EXPLANATORY STATEMENT

Veterans' Entitlements (Attribution of Assets) Principles 2025

EMPOWERING PROVISION

The Repatriation Commission makes this instrument under section 52ZZZQ of the *Veterans’ Entitlements Act 1986* (the**Act**)*.*

PURPOSE

This instrument revokes schedule 3 to the Veterans’ Affairs (Legislative Instrument Re-making Exercise) Instrument 2014 (the **2014 Instrument**) and remakes it as a new standalone instrument ahead of its sunsetting date. Schedule 3 contains the Veterans’ Entitlements (Attribution of Assets) Principles 2001*.*

The instrument has been re-made with no substantive changes from Schedule 3 to the 2014 Instrument.

OVERVIEW

Section 52ZZZQ of the Act provides that the Repatriation Commission may formulate principles to be complied with by the Commission when making decisions under a number of sections of the Act, including sections 52ZZR, 52ZZT and 52ZZU.

This instrument sets out decision-making principles that the Commission must comply with in making determinations under sections 52ZZR, 52ZZT and 52ZZU of the Act. Such determinations relate to the way in which the assets and liabilities of a company or trust are attributed or not attributed to an individual under the means test for income support payments. An equivalent instrument exists under the *Social Security Act 1991* (Social Security Act).

Part IIIB of the Act specifies the means test treatment of private companies and private trusts. The provisions in Part IIIB aim to ensure that people who hold their assets in private companies or private trusts receive comparable treatment under the means test to those 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.

Section 52ZZR, 52ZZT and 52ZZU of the Act set out various rules relating to the way in which the assets and liabilities of a company or trust will be maintained against an individual. These decision-making principles will assist the Commission in modifying the application of those general rules, where this is necessary.

The following minor technical changes have been made to the drafting of schedule 3 to the 2014 Instrument:

* an authority provision added—new section 3;
* the purpose provision in section 4 of schedule 3 to the 2014 Instrument is removed—the purpose provision is redundant, and its removal preserves numbering consistency with the equivalent Social Security Act instrument;
* a repeal provision added as new section 3A—noting this section will be automatically repealed under section 48C of the *Legislation Act 2003*. Again, this is intended to preserve consistency with the numbering in the Social Security Act instrument.

EXPLANATION OF PROVISIONS

**Part 1** consists of sections 1, 2, 3, 3A and 4 and deals with preliminary matters.

Section 1 provides that the name of the instrument is the Veterans' Entitlements (Attribution of Assets) Principles 2025.

**Section 2** provides that the instrument commences on the day after the day it is registered.

**Section 3** sets out the authority for the Repatriation Commission making the instrument, namely section 52ZZZQ of the Act.

**Section 3A** repeals schedule 3 to the 2014 Instrument.

**Section 4** is the definition section. It signposts terms used in the instrument that have a defined meaning in the Act. It also defines other terms used in the instrument.

**Part 2** consists of sections 5 and 6 which deal with ***excluded assets***.

**Section 5** is a purpose provision. It highlights that Part 2 sets out decision-making principles with which the Commission must comply for the purposes of making a determination under subsection 52ZZR(2) of the Act—a determination that a specified asset is an ***excluded asset*** for the application of subsection 52ZZR(1) to a specified individual and a particular company or trust.

**Section 6** sets out principles relating to a ***genuine transfer of capital*** that the Commission is to comply with in determining that a specified asset is an ***excluded asset***.

Subsections 6(1) and 6(2) apply section 6 to circumstances where:

* an individual (the investor) who is not an attributable stakeholder of a company makes a ***genuine transfer of capital*** to the company for shares in the company;
* an individual (the investor) who is not an attributable stakeholder of a trust makes a ***genuine transfer of capital*** to the trust for units in the trust.

Subsection 6(3) provides that a transfer of capital is a ***genuine transfer of capital***, if all the following are met:

* the investor is over 18 years; and
* the investor receives, as consideration for the transfer, shares in the company, or units in the trust, of a value that is equivalent to the value of the capital transferred; and
* the investor has a legal or equitable right to a share of the capital on the winding-up of the company or trust; and
* the investor has a legal or equitable right to receive dividends or distributions under the constituent documents of the company or the terms of the trust.

Subsection 6(4) provides that the Commission must have regard to the following matters in considering the extent to which a ***genuine transfer of capital*** should be determined to be an ***excluded asset*** in relation to an attributable stakeholder of the company or trust:

* the value of the capital transferred to the company or trust; and
* the value of shares or units received by the investor; and
* the extent, if any, to which the value of the capital would not be required to be disregarded by any express provision of the Act.

**Part 3** consists of sections 7, 8, 9 and 10 and deals with ***excluded charges or encumbrances***.

**Section 7** is a purpose provision. It highlights that Part 3 sets out decision-making principles with which the Commission must comply for the purposes of making a determination under subsection 52ZZT(6) of the Act—a determination that the whole or part of a specified charge or encumbrance over the assets of a company or trust is excluded for the purposes of paragraphs 52ZZT(2)(c) or 52ZZT(4)(b).

**Section 8** provides that the Commission must take into account the following matters in determining that a charge or encumbrance is excluded:

* whether a transaction that gave rise to the charge or encumbrance was an ***arm’s length transaction***, having regard to the criteria described in section 9; and
* the matters referred to in section 10.

