payment split under Part VIIIB of the Family Law Act, then where there has been any rollover, transfer, commutation or lump sum payment from the original family law affected income stream, the primary family law affected income stream will be taken to meet those requirements. This only applies where the amount rolled over, transferred, commuted or paid out is not greater than the amount that was required to satisfy the non-member partner's entitlement in relation to the payment split.

Unless the Act so provides, the owner of an income stream cannot take the opportunity, where there is a payment split in relation to their income stream, to take out from their income stream an extra amount, that is an amount that is more than the amount of funds that they are required to pay to their former partner, and still retain an asset-test exempt status in relation to the income stream.

Where subsection 17(2) applies, it provides that there must be in force a current actuarial certificate in relation to the income stream that states that, in the actuary's opinion, there is a high probability that the income stream provider will be able to pay the income stream as required by the contract or governing rules. Additionally, the effect of this provision is that, where an actuarial certificate expires, it will be taken, for the purposes of these Guidelines, to remain in force for a period of 26 weeks after its expiry.

Section 18 provides that the Principles will cover an asset-test exempt income stream if:

- the income stream is purchased or acquired on or after 20 September 2004 and is covered by section 9A or 9B of the Act; and
- it results from another asset-test exempt income stream (the original income stream) being commuted as a result of the closure of a regulated superannuation fund or sub-fund (except in instances where the original income stream has been commuted as a result of the closure of a self-managed superannuation fund); and

- the original income stream was also covered by section 9A or 9B of the Act and was sourced from a regulated superannuation fund; and
- the original income stream was covered by the legislative instruments as described in paragraph 18(f).

Part 3 – Partially asset-test exempt income streams

Paragraph (b) of the definition of partially asset-test exempt income stream in subsection 1118(1A) of the Act provides that a partially asset-test exempt income stream is an income stream that:

(i) commences on or after 20 September 2007; and
(ii) is covered by principles that the Secretary has determined in relation to this issue.

This means that income streams purchased on or after 20 September 2007 which derive from 50% asset-test exempt income streams retain the 50% asset-test exempt status if they are covered by principles made under subparagraph (b)(ii) of the definition of partially asset-test exempt income stream in subsection 1118(1A).

Part 3 of the Principles is made for the purposes of subparagraph (b)(ii) of the definition of partially asset-test exempt income stream in subsection 1118(1A). That is, income streams covered by Part 3 retain their 50% asset-test exempt status (that is, they are 'partially asset-test exempt income streams' rather than having no exemption status at all).

Part 3 also covers certain income streams that derive from pre-existing partially asset-test exempt income streams. For the final income stream in a series of income streams that have been commuted and rolled over, to be partially asset-test exempt, the very first income stream in a series of related income streams will have been purchased or acquired between 20 September 2004 and 19 September 2007 inclusive and have met the definition of a partially asset-test exempt income stream, although that initial income stream may have been commuted or rolled over into new income streams since that time.

Income streams derived from an unbroken chain of earlier income streams (and otherwise complying with Part 3) will also retain the 50% asset-test exemption. This is, where that chain has not been broken since the initial income stream was purchased between 10 September 2004 and 19 September 2007, because each income stream in the chain has either:
- not been covered by the 2005 Principles between 20 September 2004 and 19 September 2007; or
- been covered by a prior application of Part 3 of the 2007 Principles, Part 2 of the 2011 Principles or these Principles on or after their date of commencement.

Section 19 sets out that the Principles in Part 3 are those for the purposes of subparagraph (b)(ii) of the definition of 'partially asset-test exempt income stream' in subsection 1118(1A) of the Act. Income streams covered by the Principles under Part 3 will retain their 50% asset-test exemption.

Any income stream covered by **section 20** must meet the requirements of **subsection 20(1)** of the Principles: that is, the new income stream (referred to as the 'present income stream') must be purchased by the primary beneficiary on or after 20 September 2007 from the commutation of a partially asset-test exempt income stream purchased on or after 20 September 2004 and before 20 September 2007 (referred to in the section as the 'original income stream'). A commutation is a lump sum withdrawal of capital from the assets backing the income stream. Commutations are separate from any regular income payments that are paid from the income stream.

