

## EXPLANATORY STATEMENT

### Veterans' Entitlements (Attribution of Income) Principles 2002

#### Summary

Section 52ZZZQ of the *Veterans' Entitlements Act 1986* (the Veterans' Entitlements Act) provides that the Commission may formulate principles to be complied with by it when making decisions under a number of provisions of the Veterans' Entitlements Act, including subsections 52ZZK(2), 52ZZL(1), 52ZZP(2) and 52ZZQ(1).

The purpose of this instrument is to set out decision-making principles that the Commission must comply with in making determinations under sections 52ZZK, 52ZZL, 52ZZP and 52ZZQ of the Veterans' Entitlements Act. The determinations under section 52ZZK and 52ZZL relate to preventing the double counting of attribution and distribution income from a company or trust in relation to an attributable stakeholder of that entity and also the appropriate treatment of capital distributions. The determinations made under sections 52ZZP and 52ZZQ relate to finding appropriate derivation and attribution periods for the company or trust and the attributable stakeholders so that the typical earnings of the company or trust are fairly attributed to an affected income support pensioner.

#### Background

The *Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies – Integrity of Means Testing) Act 2000* amended the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to give effect to a measure in the Government's 2000-2001 Budget to revise the means test treatment of private companies and private trusts. The measure aims to ensure that income support pensioners who hold their assets in private companies or private trusts receive comparable treatment under the means test to those income support pensioners who hold their assets directly. The assets and income of the structure will be attributed to the person or persons who control the company or trust, or to the person or persons who were the source of the capital or corpus of the company or trust.

Sections 52ZZK and 52ZZL of the Veterans' Entitlements Act relate to the way in which income of a company or trust can be attributed, or not attributed, to an attributable stakeholder of that entity. Section 52ZZP deals with finding a typical earnings period for a company or trust, the derivation period, whilst section 52ZZQ provides for determining the period (the attribution period) during which an amount equal to these 'typical earnings' will be held against the income support pensioner as personal income for Veterans' Entitlements purposes. These decision-making principles will assist the Commission in making these various determinations.

#### Explanation of the provisions

##### Part 1

Section 1 of the Principles states the name of the instrument and section 2 states that the Principles commence on gazettal. Section 3 contains interpretation provisions. Section 4 sets out the purpose of the instrument.

## Part 2

### *Division 2.1*

This Division, and Division 2.2, are intended to stop the double counting of attributable income and distribution income from a company or trust to a couple, where the operation of section 5ZZZL of the Act would be unable to prevent the double counting by itself. This problem comes about because of the rules, under the Veterans' Entitlements Act, that relate to working out a couple's income and assets for Veterans' Entitlements purposes.

Section 5 provides that this division will apply, in relation to an individual, where:

- the individual is a member of a couple;
- both members of the couple are attributable stakeholders of a particular company or trust;
- both members of the couple have been attributed income from the company or trust during the relevant period; and
- the individual's partner has also received a distribution from the company or trust during this same time.

Section 6 states that where the sum of a couple's distribution income from a company or trust is equal to their attribution income from that same source and the partner's distribution income is greater than his or her attribution income then, the Commission must consider whether an amount equal to the difference between the partner's two income levels should be excluded income in relation to the individual.

Section 7 provides that where the sum of a couple's distribution income from a company or trust is less than their attribution income from that same source and the partner's distribution income is greater than his or her attribution income then the Commission must consider whether an amount equal to the difference between the partner's two income levels should be excluded income in relation to the individual.

Section 8 states that where the sum of a couple's distribution income from a company or trust is greater than their attribution income from that same source and the individual's distribution income is less than his or her attribution income then the Commission must consider whether an amount equal to the difference between the individual's two income levels should be excluded income in relation to the individual.

### *Division 2.2*

Section 9 provides that this division will apply, in relation to an individual, where:

- the individual is a member of a couple;
- the individual is an attributable stakeholder of a particular company or trust, but his or her partner is not;
- the individual has been attributed income from the company or trust during the relevant period; and
- the individual's partner has received a distribution from the company or trust during this same period.

If this section applies, the Commission must consider determining that an amount equal to the amount of the distribution received by the individual's partner is excluded income in relation to the individual.

### *Division 2.3*

Section 10 provides that this Division will apply where an individual (the investor) makes a genuine transfer of capital to a company or trust in regard to which the investor is not an attributable stakeholder.

Section 11 states that for a genuine transfer of capital to exist the investor must:

- receive shares or units in the company or trust equivalent in value to the value of the capital transferred as consideration for the transfer;
- receive a legal or equitable right to a share of the capital of the company or trust;
- receive a legal or equitable right to receive dividends or distributions from the company or trust; and
- be over 18 years of age.

