

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Finance

in compliance with section 15J of the *Legislation Act 2003*

*Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948)
Amendment Orders 2023*

The *Parliamentary Contributory Superannuation Act 1948* (the PCS Act) provides superannuation benefits to former parliamentarians who entered Federal Parliament prior to 9 October 2004, or to their eligible dependants upon their death, or to former spouses as a result of a family law superannuation splitting arrangement. The superannuation scheme is known as the Parliamentary Contributory Superannuation Scheme (the PCSS).

Part VAA of the PCS Act sets out the family law splitting arrangements in the PCSS when the trustee of the scheme is served with a superannuation splitting agreement or order as defined under the *Family Law Act 1975*. Part VAA allows for a separate interest to be created in the PCSS for the non-member (former) spouse of a PCSS member who has been allocated a part of the member spouse's interest in the PCSS under a superannuation splitting agreement or order. Section 22CK of the PCS Act provides that the Minister may, by legislative instrument, make Orders prescribing matters required or permitted by Part VAA of the PCS Act to be prescribed.

The *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Orders 2004* (the Orders) include methods and factors used to value PCSS interests (which are a life-time pension (retiring allowance) or annuity payable under the PCS Act) for the purposes of superannuation splitting. Relevantly, this includes the process for determining the 'scheme value' of a PCSS interest. The scheme value of the PCSS interest (in addition to the 'family law value', which is determined in accordance with the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003*) is required to determine the applicable transfer amount to be allocated under the PCSS to the member's former spouse.

The purpose of the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023* (the Amendment Orders) is to rectify an anomaly relating to the determination of the scheme value of the PCSS pension or annuity in circumstances where that benefit has been temporarily reduced under arrangements specified in section 21 of the PCS Act. Section 21 of the PCS Act reduces the rate of PCSS pension while a member is receiving salary as a member of a State or Territory Parliament, by the rate of that salary.

The Amendment Orders amend the Orders to ensure that the scheme value in respect of a PCSS pension or annuity that has been temporarily reduced under section 21 of the PCS Act is determined by reference to the *substantive value* of the retiring allowance or annuity rather than its temporarily reduced rate. This is consistent with the method for determining the scheme value of a PCSS pension or annuity that has been temporarily reduced under section 21B of the PCS Act (reduction due to "office of profit" income), and with the broader

objectives of the superannuation splitting framework as provided under the *Family Law Act 1975*, to ensure superannuation agreements and orders are made on just and equitable terms.

The amendments apply in relation to the determination of the value of a PCSS interest identified in an agreement or order made on or after the commencement of the Amendment Orders, notwithstanding whether the operative time in relation to the payment split was before, on or after the commencement of the Amendment Orders.

The Amendment Orders are a legislative instrument for the purposes of the *Legislation Act 2003*. Section 22CK of the PCS Act provides that despite anything in regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*, section 42 (disallowance) of that Act applies to the orders made under section 22CKs.

The Amendment Orders and the Orders are not subject to sunseting. Item 6 of the table in section 11 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, made under paragraph 54(2)(b) of the *Legislation Act 2003*, exempts legislative instruments (other than regulations) that relate to superannuation from the sunseting regime set out under Part 4 of Chapter 3 of that Act. Instruments pertaining to family law superannuation splitting in the PCSS are intended to have enduring operation and the existence of uncertainty in respect of an individual's scheme entitlements would not be appropriate.

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 Amendment Orders commence on the later of either the day after the Amendment Orders are registered on the Federal Register of Legislation, or the day after the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023* (a related instrument) is registered. However, the Amendment Orders do not commence at all if the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023* is not registered.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Attorney-General's Department to ensure the amendments will achieve a consistent method for the determination of the scheme value of PCSS pensions that have been temporarily reduced.

The Office of Impact Analysis was also consulted on this instrument and advised that an Impact Analysis is not required for these amendments: OIA23-05155.

Details of the Amendment Orders are set out at [Attachment A](#).

