

## **Superannuation Industry (Supervision) modification declaration No. 1 of 2015**

### **EXPLANATORY STATEMENT**

#### **Prepared by the Australian Prudential Regulation Authority (APRA)**

*Superannuation Industry (Supervision) Act 1993*, section 332

Under section 332 of the *Superannuation Industry (Supervision) Act 1993* (the Act), APRA may, in writing, declare that a modifiable provision is to have effect, as if it were modified as specified in the declaration, in relation to a particular person or class of persons, or a particular group of individual trustees or a class of groups of individual trustees. The modifiable provisions<sup>1</sup> include the operating standards for regulated superannuation funds made under Part 3 of the Act and which are contained in the *Superannuation Industry (Supervision) Regulations 1994* (the Regulations).<sup>2</sup> Regulation 5.08 is an operating standard and therefore a modifiable provision.

On 23 September 2015, APRA made Superannuation Industry (Supervision) modification declaration No. 1 of 2015 (the instrument) which modifies regulation 5.08 of the Regulations. This instrument revokes Modification Declaration No 26 made under section 332 of the Act on 22 July 2005 (MD 26).

The instrument applies to all RSE licensees of regulated superannuation funds.

The instrument commences upon registration on the Federal Register of Legislative Instruments (FRLI).

#### **1. Background**

In May 2004, new and stricter rules governing the treatment of minimum benefits were introduced into the Regulations by the *Superannuation Industry (Supervision) Amendment Regulations 2004 (No 2)* (the Amending Regulations).

The Amending Regulations amended subregulation 5.04(2) so as to make all of a member's benefits in an accumulation fund (including benefits financed by non-mandated employer contributions) minimum benefits which are subject to the restrictions relating to the treatment of minimum benefits specified in regulation 5.08.

Subregulation 5.08(1) of the Regulations imposes restrictions on the treatment of members' minimum benefits, preventing those minimum benefits from being divested from the member.

Certain employee retention arrangements that provide for members' benefits derived from non-employee mandated employer contributions are exceptions to the restrictions in subregulation 5.08(1) due to the operation of subregulation 5.08(2). This means that subregulation 5.08(2) allows for members' benefits derived from non-mandated employer contributions to be forfeited or divested if the member concerned does not stay in the employer's employment for a specified period. In effect, subregulation 5.08(2) "grandfathers" employee retention arrangements of the kind just described which have been in force in relation to the member concerned since before 12 May 2004.

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<sup>1</sup> 'Modifiable provision' is defined in section 327 of the Act.

<sup>2</sup> See paragraphs 327(1)(a) and (h) of the Act.

MD 26 was made for the purpose of expanding the scope of the exception in subregulation 5.08(2) of the Regulations by adding new subregulations 5.08(2A) – (2D). These subregulations provide similar relief for employee retention arrangements, but allow for some practical situations that are not covered by subregulation 5.08(2).

Under subsection 50(1) of the *Legislative Instruments Act 2003* (the Legislative Instruments Act), a legislative instrument registered after 1 January 2005 will sunset on the first 1 April or 1 October falling on or after the tenth anniversary of the registration of the instrument on the FRLI. MD 26 was registered on 25 July 2005 and is due to sunset on 1 October 2015.

## **2. Purpose and operation of the instrument**

As MD 26 is due to sunset on 1 October 2015, the purpose of this instrument is to continue to allow the current relief to operate without change. The effect of the instrument is to expand the scope of the exception in subregulation 5.08(2) in three ways:

- extend grandfathering to minimum service provisions contained in governing rules, an award or a certified agreement;
- extend grandfathering to minimum service provisions where the terms have been changed during the period after 12 May 2004 or where the terms have been set out in different documents at different times during that period; and
- extend grandfathering to minimum service provisions which allows the member to be an employee of their current employer's predecessor or related company for the minimum service period, or to be a member of another fund to which their current employer or its predecessor or related company contributed for the minimum service period.

This instrument adds the new subregulations 5.08(2A), (2B), (2C) and (2D) to the Regulations immediately after subregulation 5.08(2). Subregulations 5.08(2B), (2C) and (2D) contain definitions relevant to the new subregulation 5.08(2A).

Subregulation 5.08(2A) allows for minimum service provisions to be set out either in an agreement or in the fund's governing rules or in an award or certified agreement covering the member<sup>3</sup>, instead of strictly an agreement between the member and their employer (which is what subregulation 5.08(2) does).

The continuation of subregulation 5.08(2A) is necessary because minimum service provisions can be contained in funds' governing rules and in awards or certified agreements, not just in the employment contract or some other contract between the member and their employer. They can also be contained in more than one of these documents at any one time (that is, some of the provisions might be in one document while the remainder might be in another document). This instrument in effect extends the exception in subregulation 5.08(2) to minimum service provisions that are in any of these types of documents.

