

EXPLANATORY STATEMENT

Veterans' Entitlements (Primary Production Concession) Principles 2025

EMPOWERING PROVISION

The Repatriation Commission makes this instrument under paragraphs 52ZZZQ(j), (k), (l) and (m) of the *Veterans' Entitlements Act 1986 (the Act)*.

PURPOSE

This instrument revokes schedule 7 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 sunseting date. Schedule 7 contains the Veterans' Entitlements (Primary Production Concession) Principles 2001.

The instrument has been re-made with no substantive changes from Schedule 7 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 52ZZZH, 52ZZZK and 52ZZZL, paragraph 52ZZZF(1)(f) and subsection 52ZZZJ(2).

This instrument sets out decision-making principles that the Commission must comply with in making determinations under sections 52ZZZH, 52ZZZK and 52ZZZL, paragraph 52ZZZF(1)(f) and subsection 52ZZZJ(2) 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 (the 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.

The measure aims to ensure that customers who hold their assets in private companies or private trusts receive comparable treatment under the means test to those customers who hold their assets directly. These determinations relate to the way in which the trusts and companies measure affects primary production enterprises.

The following minor technical changes have been made to the drafting of schedule 7 to the 2014 Instrument:

- authority provision added—new section 3;

- purpose provision in section 4 of schedule 3 to the 2014 Instrument removed—the purpose provision is redundant, and its removal preserves numbering consistency with the equivalent Social Security Act instrument;
- 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 (Primary Production Concession) 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 paragraphs 52ZZZQ(j), (k), (l) and (m) of the Act.

Section 3A repeals Schedule 7 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 the term “Act” to mean the *Veterans' Entitlements Act 1986*.

Part 2 consists of sections 5, 6 and 7, which deal with **primary production of companies**.

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 52ZZZF(1)(f) of the Act—a determination that a person is eligible for concessional primary production treatment under Division 11A of Part IIIB of the Veterans' Entitlements Act, even though that person, and their spouse, has not earned any primary production income in the past three financial years.

Section 6 provides, in summary, that the Commission must consider whether an individual has had a long-term connection with primary production, even though he or she does not satisfy the requirements of subparagraphs 52ZZZF(1)(e)(i), (ii) and (iii). An individual will be taken to have had a long-term connection with primary production if, for a period of 20 years, he or she has been involved in carrying on one or more primary production enterprises, has contributed a significant part of his or her labour to carrying on such enterprises and has directly or indirectly derived a significant part of his or her income from those enterprises. This 20-year period can be one continuous period or made up of 2 periods which total twenty years together.

Section 7 provides, in summary, that where a primary production enterprise was being carried on by a person or entity, other than the individual, or his or her spouse, or an entity controlled by the individual, or his or her spouse, at any time in the three-year period prior to the test time (i.e.. the former owner of the enterprise) then the Commission must consider the average net income of the primary production enterprise over the prior three years. The Commission must also consider whether there would have been any reductions or adjustments to that average

income if the primary production enterprise had been carried on by the individual, or his or her spouse, or an entity controlled by the individual, or his or her spouse.

Part 3 consists of sections 8 and 9 and deals with **reducing value of an asset owned by a company or trust**.

Section 8 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 52ZZZH(2) of the Act—a determination as to the part of a specified liability that can be used to reduce the value of an asset owned by a company or trust for the purposes of determining whether a trust is a concessional primary production trust under Subdivision K of Division 11A of Part IIIB of the Act.

Section 9 provides that the Commission must consider whether the liability arose as a result of a genuine arm's length transaction. In short, a transaction will fall into this category if it relates to the specific business activities of the company or trust, is not an agreement involving a minor (as defined in subsection 9(4)) and is in the form of a written agreement signed by each party to the transaction and witnessed by an independent person.

Part 4 consists of sections 10 and 11 and deals with **ownership of companies or trusts**.

Section 10 sets out the purpose of Part 4 of the instrument. This is to provide decision-making principles that can be used in making a determination, under subsection 52ZZZJ(2), that an asset, which would otherwise be an asset controlled by an individual, is taken, for the purposes of determining whether a trust is a concessional primary production trust under Subdivision K of Division 11A of Part IIIB of the Act, not to be controlled by the individual.