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

Details of the Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023

This attachment sets out the details of the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023* (Amendment Orders).

The Amendment Orders amend the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Orders 2004* (the Orders) to rectify an anomaly relating to the determination of the ‘scheme value’ of a life-time pension or annuity payable under the *Parliamentary Contributory Superannuation Act 1948* (PCS Act). The scheme value represents a value of the member’s interest in the PCSS at the time of the relevant family law split and is a necessary component in calculating the value of the interest the former spouse will be allocated in the PCSS.

Clause 3 of Part 1 of Schedule 1 to the Orders provides the method to determine the gross scheme value of a PCSS interest in the payment phase. Relevantly, item 1 provides a formula for determining the value of a section 18 entitlement (former parliamentarian retiring allowance/pension) or section 19 entitlement (spouse annuity entitlement) payable for life under the PCS Act. One of the variables in that formula, “A”, is defined by reference to the annual pension or annuity payable under sections 18 or 19 of the PCS Act. The value “A” is then multiplied by the applicable age factor for the person as specified in the Orders to determine the scheme value of the member spouse’s PCSS pension or annuity.

The rate of the pension or annuity referred to in “A” expressly does not take into account any reduction under section 21B of the PCS Act. Section 21B temporarily reduces a member spouse’s PCSS pension or annuity while the member spouse is in receipt of income from an ‘office of profit’ (being certain Commonwealth and State government offices or positions).

However, the definition of “A” does not require any reduction to the member spouse’s PCSS pension or annuity under section 21 of the PCS Act, as a result of income the member spouse receives as a member of a State or Territory Parliament, to be likewise disregarded. This means that to the extent that a member’s pension or annuity is reduced at the point in time when their former spouse’s interest is valued, applying the existing formula could result in a determination of a scheme value of the interest, and consequently the value of the annuity entitlement in the PCSS for the former spouse, of an artificially low amount – including an amount of zero. This is not a desired policy outcome and does not properly reflect the value of the interest, given reductions to the PCSS pension or annuity under section 21 are temporary in nature.

The Amendment Orders amend the Orders to ensure that the scheme value determined in respect of the PCSS pension or annuity would disregard any reduction made to the pension or annuity under section 21 of the PCS Act. This will therefore provide consistent valuation of a PCSS pension or annuity that is subject to any temporary reduction, whether made under section 21 or section 21B of the PCS Act.

After commencement of the Orders, the amendments will provide that a former spouse’s entitlement to any PCSS associate immediate annuity is calculated by reference to the substantive PCSS pension or annuity, regardless of whether it is subject to a section 21 or

21B reduction. This will ensure that PCSS pensions or annuities, temporarily reduced for different reasons, are consistently valued for the purpose of a just and equitable property settlement under the *Family Law Act 1975*.

Part 1—Preliminary

Section 1 – Name

This section provides that the title of the instrument is the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023*.

Section 2 – Commencement

This section provides that the instrument will commence on the later of the day after the instrument is registered on the Federal Register of Legislation or the day after the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023* is registered. That instrument makes equivalent changes to the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003*. However, the Amendment Orders do not commence at all if the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment (No. 2) Approval 2023* is not registered, to ensure that the substantive instruments relating to calculation of PCSS interest values remain consistent.

Section 3 – Authority

This section provides that the instrument is made under section 22CK of the *Parliamentary Contributory Superannuation Act 1948*.

Section 4 – Schedules

This section 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 Schedule concerned. Any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Orders 2004

Item 1 – At the end of Part 2

Item 1 inserts a new Part 3 at the end of Part 2 of the Orders, which deals with application, saving and transitional matters. This is a consequential amendment to Item 2 below. New clause 3.01 provides that the amendment made by Item 2 would only apply to the determination of a value of an interest in the PCSS identified in an agreement or order made under Part VIIIB or VIIC of the *Family Law Act 1975* on or after the commencement of the Amendment Orders, notwithstanding whether the operative time in relation to the relevant payment split is before, on or after commencement.

