EXPLANATORY STATEMENT

Veterans’ Entitlements (Class of Debts – Self Managed Superannuation and Small APRA Funds) Specification 2012

Summary

The Veterans’ Entitlements (Class of Debts – Self Managed Superannuation and Small APRA Funds) Specification 2012 (the Specification) is made under subparagraph 206(1)(b)(ii) of the Veterans’ Entitlements Act 1986 (the Act).

Subparagraph 206(1)(b)(ii) provides that the Repatriation Commission may, on behalf of the Commonwealth, by determination in writing, waive or defer the right of the Commonwealth to recover debts under the Act included in a class of debts specified by the Minister [for Veterans’ Affairs] by notice in the Gazette (publication in Gazette is satisfied by publication on the Federal Register of Legislative Instruments (see: section 56 of the Legislative Instruments Act 2003)).

The purpose of the Specification is to specify a class of debts. The Repatriation Commission, on behalf of the Commonwealth, may waive or defer the right of the Commonwealth to recover a debt included in the class. It is envisaged the Repatriation Commission, in line with the approach taken by the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs, will choose to waive a debt rather than defer the right of the Commonwealth to recover it.

Background

Income streams sourced from a self managed superannuation fund or a small APRA (Australian Prudential Regulation Authority) fund:

- before 20 September 2004 (or that were commuted and rolled over on or after 20 September 2004 from those income streams and retained their 100 percent exemption); or
- between 20 September 2004 and 19 September 2007 (or that were commuted and rolled over on or after 20 September 2007 from those income streams and retained their 50 percent asset-test exemption); and

which comply with the requirements of section 5JA or 5JB of the Act, are 100 per cent or 50 per cent asset-test exempt. If these income streams are commuted, the asset-test exemption may be retained provided the new income stream complies with the requirements of the Veterans’ Entitlements (Guidelines for Determining whether Income Stream is Asset-test Exempt) Determination 2007 (No. 1) or the Veterans’ Entitlements (Retention of Exemption for Asset-test Exempt)
These requirements include commuting the income stream and purchasing a similar income stream product from a retail provider. This option is available at any time to the owner of the income stream under this specification.

These income streams are required, among other things, to meet a ‘high probability’ actuarial test that the provider of the income stream will be able to pay the income stream as required, so as to comply with the requirements of section 5JA or 5JB of the Act. However, some self managed superannuation funds or small APRA funds may no longer be able to meet this requirement due to changes in the value of assets backing their income stream.

Where an income stream does not meet the high probability test, it may be restructured by purchasing a retail asset-test exempt product (which will comply with the requirements of the Act). In these circumstances, the income stream will continue to be assessed as asset-test exempt.

Alternatively, the income stream may be restructured into a market-linked income stream either from a retail provider or within the self managed superannuation fund. However, this new income stream will no longer meet the requirements of section 5JA or 5JB of the Act. The new market-linked income stream will also not meet the requirements of section 5JBA as the income stream’s commencement day would not meet the requirements of subparagraph 5JBA(1)(a)(i) of the Act. Accordingly, the market-linked income stream will be 100 percent asset tested.

Under the Act, a consequence of restructuring an income stream which was sourced from a self managed superannuation fund or small APRA fund to a market-linked income stream, will mean that the difference between the amount that has been paid by way of income support where the income stream was asset-test exempt and the amount that would have been payable had the income stream been asset-tested, is a debt due to the Commonwealth under section 52ZMA of the Act.

This specification will allow for a debt in this class to be waived or the right to recover it deferred thereby enabling the Repatriation Commission to waive or defer the Commonwealth’s right to recover debts arising under the Act incurred by persons whose income streams, sourced from a self managed superannuation fund or a small APRA fund before 20 September 2004 (or were commuted and rolled over on or after 20 September 2004 from those income streams and retained their 100 percent exemption) and which complied with the requirements of sections 5JA and 5JB of the Act, are commuted to a market-linked income stream. A waiver or deferral may apply irrespective of whether the asset-test exempt income stream does or does not meet the high probability test. In other words, a waiver or deferral is available at any time, provided the income stream is commuted to a 100 percent asset tested market-linked income stream.
Explanation of the provisions

Section 1 states the name of the Specification is the Veterans’ Entitlements (Class of Debts – Self Managed Superannuation and Small APRA Funds) Specification 2012.

Section 2 provides that the Specification commences, or is taken to have commenced, when the Social Security (Waiver of Debts-Self Managed Superannuation Funds and Small APRA Funds) (FaHCSIA) Specification 2011 commences or commenced (FaHCSIA Specification). The FaHCSIA Specification commences on the day after the end of the period for disallowing it, in accordance with section 42 of the Legislative Instruments Act 2003. Subsection 1237AB(3) of the Social Security Act 1991 provides that an instrument made under subsection 1237AB(1) of that Act is of no effect until the time allowed for its disallowance has passed. The FaHCSIA Specification, and therefore the attached Specification, will commence on the day after the end of the disallowance period for the FaHCSIA Specification.