Subregulation 5.08(2) only grandfathers minimum service provisions if those provisions were set out in an agreement between the member and the employer and was entered into before 12 May 2004. This does not adequately cater for situations where the member has been subject to minimum service provisions during the period after 12 May 2004, where those provisions have undergone some changes, or have been set out in different

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<sup>3</sup> See subparagraphs 5.08(2A)(b)(i) to 5.08(2A)(b)(iv) and subparagraphs 5.08(2C)(a)(i) to 5.08(2C)(a)(iv) of the instrument.

documents (whether in an agreement between the member and the employer, governing rules, or an award or certified agreement) at different times during that period.

Subregulation 5.08(2A) grandfathers minimum service provisions where minimum service provisions have undergone some change, or have been imposed by different documents, since 12 May 2004. However, this is subject to the caveat that the changes must not have become more restrictive or disadvantageous for the member since that date<sup>4</sup>. Subregulation 5.08(2A) of this instrument continues to cater to these situations.

The continuation of subregulation 5.08(2A) reflects the recognition that the minimum service provisions in force on 12 May 2004 may be changed or replaced after that date. This may occur, for example, where an award or certified agreement that contains minimum service provisions expires after 12 May 2004 and is replaced by a new award or certified agreement. In this event, paragraph (f) of subregulation 5.08(2A) requires that the replacement minimum service provisions must not be any more restrictive than those previously in force.

Subregulation 5.08(2) only grandfathers minimum service provisions which make the member's entitlement to the minimum benefits concerned conditional on the member having been an employee *of the employer* for a specified minimum period. Subregulation 5.08(2A) continues to extend the exception to minimum service provisions which make the member's entitlement conditional on the member having been, for a specified minimum period, any of the following:

- an employee (or a particular class or category of employee) of the employer, or of a predecessor of the employer who previously carried on the employer's business, or of a related body corporate of the employer; or
- a member (or a particular class or category of member) of another superannuation fund (other than a self-managed superannuation fund) to which contributions were made for their benefit by the member's current employer, or by a predecessor of the current employer who previously carried on that employer's business, or by a related body corporate of the current employer.

This subregulation operates to include employee retention arrangements that stipulate a minimum period of employment with a corporate group rather than just with a single employer. It also provides for employee retention arrangements that work by stipulating a minimum period of fund membership rather than a minimum period of employment.

In light of MD 26 sunset on 1 October 2015, APRA conducted an assessment of the effectiveness and efficiency of continuing MD 26 and concluded that it was appropriate that the instrument be remade without amendment.

### **3. Consultation**

This instrument remakes MD 26 without changes to its substantive requirements. The modification to regulation 5.08 has been renumbered so that it is consistent with the numbering sequence in the Regulations. The definitions of "certified agreement" and "employment tribunal" have been expanded to take into account changes since MD 26 was made in the way in which those documents and bodies are referred to in industrial relations legislation. As MD 26 is due to sunset on 1 October 2015, this instrument allows for the continuation of the current regime which expands the scope of the exception in subregulation 5.08(2).

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<sup>4</sup> See paragraph 5.08(2A)(f) of the instrument.

APRA undertook extensive consultation with organisations representing APRA-regulated RSE licensees before making MD 26. Therefore APRA did not undertake further consultation upon making this instrument. APRA concluded that remaking MD 26 would have no impact on the superannuation industry as RSE licensees are currently operating under requirements identical to those imposed by the Instrument.

#### **4. Regulation Impact Statement**

The Office of Best Practice Regulation (OBPR) has advised that APRA need not complete a Regulation Impact Statement, nor submit a certification letter to the OBPR, given the minor impact of issuing this instrument on the superannuation industry.

#### **5. Statement of compatibility prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011**

A Statement of Compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

## ATTACHMENT A

### **Statement of Compatibility with Human Rights**

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

#### **Superannuation Industry (Supervision) modification declaration No. 1 of 2015**

This 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* (HRPS Act).

#### **Overview of the Legislative Instruments**

This legislative instrument revokes Modification Declaration No 26 made under section 332 of the *Superannuation Industry (Superannuation) Act 1993* (MD 26), and remakes the modification declaration unchanged as outlined in the Schedule.

The purpose of this Legislative Instrument is to continue to allow the relief provided by MD 26 to operate without change.

#### **Human rights implications**

APRA has assessed this Legislative Instrument and is of the view that it does not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the HRPS Act. Accordingly, in APRA's assessment, the instrument is compatible with human rights.

#### **Conclusion**

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