Item 2 – Clause 3 of Part 1 of Schedule 1 (table item 1, column headed “Method or factor”)

Item 2 amends Clause 3 of Part 1 of Schedule 1, which relates to methods and factors for valuing interests of members in the payment phase.

This amendment rectifies an anomaly relating to the determination of the scheme value of a life-time pension or annuity interest payable under the PCS Act that is subject to a reduction under section 21 of the PCS Act. Section 21 of the PCS Act requires the member spouse’s PCSS pension or annuity to be reduced while the member spouse receives salary as a result of serving in a State or Territory Parliament.

Item 1 of the table in clause 3 provides the methods and factors for determining the scheme value of a life-time pension or annuity interest payable under the PCS Act. The formula in column 1 contains a variable “A”, which relates to the annual rate of the member spouse’s PCSS pension or annuity. The definition expressly disregards any reduction in that pension due to a temporary reduction under section 21B (which reduces PCSS pensions and annuities by reference to salary received under an “office of profit”).

Item 2 omits ‘21B’ in the definition of “A” and substitutes ‘21 or 21B’. This means that the value of “A” will be the unreduced amount of the annual PCSS pension or annuity as any temporary reduction to the pension or annuity under section 21 will be disregarded in the same way as “office of profit” reductions under section 21B are disregarded. The amendment will therefore enable a consistent method for the determination of the scheme value for temporary reductions to the PCSS pension whether due to the member spouse receiving State or Territory parliamentary salary or Commonwealth or State office of profit income.

Statement of Compatibility with Human Rights

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

Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023

This disallowable 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 *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Amendment Orders 2023* (the Amendment Orders) amend the *Superannuation (Family Law—Parliamentary Contributory Superannuation Act 1948) Orders 2004* (the Orders) to rectify an anomaly relating to the determination of the scheme value of the pension or annuity which has been temporarily reduced under section 21 of the *Parliamentary Contributory Superannuation Act 1948* (PCS Act). Section 21 of the PCS Act requires the Parliamentary Contributory Superannuation Scheme (PCSS) pension or annuity to be reduced by any salary received by the member spouse for being a member of a State or Territory Parliament.

The Amendment Orders amend the Orders to provide that the method to determine the scheme value and transfer amount in respect of the PCSS pension or annuity is consistent with the method for other temporary reductions to a PCSS pension or annuity made under section 21B of the PCS Act (reduction due to “office of profit” income). Similar amendments are also being made to the method to determine the family law value as provided under the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Approval 2003*.

The amendments will provide that under such circumstances a former spouse is entitled to a PCSS associate immediate annuity from the operative time, based on the substantive PCSS pension or annuity, in respect of a superannuation splitting agreement or order made on or after the commencement of the Amendment Orders. This is consistent with the broader objectives of the Family Law superannuation splitting regime for creating a separate interest for the former spouse upon marriage breakdown (with a subsequent reduction to the member spouse’s original PCSS pension or annuity interest).

Human rights implications

This Instrument engages the following rights:

- the equality of rights and responsibilities of spouses at the dissolution of a marriage or de facto relationship in Article 23(4) of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the obligation to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property in

Article 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).

Article 23(4) of the ICCPR states that ‘States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.’

Article 16 of the CEDAW provides that States Parties are to take all appropriate measures to ensure ‘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’.

This Instrument promotes these rights by providing consistency for determining interests in instances where a member holds an office of profit or where a member is a member of a State or Territory Parliament. The amendments made by this Instrument ensure that superannuation interests can be accurately valued and divided in accordance with the Family Law objectives in splitting superannuation justly and equitably through ensuring that the pension is accurately valued during a marriage breakdown.

Conclusion

This Instrument is compatible with human rights freedoms because it promotes the protection of human rights.

**Senator the Hon Katy Gallagher
Minister for Finance**