

EXPLANATORY STATEMENT

Social Security Act 1991

Social Security Amendment (Family Law—Western Australia De Facto Superannuation Splitting) Determination 2022

Purpose

The Social Security Amendment (Family Law—Western Australia De Facto Superannuation Splitting) Determination 2022 (**the Determination**) makes necessary consequential amendments to a number of instruments relating to valuing superannuation income streams for the purposes of the social security means test. This reflects amendments made to the *Family Law Act 1975* (**Family Law Act**) to give effect to a referral of power from Western Australia to the Commonwealth in respect of superannuation matters in family law proceedings for separating de facto couples in Western Australia.

Background

The *Social Security Act 1991* provides that certain social security payments are subject to an income and assets test. The value of a family law affected income stream may be assessable both as a person's income and assets for the purposes of the social security law. An income stream is a regular series of payments made directly from accumulated superannuation contributions or purchased with a lump sum. An income stream can be affected by court orders splitting assets of separated couples, such as property and superannuation.

The *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020* (**Family Law Amendment Act**) gives effect to a narrow referral of power from the Parliament of Western Australia to the Commonwealth, to allow a Commonwealth Court to order splitting of Western Australian former de facto couples superannuation as part of Commonwealth family law property proceedings. The Family Law Amendment Act commenced on 28 September 2022 by proclamation.

Schedule 1 to the Family Law Amendment Act creates a new Part VIIIC in the Family Law Act that deals solely with superannuation splitting for separating de facto couples in Western Australia. This new Part replicates the existing superannuation splitting provisions and definitions that apply to married and de facto couples in other states and territories, which are located in Part VIIIB of the Family Law Act.

The Determination amends various social security legislative instruments to insert references to orders that will be made under new Part VIIIC where the instruments currently refer to Part VIIIB.

Commencement

The Determination commences on the day after this instrument is registered.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that the power to make a legislative instrument 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.

Consultation

Consultation has been undertaken with the Australian Government Solicitor, the Departments of Attorney-General, Treasury, and Veterans' Affairs, and Services Australia

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) was consulted and confirmed that the Determination is unlikely to have a more than minor regulatory impact and does not require a Regulatory Impact Statement (OBPR Reference: 22-03400).

Availability of independent review

The instruments that are being amended by the Determination are instruments that provide guidelines for determining the value of a family law affected income stream for the purposes of the social security law income and assets tests, and determining whether the family law affected income stream is asset-test exempt in certain situations.

Decisions guided by these instruments are applied when a decision-maker is calculating the rate of social security of a person. Such decisions are subject to internal and external merits review under Part 4 and 4A of the *Social Security (Administration) Act 1999*.

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

Explanation of the provisions

Section 1 provides that the name of the Determination is the Social Security Amendment (Family Law—Western Australia De Facto Superannuation Splitting) Determination 2022.

Section 2 provides that the Determination commences on the day after the Determination is registered.

Section 3 provides that the Determination is made under subsections 9A(6), 9B(5), section 1099DD, subsection 1118(1A), and subsection 1120A(5) of the *Social Security Act 1991*.

Section 4 provides that the instruments that are specified in a Schedule to the Determination are amended or repealed as set out in the applicable items of the Schedule, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Social Security (Family Law Affected Income Streams) Principles 2022

Items 1 and 2 amend section 4 of the Social Security (Family Law Affected Income Streams) Principles 2022 (**2022 Principles**). Section 4 of the 2022 Principles provides definitions of terms used within the instrument.

Item 1 inserts definitions of terms that are currently defined in the 2022 Principles but which have been given meaning by reference to Part VIII B of the Family Law Act under subsection 4(2). Amending subsection 4(2) to insert reference to Part VIII C could be confusing in that it may appear to suggest that the meaning of a term is contingent on what type of payment split is in issue in any particular case.

Instead, each term is now defined to have the meaning it would have in Part VIII B or the new Part VIII C of the Family Law Act.

As a consequence of the new definitions being inserted into subsection 4(1), subsection 4(2) is repealed by Item 2, and the reference to subsection (1) is repealed by Item 1. This means that Section 4 of the 2022 Principles is no longer divided into subsections.

