

EXPLANATORY STATEMENT

Veterans' Entitlements Legislation Amendment (Western Australia Superannuation Splitting) Instrument 2022 (No. R39)

EMPOWERING PROVISIONS

The following sections of the *Veterans' Entitlements Act 1986 (VEA)*:

- 1) For amendments to the *Veterans' Entitlements (Family Law Affected Income Streams) Principles 2022*—Sections 46ZC and 52BA;
- 2) For amendments to the *Veterans' Entitlements (Guidelines for Determining Whether Income Stream is Asset-test Exempt) Determination 2022*—Subsections 5JA(6) and 5JB(5);
- 3) For amendments to the *Veterans' Entitlements (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022*—Subsections 52(1AA), (1AB) and (1AC).

PURPOSE

The purpose of the instrument is to make amendments to the instruments mentioned above as a result of the commencement of *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020 (the Amendment Act)*.

The VEA provides that certain 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 asset for the purposes of the VEA. 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 three instruments generally provide guidance on whether particular family law affected income streams are exempt from the income or asset test for the purposes of the VEA.

In 2001, the *Family Law Act 1975 (the FLA)* was amended by the *Family Law Legislation Amendment (Superannuation) Act 2001*, to enable parties to family law proceedings to split their superannuation interests as part of their family law property division. Part VIII B was inserted in the FLA, enabling superannuation interests to be split either by agreement or by order of the Court (later amended to include splitting for de facto couples). All states other than Western Australia provided the Commonwealth with full subject matter referrals of power for de facto property, maintenance and superannuation in family law matters.

In 2008, the *Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008* extended the financial settlement regime under the FLA to de facto couples, relying on referrals by States to the Commonwealth in accordance with subsection 51(xxxvii) of the Constitution. Between 2003 and 2010, all states except Western Australia provided the Commonwealth with full subject matter referrals of power for de facto property, maintenance and superannuation in family

law matters. Since these referrals took effect, family courts have been able to make orders in respect of de facto couples' property as they do for married couples in all states and territories other than Western Australia.

The 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 Amendment Act, creates a new Western Australian specific Part VIIC in the FLA, dealing with superannuation splitting for separating de facto couples. The provisions relating to Western Australia are confined to Part VIIC to aid usability and comprehension for judicial officers, lawyers, and separating couples in seeking to find WA-specific provisions.

As a result of the Amendment Act, references to superannuation splitting under Part VIIB of the FLA in the three instruments also need to include reference to the newly created Part VIIC to ensure coverage of Western Australian specific scenarios.

CONSULTATION

Section 17 of the *Legislation Act 2003* requires a rule-maker to be satisfied, before making a legislative instrument that any consultation the rule-maker considered appropriate and reasonably practicable, has been undertaken.

Given these are routine consequential amendments as a result of other amending legislation, consultation is not required and therefore, it is considered the requirements of section 17 of the *Legislation Act 2003* have been met.

RETROSPECTIVITY

None.

DOCUMENTS INCORPORATED-BY-REFERENCE

No.

REGULATORY IMPACT

None. Office of Best Practice Regulation was consulted on mirror amendments to the Department of Social Services portfolio instruments and advised that a RIS is unnecessary given the consequential nature of the instrument. OBPR: 22-03400: 21 September 2022

FURTHER EXPLANATION OF PROVISIONS

See: [Attachment A](#)

FURTHER EXPLANATION OF PROVISIONS

Clause 1—Name

This sets out the name of the instrument – the *Veterans’ Entitlements Legislation Amendment (Western Australia Superannuation Splitting) Instrument 2022*.

Clause 2—Commencement

This is the commencement provision. It provides that the instrument commences on the later of the day after registration of the instrument and the commencement of the *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020*.

Clause 3—Authority

This clause sets out the enabling provisions contained in the primary legislation that authorises the making of the instrument. As the instrument amends 3 separate instruments, the following are the enabling provisions for the amendments:

- 1) For amendments to the *Veterans’ Entitlements (Family Law Affected Income Streams) Principles 2022*—Sections 46ZC and 52BA;
- 2) For amendments to the *Veterans’ Entitlements (Guidelines for Determining Whether Income Stream is Asset-test Exempt) Determination 2022*—Subsections 5JA(6) and 5JB(5);
- 3) For amendments to the *Veterans’ Entitlements (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022*—Subsections 52(1AA), (1AB) and (1AC).

Clause 4—Schedules

This clause is a technical section that sets out the operation of the schedule in the instrument.

Schedule 1—Amendments

This is the only schedule of the instrument and sets out the amendments to be made to the instruments.

Amendments to the *Veterans’ Entitlements (Family Law Affected Income Streams) Principles 2022*

Item 1—Subsection 4(2)

This amendment includes a reference to new Part VIIC of the FLA after the existing reference to Part VIIB. This allows a term used in the instrument to have the same meaning in Part VIIC of the FLA.

Item 2—Subsection 4(2) (note)

This amendment substitutes part of the note to point the reader to sections 90YD of Part VIII B and new section 90XD of Part VIII C for meanings of terms listed in the note.

Amendments to the Veterans' Entitlements (Guidelines for Determining Whether Income Stream is Asset-test Exempt) Determination 2022

Item 3—Section 4 (definition of *payment split*)

This amendment substitutes the definition of *payment split*. The substituted definition now references the sections that give meaning to the term in relation to a payment split under Part VIII B and Part VIII C of the FLA.

Item 4—Paragraph 10(e)

This amendment is a minor textual amendment to correct an error, retitling an incorrectly termed second subparagraph (iv) and as subparagraph (v).

Item 5—Paragraph 11(c)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 6—Paragraph 16(f)

This amendment is a minor textual amendment to correct an error, retitling an incorrectly termed subparagraph (iiv) as subparagraph (iv).