Section 12 provides that where an individual, who is an attributable stakeholder of a company or trust, is attributed with income that has actually been distributed to a genuine investor, then the Commission must consider excluding income in relation to the individual equal to the amount of the distribution paid to the genuine investor, multiplied by the individual's income attribution percentage.

## Part 3

### *Division 3.1*

Section 13 states that for the purposes of determining whether income distributed to an individual, who is an attributable stakeholder, is to be excluded from the individual's income for income testing purposes under section 52ZZL of the Veterans' Entitlements Act, the Commission must take into account whether the individual is an attributable stakeholder of more than one controlled private company or trust. The Commission also needs to consider whether any company or trust, in relation to which the individual is an attributable stakeholder, has received, whether directly or indirectly, a dividend or distribution from another controlled private company or trust.

Generally, where section 46A of the Veterans' Entitlements Act applies to a dividend or distribution payment, this payment will be held against an income support pensioner, for income testing purposes, for the following 12 months. Section 14 provides that where section 46A does apply to a payment in relation to an individual and the company or trust that made the payment to the individual has suffered a significant decrease in its earning capacity due it either having been wound up, or otherwise ceasing to exist, or has been subject to circumstances that have adversely affected its profitability then the Commission needs to consider whether the application of section 46A of the Veterans' Entitlements Act to the individual would be unfair or unreasonable. If the Commission decides that this is the case then the Commission can determine, under section 52ZZL of the Act, that the amount, or part of the amount, that is subject to the application of section 46A should not be included in the income of the individual for income testing purposes.

### *Division 3.2*

Section 15 provides that where an individual is an attributable stakeholder of a company and that company gives an equal, taking into account each attributable stakeholder's asset attribution percentage, distribution of capital to all of its attributable stakeholders then the Commission must consider whether all, or a part, of the distribution should not be included within the ordinary income of the individual for Veterans' Entitlements purposes.

Section 16 states that where a company makes a distribution to an individual who is an attributable stakeholder, which does not fall within the operation of sections 14 and 15, above, and the amount of the distribution is less than or equal to the income attributed to the individual under section 52ZZK of the Act then the Commission must consider whether the amount of the distribution should be excluded from the individual's income assessment for Veterans' Entitlements purposes. Alternatively, if the amount of the distribution is greater than the amount of income attributed to the individual under section 52ZZK of the Act then the Commission must consider whether a part of the distribution equal to the amount of income attributed to the individual should be excluded from the individual's income assessment for Veterans' Entitlements purposes.

### *Division 3.3*

Section 17 provides that where an individual is an attributable stakeholder of a trust and that trust gives an equal, taking into account each attributable stakeholder's asset attribution percentage, distribution of capital to all of its attributable stakeholders then the Commission must consider whether all, or a part, of the distribution should not be included within the ordinary income of the individual for Veterans' Entitlements purposes.

Section 18 states that where a trust makes a distribution to an individual who is an attributable stakeholder, which does not fall within the operation of sections 14 and 17, above, and the amount of the distribution is less than or equal to the income attributed to the individual under section 52ZZK of the Act then the Commission must consider whether the amount of the distribution should be excluded from the individual's income assessment for Veterans' Entitlements purposes. Alternatively, if the amount of the distribution is greater than the amount of income attributed to the individual under section 52ZZK of the Act then the Commission must consider whether a part of the distribution equal to the amount of income attributed to the individual should be excluded from the individual's income assessment for Veterans' Entitlements purposes.

### *Part 4*

Generally a derivation period in relation to a company or trust will be a tax year. However, at times, a tax year will not give an accurate indication of the current rate of income of a company or trust. Where this is the case the Commission can determine that another period more accurately reflects the company or trust's typical income. In determining what is a suitable derivation period, section 19 says that the Commission must take the following matters into account:

- the ordinary income of the company or trust during the relevant tax year;
- the ordinary income of the company or trust for any other period/s that is/are a typical earnings period/s for that entity;

- any circumstances affecting the company or trust during any of the above periods; and
- whether those circumstances would justify using a different derivation period than the relevant tax year.

*Part 5*

Section 20 provides for the determination of an appropriate attribution period, both in relation to an individual, and the company or trust in regard to which he or she is an attributable stakeholder, and also in relation to a derivation period. To determine an attribution period the Commission must have regard to the following matters:

- the ordinary income of the individual for the derivation period;
- the ordinary income of the individual for any other period/s that is/are a typical earnings period/s for the individual;
- any circumstances affecting the individual during any of the above periods; and
- any circumstances that could be regarded as likely to affect the individual's ordinary income.