Schedule 2 – Social Security (Guidelines for Determining Whether Income Stream is Asset-test Exempted) Determination 2022

Item 1 amends section 4 of the Social Security (Guidelines for Determining Whether Income Stream is Asset-Test Exempted) Determination 2022 (**2022 Determination**). Section 4 of the 2022 Determination provides, amongst other things, the definition of a payment split within the instrument.

Item 1 repeals the definition of payment split because the operative provisions of the 2022 Determination, as amended by item 2, make reference to the definitions of the relevant terms in the Family Law Act. This means that the definition of a payment split in section 4 is unnecessary.

Item 2 amends sections 11, 17 and 18 of the 2022 Determination to insert references to Part VIII C of the Family Law Act wherever a reference to Part VIII B of that Act appears.

This means that every time a reference to a payment split under the Family Law Act occurs in the 2022 Determination it can take its meaning from whichever of Part VIII B or Part VIII C is applicable.

Schedule 3 – Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022

Item 1 amends section 4 of the Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022 (**Exemption Principles**). Section 4 of the Exemption Principles provides, amongst other things, the definition of a payment split within the instrument.

Item 1 repeals the definition of payment split from section 4 because the operative provisions of the Exemption Principles, as amended by item 2, make reference to the definitions of the relevant terms of the Family Law Act. This means that the definition of a payment split in section 4 is unnecessary.

Item 2 amends sections 10, 17, 22 and 30 of the Exemption Principles by inserting references to Part VIIC of the Family Law Act wherever Part VIIB of that Act is referred to.

This means that every time a reference to a payment split under the Family Law Act occurs in the Exemption Principles it can take its meaning from whichever of Part VIIB or Part VIIC is applicable.

Schedule 4 – Social Security (Partially Asset-Test Exempt Income Stream – Exemption) Principles 2017

Item 1 repeals the entirety of the Social Security (Partially Asset-Test Exempt Income Stream – Exemption) Principles 2017 (**2017 Principles**). In the process of consultation it became clear that the 2017 Principles are covered by the Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022 (**2022 Principles**).

The 2022 Principles operate more broadly, and cover additional scenarios by comparison to the 2017 Principles. For these reasons, the 2017 Principles are repealed.

Statement of Compatibility with Human Rights

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

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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 Amendment (Family Law—Western Australia De Facto Superannuation Splitting) Determination 2022 (**the Determination**) makes amendments to the following instruments:

- Social Security (Family Law Affected Income Streams) Principles 2022;
- Social Security (Guidelines for Determining Whether Income Stream is Asset-test Exempt) Determination 2022; and
- Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022;

and repeals:

- Social Security (Partially Asset-test Exempt Income Stream – Exemption) Principles 2017.

These amendments are made as a consequence of amendments made by the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020 (Family Law Amendment Act)*. The instrument amendments allow a decision-maker to value or exempt a particular income stream affected by an order under the new Part of the Family Law Act for the purposes of the social security means test, in the same manner as the instruments amended currently apply to income streams affected by Family Law orders.

Human rights implications

The primary instruments that are being amended by the Determination engage the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights. The right to social security requires that a system be established under domestic law, and that public authorities take responsibility for the effective administration of the system. The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

The Determination will result in a consistent approach for assessing family law affected income streams under the social security law for all persons whose superannuation is split under a Family Law order. The effects of the Determination are consequential and administrative in nature. The amended instruments are compatible with Australia's obligations in relation to social security, and do not unreasonably restrict a person's eligibility to receive a social security benefit or reduce the benefits to which a person may be entitled. The Determination does not seek to affect the instrument's engagement with these applicable rights and freedoms.

The revocation of the Social Security (Partially Asset-test Exempt Income Stream – Exemption) Principles 2017 does not engage with Australia’s obligations in relation the rights to social security, and do not unreasonably restrict a person’s eligibility to receive a social security benefit because a person would otherwise be covered by the Social Security (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022, which provide for the same outcome.

Conclusion

This Determination is compatible with human rights as it preserves a person’s right to social security.

**Andrea Wallace-Green, Acting Branch Manager, Delegate of the Secretary of the
Department of Social Services**