In addition, the original income stream must meet the more specific requirements of one of the following subsections 20(2) to (5).

Subsection 20(2) sets out that the subsection applies to an original income stream if:

- the income stream was purchased for the benefit of the primary beneficiary and a reversionary beneficiary; and
- payments under the original income stream were based on the reversionary beneficiary's life expectancy; and
- that reversionary beneficiary has died before the primary beneficiary (that is, the primary beneficiary purchases a lifetime income stream and specifies that it must revert to the reversionary beneficiary who has a longer life expectancy at the time of purchase but predeceases the person who purchased the income stream).

Subsection 20(3) sets out that the subsection applies to an original income stream if it is not covered by section 22 or 23 of the Principles (payment splits and Family Court Orders). The original income stream must also have been purchased by the primary beneficiary for the benefit of both the primary beneficiary and a reversionary beneficiary who are members of a couple at the time of the purchase, but who subsequently part.

Subsection 20(4) sets out that the subsection applies to an original income stream which is a defined benefit pension covered by section 9A or 9B that is provided by a regulated superannuation fund and in relation to which the Secretary is not satisfied as required by paragraph 9A(1)(b) or 9B(1A)(b) (that is, the Secretary is not satisfied that there is in place a current actuarial certificate setting out that in the actuary's opinion there is a high probability that the income stream's provider will be able to pay the income stream as required under the income stream's contract or governing rules).

Subsection 20(5) sets out that the subsection applies to an original income stream which is an immediate annuity under a statutory fund established by a life company, or under a benefit fund, and the original income stream is either:

- an income stream to which the Secretary is not satisfied as required by paragraph 9A(1)(b) or 9B(1A)(b) of the Act (that is, the Secretary is not satisfied that there is in place a current actuarial certificate setting out that in the actuary's opinion there is a high probability that the income stream's provider will be able to pay the income stream as required under the income stream's contract or governing rules); or
- the income stream fails to satisfy the relevant standards published by the Australian Prudential Regulation Authority about minimum surrender values and paid up values.

Sections 21 to 28 of the Principles deal with an 'original income stream' (as defined in each section) that was purchased on or after 20 September 2004 and before 20 September 2007 or was covered by the 2007 Principles, the 2011 Principles or by these Principles.

The fundamental difference between section 20 of the Principles and sections 21 to 28, is that the 'original income stream' can be commuted and rolled over only once under the Principles specified in section 20, that is, the 'original income stream' must have been purchased on or after 20 September 2004 and before 20 September 2007. By contrast, under sections 21 to 28, the 'original income stream' may be one of a succession of intermediate income streams that itself has been sourced from the commutation and rollover of a previous 'original income stream' under any one of the principles specified in those sections. While the first of the succession of income streams must have commenced on or after 20 September 2004 and before 20 September 2007, subsequent income streams may have commenced after that date provided they satisfy the Principles specified in sections 21 to 28.

In these circumstances, the partial (50%) exemption from the assets test would carry through to the new income stream. A further requirement of these sections is that the capital used to source the intermediate income stream and the new income stream must have originated only from the previous commuted income stream. That is, it would not be permissible to increase this capital with assets from elsewhere, thus increasing the purchase price of the new income stream. That is, under sections 21 to 28, the original income stream could have been purchased on or after 20 September 2007 from a previous 50% asset-test exempt income stream which itself was purchased on or after 20 September 2007 from a 50% asset-test exempt income stream (and had that status because it was not covered by the 2005 Principles when they were in force, or was covered by a prior application of Part 3 of the 2007 Principles, Part 3 of the 2011 Principles or these Principles).

For a new income stream to be covered by any of sections 21 to 28 of the Principles, the new income stream must have commenced on or after 20 September 2007. The original income stream, which is the source of the new income stream, and any succession of income streams, must also have:

- been covered by either section 9A, 9B or 9BA of the Act, or would have been covered by those sections if paragraph 9A(1)(aa), subparagraph 9B(1)(a)(i) or subparagraph 9BA(1)(a)(i) of the Act did not apply. (The

position for section 27 of the Principles is slightly different – see discussion in relation to section 27 below); and
- either been purchased on or after 20 September 2004 and before 20 September 2007, or was covered by a prior application of Part 3 of the 2007 Principles, Part 3 of the 2011 Principles or these Principles.