Section 11 provides that in making this determination the Commission needs to consider whether it is likely that, having regard to those decision-making principles set out in Part 2 of the *Veterans' Entitlements (Attributable Stakeholders and Attribution Percentages) Principles 2001*, the individual would be considered to be an attributable stakeholder of the company or trust that owns the asset. If the asset is owned by a concessional primary-production trust, the Commission must consider the likelihood that, but for this fact, the individual would be considered to be an attributable stakeholder of the trust.

Part 5 consists of sections 12 and 13 and deals with ***company assets attributable to individuals***.

Section 12 sets out the purpose of Part 5 of the instrument. This is to provide decision-making principles that can be used in making a determination, under subparagraph 52ZZZK(2)(a)(ii) or (b)(ii), that the adjusted net value of an asset controlled by an individual is, for the purposes of determining whether a trust is a concessional primary production trust under Subdivision K of Division 11A of Part IIIB of the *Veterans' Entitlements Act*, less than 100%.

Section 13 provides that in making this determination the Commission needs to consider whether it is likely that, having regard to those decision-making principles set out in Part 2 of the *Veterans' Entitlements (Attributable Stakeholders and Attribution Percentages) Principles 2025*, the individual would be considered to be an attributable stakeholder of the company or trust that owns the asset.

If the asset is owned by a concessional primary-production trust, the Commission must consider the likelihood that, but for this fact, the individual would be considered to be an attributable stakeholder of the trust. If the Commission does consider that it is likely that the individual would have been considered to be an attributable stakeholder of the company or trust, then the Commission must also consider what would be the individual's likely asset attribution percentage in relation to the company or trust, taking Part 3 of the *Veterans' Entitlements (Attributable Stakeholders and Attribution Percentages) Principles 2025* into account.

Part 6 consists of sections 14 and 15 and deals with **income attributed to individuals which is generated from companies or trusts**.

Section 14 sets out the purpose of Part 6 of the instrument. This is to provide decision-making principles that can be used in making a determination, under subparagraph 52ZZZL(1)(b)(ii) or (c)(ii), that, for the purposes of determining whether a trust is a concessional primary production trust under Subdivision K of Division 11A of Part IIIB of the Act, less than 100% of the net income generated by a primary production enterprise, which was carried on by a company or trust that was a controlled private company or trust in relation to the individual for the tax year, applies to the individual.

Section 15 provides that in making this determination the Commission needs to consider whether it is likely that, having regard to those decision-making principles set out in Part 2 of the *Veterans' Entitlements (Attributable Stakeholders and Attribution Percentages) Principles 2025*, the individual would be considered to be an attributable stakeholder of a company or trust that owns the asset.

If the asset is owned by a concessional primary-production trust, the Commission must consider the likelihood that, but for this fact, the individual would be considered to be an attributable stakeholder of the trust.

If the Commission does consider that it is likely that the individual would have been considered to be an attributable stakeholder of the company or trust, then the Commission must also consider what would be the individual's likely income attribution percentage in relation to the company or trust, taking Part 4 of the *Veterans' Entitlements (Attributable Stakeholders and Attribution Percentages) Principles 2025* into account.

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 sunseting 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 52ZZZH, 52ZZZK and 52ZZZL and subsections 52ZZZF(1)(f), 52ZZZJ(2) 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 (Primary Production Concession) Principles 2025 (the instrument) repeals Schedule 7 to the Veterans' Affairs (Legislative Instrument Re-making Exercise) Instrument 2014 and remakes it as a standalone instrument ahead of its sunset 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 52ZZZH, 52ZZZK and 52ZZZL, paragraph 52ZZZF(1)(f) and subsection 52ZZZJ(2) of the Act. These determinations relate to modifying the way in which Division 11A of Part IIIB of the *Veterans' Entitlements Act 1986* (the Act) would otherwise maintain the assets and liabilities of a company or trust against a Veterans' Entitlements income support pensioner.

Under the Act, 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 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. 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.¹

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 for means testing purposes under Part IIIB of the Act.

Conclusion

This disallowable legislative Instrument is compatible with human rights as it engages and promotes the right to social security by ensuring that rules designed assess pension under the Act are applied flexibly and fairly.

Repatriation Commission
Rule-Maker

¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security* (art. 9), 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [11].