**Section 9** defines ***arm’s length transaction*** for section 8.

Subsection 9(1) provides that a transaction is an ***arm’s length transaction***, if:

* the transaction is for the purposes of the business activities of the company or trust; and
* the transaction is made under a written agreement that is signed by each party to the agreement, and witnessed by an individual who is not a party to the transaction; and
* each party to the transaction is:
  + at least 18 years old; or
  + at least 16 years old and engaged in a ***full-time occupation***; or
  + at least 16 years old and receiving a social security entitlement; and
* the transaction is made for an ***arm’s length amount***.

Subsection 9(2) provides that ***full-time occupation***:

* includes any employment, trade, business, profession, vocation or calling; and
* does not include a course of education at a school, college, university or similar institution.

***Arm’s length amount*** is a defined term in the Act—see section 52ZO of the Act.

**Section 10** sets out the other matters that the Commission must take into account in determining that a charge or encumbrance is excluded. These are:

* whether the individual is the sole attributable stakeholder, or a member of a couple both members of which are the only 2 attributable stakeholders of the company or trust; and
* the commercial, social and familial relationships (if any) between the parties to the transaction; and
* the nature and circumstances of the transaction.

**Part 4** consists of sections 11, 12, 13 and 14 and deals with ***unsecured loans over the assets of company or trust.***

**Section 11** is a purpose provision. It highlights that Part 4 sets out decision-making principles with which the Commission must comply in making a determination under subsection 52ZZU(1) of the Act—a determination that the value of a specified asset of the company or trust is to be reduced by the whole or part of the unsecured loan.

**Section 12** provides that in relation to an unsecured loan, the Commission must take into account:

* whether a transaction that gave rise to the loan was an ***arm’s length transaction*** as outlined in section 13; and
* the matters referred to in section 14.

**Section 13** defines ***arm’s length transaction*** for section 12.

Subsection 13(1) provides that a transaction is an ***arm’s length transaction***, if:

* the transaction is for the purposes of the business activities of the company or trust; and
* the transaction is made under a written agreement that is signed by each party to the agreement, and witnessed by an individual who is not a party to the transaction; and
* each party to the transaction is:
  + at least 18 years old; or
  + at least 16 years old and engaged in a ***full-time occupation***; or
  + at least 16 years old and receiving a social security entitlement; and
* the transaction is made for an ***arm’s length amount.***

Subsection 13(2) provides that ***full-time occupation***:

* includes any employment, trade, business, profession, vocation or calling; and
* does not include a course of education at a school, college, university or similar institution.

***Arm’s length amount*** is a defined term in the Act—see section 52ZO of the Act.

**Section 14** sets out the other matters that theCommission must take into account in relation to the transaction that gave rise to the charge or encumbrance. These are:

* whether the individual is the sole attributable stakeholder, or a member of a couple both members of which are the only 2 attributable stakeholders of the company or trust; and
* whether the loan is secured by a charge or encumbrance over an asset other than an asset described in paragraph 52ZZU(1)(b) of the Act; and
* the commercial, social and familial relationships (if any) between the parties to the transaction; and
* the nature and circumstances of the transaction.

CONSULTATION

The Department did not consult directly with individuals likely to be affected by the remake of this instrument. This was not considered necessary given the remake is administrative in nature to prevent the instrument from arbitrarily sunsetting on 1 April 2025. The remaking of this instrument will maintain the same policy intent and treatment to set out decision-making principles that the Commission must comply with in making determinations under sections 52ZZR, 52ZZT and 52ZZU of the Act. These determinations relate to modifying the way in which Division 11A of Part IIIB of the Act would otherwise maintain the assets and liabilities of a company or trust against an individual receiving a means tested income support payment.

HUMAN RIGHTS IMPLICATIONS

This instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment A.**

Approved by the rule-maker:

The Repatriation Commission

**Attachment A**

**Statement of Compatibility with Human Rights**

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

**Veterans' Entitlements (Attribution of Assets) Principles 2025**

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 Disallowable Legislative Instrument**

The Veterans' Entitlements (Attribution of Assets) Principles 2025 (the instrument) repeals Schedule 3 to the Veterans’ Affairs (Legislative Instrument Re-making Exercise) Instrument 2014 and remakes it as a standalone instrument ahead of its sunsetting date of 1 April 2025.

The purpose of the instrument is to set out decision-making principles that the Commission must comply with in making determinations under sections 52ZZR, 52ZZT and 52ZZU of the Act.  These determinations relate to modifying the way in which Division 11A of Part IIIB of the Act would otherwise maintain the assets and liabilities of a company or trust against a Veterans' Entitlements income support pensioner.

Under the *Veterans’ Entitlements Act 1986* the income and assets of a company or trust that benefits a pensioner may be attributed to the pensioner with the result that less pension is payable to the person. There are circumstances where it would be unfair if the relevant provisions were applied strictly and accordingly a discretion is vested in the Repatriation Commission (the Commission) to apply the rules in a flexible manner.

**Human rights implications**

This disallowable legislative instrument engages and promotes the right to social security contained in Article 9 of the [International Covenant on Economic Social and Cultural Rights](http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/CFB1E23A1297FFE8CA256B4C000C26B4). The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system.

The instrument is compatible with human rights as it ensures a person’s current resources are appropriately assessed for the purposes of ascertaining the person’s assessable income and assets for means testing purposes under Part IIIB of the Act.

**Conclusion**

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

Repatriation Commission

**Rule-Maker**