Section 21 of the Principles covers an income stream where it results from the transfer of the original income stream to a successor fund on or after 20 September 2007 ('successor fund' is defined in subregulation 1.03(1) of the *Superannuation Industry (Supervision) Regulations 1994*). The original income stream must have been provided by a regulated superannuation fund ('regulated superannuation fund' is defined in section 19 of the *Superannuation Industry (Supervision) Act 1993)*. This excludes self-managed superannuation funds and small APRA funds.

Sections 22 and 23 of the Principles cover various income streams that are commuted because of the operation of the Family Law Act. The purpose of these sections is to ensure that the 50% exemption from the assets test is carried through to any new income streams sourced from the commutation of an original income stream, because of the operation of the Family Law Act.

Section 22 covers an income stream that has been purchased or acquired by the primary beneficiary or their partner or former partner on or after 20 September 2007, and the income stream results from the original income stream being commuted as a result of a payment split under Part VIIIB of the Family Law Act.

Section 23 covers an income stream that has been purchased or acquired by the primary beneficiary or their partner or former partner on or after 20 September 2007, and the income stream results from the original income stream being commuted as a result of:

- an order made under either section 79, 90SM, 90SS or 114 of the Family Law Act; or
- an injunction that has been granted under either section 90SS or 114 of that Act that is binding on a third party (such as the income stream provider) under Part VIIIAA of that Act; or
- any other order or injunction under the Family Law Act that relates specifically to the original income stream.

Section 24 of the Principles covers an income stream that has been purchased by the primary beneficiary on or after 20 September 2007, and which results from the commutation of the original income stream to pay a superannuation contributions surcharge debt.

Section 25 covers an income stream that has been purchased by the primary beneficiary on or after 20 September 2007, and which results from the commutation of the original income stream to pay an amount to give effect to a release authority given for the benefit of the primary beneficiary under former section 292-415 of the *Income Tax Assessment Act 1997* or section

292-80C of the *Income Tax (Transitional Provisions) Act 1997*, that is, to pay the primary beneficiary's excess contributions tax liability. The original income stream must have been purchased in the period 20 September 2004 to 19 September 2007, inclusive, or have been covered by the Principles specified in paragraph 25(d). This means that this provision can apply where there have been one or more intervening income streams.

Section 26 of the Principles covers an income stream that has been purchased by the primary beneficiary on or after 20 September 2007 and results from the commutation of the original income stream to pay a hardship amount, which is defined in subsection 9A(7) of the Act.

Section 27 covers market-linked income streams that meet the requirements of section 9BA of the Act, or an income stream that would have met the requirements of section 9BA except for the operation of subparagraph 9BA(1)(a)(i), if the income stream results from the commutation and rollover of all the assets of the original income stream. The original income stream must have either been covered by section 9BA of the Act or would have been covered by that section if subparagraph 9BA(1)(a)(i) did not apply. The original income stream must have been purchased on or after 20 September 2004 and before 20 September 2007 or was covered by the Principles specified in paragraph 27(d).

Section 28 of the Principles covers an income stream which was not sourced from a self-managed superannuation fund, has been purchased by the primary beneficiary and results from the original income stream (sourced from a self-managed superannuation fund) being commuted due to the closure of the self-managed superannuation fund because:

- a member of the fund supporting the original income stream has died; or
- the administrative responsibilities of the fund supporting the original income stream have become too onerous due to the age or incapacity of a trustee.

Section 29 of the Principles covers an income stream which has been purchased by the primary beneficiary on or after 1 July 2007 and results from the original income stream being commuted and rolled over to a new income stream that is compliant with subregulation 6.21(2A) of the SIS Regulations.

This will also apply in certain circumstances, such as where the contract or governing rules of the original income stream are altered to make the income stream compliant with subregulation 6.21(2A) of the SIS Regulations.