Section 3 contains definitions relevant to the Specification.

Section 4 specifies the class of debt that may be waived or deferred. A debt is in a specified class if a person owes a debt to the Commonwealth under section 52ZMA of the Act which did not arise because the person knowingly made a false or misleading statement, or knowingly provided false information to the Repatriation Commission or the Commonwealth (paragraphs 4(a) and (b)).

The specified class of debts must also meet the requirements of subparagraphs 4(c)(i)(A) and (B). That is, immediately before the commencement of the Specification, the income stream that is relevant for the purposes of section 52ZMA:

- was an asset-test exempt income stream that met the requirements of either section 5JA or 5JB of the Act; or
- an asset-tested income stream (long term) that was previously an asset-test exempt income stream but due to changes in the value of the assets backing the income stream, failed to meet the high probability actuarial test. As these income streams are no longer able to meet the requirements of either paragraph 5JA(1)(b) or 5JB(1A)(b) of the Act, they are unable to retain their asset-test exemption. In these circumstances, these income streams would be assessed as asset-tested income streams and this change of status would normally trigger the operation of section 52ZMA of the Act.

Further, a debt is in a specified class if the income stream, being one that meets the requirements of subparagraphs 4(c)(i)(A) or (B) of the Specification, was also sourced from a self managed superannuation fund or a small APRA fund (subparagraphs 4(c)(ii)(A) and (B)) and on or after the commencement of
the Specification the income stream is commuted and rolled over into an asset tested market-linked income stream (paragraph 4(d)).

Retrospectivity

The attached legislative instrument may (retrospectively) commence before it is registered on the Federal Register of Legislative Instruments. If that occurs, subsection 12(2) of the *Legislative Instruments Act 2003* will not be infringed because the instrument does not negatively affect a right of any person or impose a liability on any person. The instrument is benevolent in nature.

Consultation

Public consultation has not been undertaken as the Specification is benevolent in nature and the outcome of any consultation would probably have been predictable (i.e. favourable). Consultation by e-mail was undertaken with the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) which made a similar Specification. In respect of its Specification, FaHCSIA consulted Centrelink, the Department of Veterans’ Affairs and the Department of Education, Employment and Workplace Relations, to ensure a co-ordinated approach by all relevant Departments. A similar Specification has also been made by the Minister for Employment to allow the waiver of debts for which the Minister for Employment has responsibility.
Statement of Compatibility with Human Rights

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

The attached 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 legislative instrument is made by the Minister for Veterans’ Affairs. It sets out a class of debts. The Repatriation Commission may waive or defer a debt within the class.

The class of debt is in respect of certain debts incurred by pensioners under the *Veterans’ Entitlements Act 1986*. The debts relate to pension overpayments brought about because certain superannuation income streams (assets) should have been taken into account (assets test) when assessing the level of pension for the pensioners in question. The more assessable assets a person has, the less their pension will be. If assessable assets are not taken into account for the purposes of determining the level of pension for a person, as in the current case, then an overpayment occurs which is a debt to the Commonwealth.

In the current case, the assets that became assessable were previously not assessable and pension was not overpaid in respect of them. The assets became assessable because, due to poor financial conditions generally, they could no longer meet the requirements that would make them non-assessable (i.e. exempt from the assets test).

In particular the assets did not satisfy the “high probability test” i.e. that an independent actuary is satisfied that there is a high probability that the superannuation fund that governs the asset (income stream) will be able to make payments to the owner of the income stream as required under the contract that established the income stream. In short, poor financial conditions meant the income streams underperformed and could not generate the necessary payments and it was the capacity to meet the required level of payment that made the income stream asset test exempt.

In these circumstances the Minister for Veterans’ Affairs decided to give the Repatriation Commission the option of waiving or deferring the debts arising from pension overpayments due to the income streams in question no longer being asset-test exempt meaning pension should have been reduced accordingly.

Essentially this has the effect of enabling the previously asset-test exempt income streams to continue as asset-test exempt income streams which
would have been the case but for the poor financial conditions that resulted in the underperformance of superannuation funds.

**Human rights implications**

The attached Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Warren Snowdon  
Minister for Veterans’ Affairs  
Rule Maker
Regulatory Impact Statement

A Regulatory Impact Statement and a Business Costs Calculator are not required as a waiver or deferral of the Commonwealth’s right to recover debts under the Act will have no regulatory or competition impacts, and will not impose compliance costs on business.