The Military Superannuation and Benefits Act 1991 (“the Act”) in section 4 required the making of a deed (“the Trust Deed”) to establish an occupational superannuation scheme for members of the Australian Defence Forces undertaking continuous full time service and to set out the functions and powers of the Military Superannuation and Benefits Board of Trustees No. 1 (the Board) established under Part 6 of the Act.

The Schedule to the Trust Deed made by the Minister for Defence Science and Personnel under section 4 of the Act contains Rules (the MSB Rules) which deal with various aspects of the scheme, including the benefits to be provided to members of the scheme upon retirement, or to dependants of deceased members of the scheme.

Section 5 of the Act provides that the Trust Deed may be amended by legislative instrument signed by the Minister, with the consent of the Board.

Division 2 of Part 3 of the MSB Rules provides for invalidity benefits, based on a 3-tiered system of invalidity classification (Class A, B or C), when a member is retired on the ground of invalidity. Benefits are commensurate with an invalidity retiree’s percentage of incapacity for civil employment. The Division also provides for the review of a person’s invalidity classification.

A person with a Class A invalidity classification is entitled to an invalidity pension based on an employer benefit that takes into account actual service and prospective service to the later of age 55 or retiring age. A person with a Class B invalidity classification is entitled to an invalidity pension that is the greater of either:
- half the invalidity pension that would have been paid had the person been classified as Class A; or
- the pension that would have been payable had the person not been retired on the grounds of invalidity and had elected to convert the employer benefit to pension.

Paragraph 43(1)(a) of the MSB Rules provides for the payment of a lump sum when an invalidity pensioner without dependants dies within 10 years of the pension becoming payable. The lump sum is the lesser of:
- the amount by which the invalidity pensioner’s employer benefit exceeds the amount of pension already paid; or
- the amount of pension that would have been paid in the period from the pensioner’s date of death to the end of the 10 year period from when the pension first became payable.
The amendments made by the Military Superannuation and Benefits Amendment Trust Deed 2010 (No. 1) are clarifying amendments to make it absolutely clear that, when determining whether a lump sum is payable under paragraph 43(1)(a) of the MSB Rules, prospective service to the later of age 55 or retiring age is to be used when calculating the employer benefit of a deceased invalidity pensioner who was in receipt of a pension equal to half the invalidity pension that would have been paid had the person been classified as Class A (that is, a pension payable under subparagraph 28(1)(b)(i) of the MSB Rules). This was the intent set out in the Report of the Defence Force Retirement and Death Benefit Scheme Review Committee (known as the Cole Report) that recommended the establishment of the MSB scheme.

The amendments also make it clear that prospective service is not to be taken into account when determining whether a lump sum is payable under paragraph 43(1)(a) of the MSB Rules for a person with a Class B invalidity classification in receipt of a pension calculated as if the person had not been retired on the ground of invalidity and had elected to convert the employer benefit to pension (that is, a pension payable under subparagraph 28(1)(b)(ii) of the MSB Rules).

The clarifying amendments are to have retrospective effect to the date the Deed commenced to reflect the intent set out in the Cole Report. No one is disadvantaged by the retrospective nature of the amendments as the administrator of the scheme, ComSuper, has been using prospective service when calculating eligible service for a deceased invalidity pensioner who had been classified as Class B.

Clause 1 sets out the manner in which this Instrument may be cited.

Clause 2 provides that clauses 1 to 3 and Schedule 1 of the amending Deed commence on 18 September 1991, the date the Military Superannuation and Benefit Trust Deed and Rules were made as a stand alone instrument. Schedule 2 commences on 25 September 1991, the date Rule 43 was repealed and substituted.

Clause 3 ensures that no person suffers a disadvantage or incurs any liability by virtue of the amendments made by Schedule 1.

Clause 4 ensures that no person suffers a disadvantage or incurs any liability by virtue of the amendments made by Schedule 2.

Schedule 1 Item 1 amends paragraph 2 of Schedule 5 of the MSB Rules to make it clear that for the purpose of converting an employer benefit to pension, prospective service is taken into account when calculating eligible service for an invalidity pensioner who was in receipt of a pension that was equal to one half the pension that would have been paid had the pensioner been classified as Class A (that is, a pension payable under subparagraph 28(1)(b)(i) of the MSB Rules).

Schedule 1 Item 2 amends Schedule 6 of the MSB Rules to make it clear that the eligible service of an invalidity pensioner who was classified as Class B at the date of death and who was in receipt of a pension calculated at the rate set out in subparagraph 28(1)(b)(ii) of the MSB Rules (that is, the person had been treated as if he/she had not been retired on the ground of invalidity and had elected to convert his/her employer benefit to pension) is the person’s actual service.
Schedule 1 Item 3 further amends Schedule 6 to make it clear that the eligible service of an invalidity pensioner who was classified as Class B at the date of death and who was in receipt of a pension calculated at the rate set out in subparagraph 28(1)(b)(i) of the MSB Rules (that is, the person was in receipt of half the invalidity pension that would have been paid had the person been classified as Class A) is the person’s actual service and prospective service to the later of age 55 or retiring age.

Schedule 2 Item 1 removes any doubt that, notwithstanding any reclassification of an invalidity retiree’s percentage of incapacity for civil employment (for example, from Class A to Class B or vice versa), any employer benefit calculated for the purposes of subparagraph 43(1)(a)(i) of the MSB Rules is to be calculated based on the person’s invalidity classification at the date of death.

Schedule 2 Items 2 and 3 are made to remove any doubt that it is only the lump sum that represents the residual employer benefit that is payable, not the whole employer benefit.

This is a legislative instrument for the purpose of section 44(2) of the Legislative Instruments Act 2003 (LIA) and is not subject to disallowance in accordance with item 39 of the table in subsection 44(2) of the LIA.

The Military Superannuation and Benefits Board of Trustees No. 1 has consented to the amendments. The administrator (ComSuper) and Defence have been consulted in relation to these amendments.

A regulation impact statement is not required as these are clarifying amendments.

Authority: Section 5 of the Military Superannuation and Benefits Act 1991