Section 30 covers a family law affected income stream, where its contract or governing rules do not meet the requirements of subsection 9A(2) or 9B(2) of the Act, where:

- either:
    - o the income stream meets all the requirements of either paragraphs 9A(2)(a) to (l) or 9B(2)(a) to (l) of the Act, other than those that are not met because of the operation of an order

under Part VIIIAA or a payment split under Part VIIIB of the Family Law Act relating to the income stream; or
  - as a result of the operation of one or more orders under Part VIIIAA or one or more payment splits under Part VIIIB of the Family Law Act , the income stream was derived from an income stream that is an asset-test exempt income stream to which subsection 9A(1A) or 9B(1B) of the Act applied at the time of the relevant order or payment split (or whichever is the latter); and
- the original family law affected income stream from which the income stream is derived as a result of the operation of one or more orders under Part VIIIAA or one or more payment splits under Part VIIIB of the Family Law Act, was purchased after 19 September 2004 and before 20 September 2007.

This provision ensures that income streams created from an original income stream as a consequence of a payment split that result in lower payments from the new income stream(s), do not necessarily cause a loss of the income stream's partial asset-test exempt status.

Additionally, income streams that are an immediate annuity under a statutory fund established by a life company, or under a benefit fund, must satisfy the standards published by the Australian Prudential Regulation Authority about minimum surrender values and paid up values that apply to the annuity. All other income streams must meet the requirements of subsection 30(2).

When the Secretary is considering whether or not the contract or governing rules of the primary family law affected income stream in question would have met the requirements of subsection 9A(2) or 9B(2), but for the operation of a payment split under Part VIIIB of the Family Law Act, then where there has been any rollover, transfer, commutation or lump sum payment from the original family law affected income stream, the primary family law affected income stream will be taken to meet those requirements. This only applies where the amount rolled-over, transferred, commuted or paid out is not greater than the amount that was required to satisfy the non-member partner's entitlement in relation to the payment split. Unless the Act so provides, the owner of an income stream cannot take the opportunity, where there is a payment split in relation to their income stream, to take out, from their income stream, an extra amount that is, an amount that is more than the amount of funds that they are required to pay to their former partner, and still retain partial asset-test exempt status in relation to the income stream.

Where subsection 30(2) applies, it provides that there must be in force a current actuarial certificate in relation to the income stream that states that, in the actuary's opinion, there is a high probability that the income stream provider will be able to pay the income stream as required by the contract or governing rules. Additionally, the effect of this provision is that, where an actuarial certificate expires, it will be taken, for the purposes of these Principles, to remain in force for a period of 26 weeks after its expiration.

Section 31 provides that the Principles will cover an income stream if:

- it is purchased or acquired on or after 20 September 2007; and
- it results from a partially asset-test exempt income stream (the original income stream) being commuted as a result of the closure of a regulated superannuation fund or sub-fund (except in instances where the original income stream has been commuted as a result of the closure of a self-managed superannuation fund); and
- the original income stream was also covered by section 9A, 9B or 9BA of the Act or would have been covered by those sections if paragraph 9A(1)(aa), subparagraph 9B(1)(a)(i) or subparagraph 9BA(1)(a)(i) of the Act did not apply; and
- the original income stream was sourced from a regulated superannuation fund; and
- the original income stream was covered by the legislative instruments as described in subparagraph 31(d)(iii).

Statement of Compatibility with Human Rights

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

Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022

The Determination 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 Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022 (the Principles) provides for certain income streams to be fully or partially exempt from the assets test under the Act. In particular, the operation of the Principles means that certain income streams which are 50% and 100% asset-test exempt retain that status where they have been commuted for particular tax or family law purposes.

Human rights implications

The Amendment Determination engages the right to social security.

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises the right of everyone to social security.

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security system must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

The Principles will operate beneficially as a person's income stream will, in specified circumstances, not be taken into account or a reduced amount will be taken into account when assessing a person's assets (subject to other legislative requirements). If a person's income stream is not exempted or reduced, a person in receipt of that income stream may not be eligible for social security payment or, if they are eligible, their rate of payment might be reduced. The Principles are therefore consistent with the right to social security.

Conclusion

The Principles are compatible with human rights as the Principles preserve a person's right to social security.

Issued by the authority of the Acting Group Manager, Pensions, Housing and Homelessness Group of the Department of Social Services