Item 7—Subparagraphs 17(1)(a)(i) and (ii)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 8—Paragraphs 17(1)(b) and (d)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 9—Paragraph 18(b)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Amendments to the Veterans' Entitlements (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022

Item 10—Section 4 (note)

This amendment is a minor textual amendment to correct an error, retitling the second paragraph (b) as paragraph (c).

Item 11—Section 4 (definition of payment split)

This amendment substitutes the definition of *payment split*. The substituted definition now references the sections that give meaning to the term in relation to a payment split under Part VIII B and Part VIII C of the FLA.

Item 12—Paragraph 10(c)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 13—Paragraph 14(e)

This amendment is a minor textual amendment to correct an error, retitling the second subparagraph (iv) as subparagraph (v).

Item 14—Subparagraphs 17(1)(a)(i) and (ii)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 15—Subparagraph 17(1)(b)(i)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 16—Paragraphs 17(1)(c) and (e)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 17—Paragraph 22(b)

This amendment includes a reference to new Part VIII C of the FLA after the existing reference to Part VIII B to ensure payment splits under either part are covered by the operation of this provision.

Item 18—Subparagraphs 30(1)(a)(i) and (ii)

This amendment includes a reference to new Part VIIC of the FLA after the existing reference to Part VIIB to ensure payment splits under either part are covered by the operation of this provision.

Item 19—Paragraphs 30(1)(b) and (d)

This amendment includes a reference to new Part VIIC of the FLA after the existing reference to Part VIIB to ensure payment splits under either part are covered by the operation of this provision.

Statement of Compatibility with Human Rights

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

Veterans' Entitlements Legislation Amendment (Western Australia Superannuation Splitting) Instrument 2022 (No. R39)

The 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 instrument is to make amendments to the following instruments as a result of the commencement of *Family Law Amendment (Western Australia De Facto Superannuation Splitting and Bankruptcy) Act 2020* (the **Amendment Act**). The instruments are:

- (a) the *Veterans' Entitlements (Family Law Affected Income Streams) Principles 2022*; and
- (b) the *Veterans' Entitlements (Guidelines for Determining Whether Income Stream is Asset-test Exempt) Determination 2022*; and
- (c) the *Veterans' Entitlements (Retention of Exemption for Asset-test Exempt Income Streams) Principles 2022*.

The Veterans' Entitlements Act (**VEA**) provides that certain 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 asset for the purposes of the VEA. 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 three instruments generally provide guidance on whether particular family law affected income streams are exempt from the asset or income test for the purposes of the VEA.

In 2001, the *Family Law Act 1975* (the **FLA**) was amended by the *Family Law Legislation Amendment (Superannuation) Act 2001*, to enable parties to family law proceedings to split their superannuation interests as part of their family law property division. Part VIII B was inserted in the FLA, enabling superannuation interests to be split either by agreement or by order of the Court (later amended to include splitting for de facto couples). All states other than Western Australia provided the Commonwealth with full subject matter referrals of power for de facto property, maintenance and superannuation in family law matters.

The Amendment Act, creates a new Western Australian specific Part VIII C in the FLA, dealing with superannuation splitting for separating de facto couples. The provisions relating to Western Australian are confined to Part VIII C to aid usability and comprehension for judicial officers, lawyers, and separating couples in seeking to find WA-specific provisions.

Human rights implications

The attached instrument generally engages the following human rights:

- The right to social security: Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The rights of equality and non-discrimination: Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- The obligation to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property: Article 16 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)

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

Conclusion

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

Right to equality and non-discrimination

Article 26 of the ICCPR states that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...national or social origin, property...or other status'.

The instrument makes amendments to ensure that redress made by the Amendment Act operates as intended. In particular the Amendment Act fills a gap in the law, to allow de facto couples in Western Australia to split their superannuation interests following separation.

Currently, by virtue of their marital status and geographical location, de facto couples in Western Australia constitute the only class of couple relationship in Australia who are not able to split their superannuation interests following the end of their relationship. This differential treatment under the law is having increasingly unfair consequences for de facto couples in Western Australia, as the value of superannuation assets in the community continues to grow.

Schedule 1 of the Amendment Act addresses this inequity by extending to Western Australia de facto couples the ability to split their superannuation, either by agreement or by court order. The Amendment Act's amendments ensure all married and de facto couples in Australia are treated equally under the law in respect of their ability to divide their property, including their superannuation, following separation. The instrument by extension provides for the equal application to Western Australian de facto couples by ensuring consistent application under the instruments being amended.

The instrument therefore promotes equal protection before the law for separating de facto couples in Western Australia.

The obligation to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property

Article 16 of CEDAW states that 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women... (h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.'

While the inability of Western Australia de facto couples to split their superannuation applied equally to men and women, the consequences of this inability for couples to transfer ownership of their superannuation following a relationship breakdown may disproportionately affect women. This is due to the lower amounts of superannuation women accumulate by retirement, on average.

Women's obstacles to accumulating as much superannuation as a male partner may arise from, for example, taking time out of the paid workforce to give birth to, and care for children. Differential levels of superannuation between men and women are also explained by higher incidence of women occupying casual, part-time or lower paid roles over their career. The Amendment Act ensures that, if a couple agrees, or if a court determines that it is fair and equitable, the superannuation interests of both parties may be redistributed between them, having regard to the parties' respective contributions (including non-financial and homemaker contributions), and their future needs (including consideration of their future earning capacity). Again, the instrument by extension provides for the equal application to Western Australian de facto couples by ensuring consistent application under the instruments amended.

The instrument therefore promotes the equality of the spouses with respect to ownership of property following the end of the relationship.

Conclusion

This attached instrument is compatible with human rights as it promotes some rights while not limiting any others.

Repatriation Commission