

EXPLANATORY STATEMENT

Veterans' Entitlements (Modification of Income Deprivation Rules) 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 6 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 sunset date. Schedule 6 contains the *Veterans' Entitlements (Modification of Income Deprivation Rules) Principles 2002*.

The instrument has been re-made with no substantive changes from schedule 6 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 52ZZZB, 52ZZZC, 52ZZZD and 52ZZZE.

This instrument sets out decision-making principles that the Commission must comply with in making determinations under sections 52ZZZB, 52ZZZC, 52ZZZD and 52ZZZE of the Act. Such determinations relate to the way in which the assets and liabilities of a company or trust to 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.

A determination under section 52ZZZB, 52ZZZC, 52ZZZD and 52ZZZE of the Act defines the way in which the 'disposal of ordinary income' rules in the Act will operate in relation to an individual affected by this measure. These decision-making principles will assist the Commission in modifying the application of those disposal rules, where this is necessary.

The following minor technical changes have been made to the drafting of schedule 6 to the 2014 Instrument:

- an authority provision is added—new section 3;
- the purpose provision in section 4 of schedule 6 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 is 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 (Modification of Income Deprivation Rules) 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(h) and (i) of the Act.

Section 3A repeals schedule 6 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, 6, 7, 8, 9 and 10 which deal with *disposal of ordinary income on or after 1 January 2002 by an individual*.

Section 5 sets out the purpose of Part 2 of the instrument, which is to provide decision-making principles that the Commission must use in making a determination, under subsection 52ZZZB(1), that where:

- an individual disposes of ordinary income to a trust or company on or after 1 January 2002; and
- the individual is an attributable stakeholder of that trust or company, or becomes one as a result of the transfer:

the amount of the disposal for the purposes of Division 7 of Part IIIB of the Act can be taken to be nil, or an amount less than the amount of the original disposal.

Section 6 provides definitions that are used in this part of the instrument.

Section 7 states that in the case of an individual, who is not a member of a couple, the Commission must take into account whether at the time of, or as a result of, the disposal to the company or trust, the individual was the sole attributable stakeholder of the company or trust.

Often, where this is the case, the individual will be attributed with the full value of the disposed income in any event, being the only attributable stakeholder of the company or trust which is holding the income, and therefore it would be unfair on the income support pensioner to also hold the value of the disposal against them for income test purposes.

Section 8 states that in the case of an individual, who is a member of a couple, the Commission must take into account whether at the time of, or as a result of, the disposal to the company or trust, one or both members of the couple were the sole attributable stakeholders of the company or trust.

Often, in these circumstances, the members of the couple will be attributed with the full value of the disposed income in any event, being the only attributable stakeholders of the company or trust which is holding the income, and therefore it would be unfair on the income support pensioners to also hold the value of the disposal against them for income test purposes.

Section 9 applies where an attributable stakeholder of a company or trust disposes of income to that entity and either:

- before the time of the disposal there were two or more attributable stakeholders in regard to that entity; or
- as a result of the disposal, there were two or more attributable stakeholders.

In this situation the Commission must take into account the attribution percentage of all attributable stakeholders of the company or trust both prior to and as a result of the disposal.

Section 10 applies where an individual, who is not an attributable stakeholder of a company or trust, disposes of income to that entity and as a result of the disposal the individual became an attributable stakeholder of the company or trust. In this case the Commission must take into account the attribution percentages of all attributable stakeholders prior to, and as a result of, the disposal. Where an individual disposes of income to a company or trust, but ends up with an income attribution percentage of less than 100% in relation to the company or trust, then the Commission may decide only to reduce the amount of the original disposal by an amount equal to the percentage of the income that the individual now is being attributed with, as a result of being an attributable stakeholder of the company or trust.

Part 3 consists of sections 11 and 12 which deals with *disposal of ordinary income on or after 1 January 2002 by company or trust*.

Section 11 sets out the purpose of Part 3 of the instrument, which is to provide decision-making principles that can be used in making a determination, under subsection 52ZZZC(3).

The effect of subsection 52ZZZC(1) is that, where a company or trust, in regard to which the individual is an attributable stakeholder, disposes of income then, for the purposes of Division 7 of Part IIIB of the Act, it will be taken as if the individual had disposed of income, or a percentage of the income equal to the individual's income attribution percentage, that he or she had owned personally.

Subsection 52ZZZC(3) allows the Commission to exempt a disposal of specified income from the operation of subsection 52ZZZC(1), or reduce the percentage of the income that the individual is taken to have disposed of.

Section 12 states that the Commission must take into account whether a disposal of income, under this Part, is to a person who is an attributable stakeholder of the company or trust making the disposal.

Part 4 consists of sections 13, 14, 15, 16, 17 and 18 which deals with *disposal of ordinary income before 1 January 2002 by individual*.

Section 13 sets out the purpose of Part 4 of the instrument, which is to provide decision-making principles that can be used in making a determination, under subsection 52ZZZD(1).

The effect of subsection 52ZZZD(1) is that, where:

- an individual disposes of income to a trust or company before 1 January 2002; and
- on 1 January 2002 he or she becomes an attributable stakeholder of that trust or company:

then the Commission may determine that the continuing effect of the income disposal rules (in Division 7 of Part IIIB of the Act) can be taken to cease, or only apply to the value of the income disposed of reduced by a percentage equal to the attributable stakeholder's income attribution percentage, or a higher percentage, on 1 January 2002.

Section 14 provides definitions that are used in this part of the instrument.

Section 15 will apply where:

- an individual disposes of property to a company or trust prior to 1 January 2002; and
- on 1 January 2002 the property is still owned by that company or trust; and
- the value of the property is the same or more than it was on the date of the original disposal.

If this section applies, the Commission must consider whether, taking all the circumstances into account, it would be unfair or unreasonable to apply the income deprivation rules to the individual.

Section 16 applies where:

- an individual disposes of income to a company or trust prior to 1 January 2002; and
- on 1 January 2002 the income is still owned by the company or trust that received it from the individual; and
- the value of the income decreased from what it was on the date of the original disposal; and
- the decrease is not due to any conduct undertaken to avoid or minimise the trust and companies rules at Division 11A of Part IIIB of the Act.

If this section applies, the Commission must consider whether, taking all the circumstances into account, it would be unfair or unreasonable to apply the income deprivation rules to the individual.

Section 17 will apply where an individual disposes of income to a company or trust that then transfers that income to another party for an arms-length price, all prior to 1 January 2002, and on 1 January 2002 the company or trust has retained the sale price as a part of its assets. In this case, the Commission must consider whether, taking all the circumstances into account, it would be unfair or unreasonable to apply the income deprivation rules to the individual.

Section 18 applies where an individual, who is a member of a couple, disposes of income to a company or trust prior to 1 January 2002 and on 1 January 2002 one or both members of the couple are the only attributable stakeholders of the company or trust. If this section applies, the Commission must consider whether, taking all the circumstances into account, it would be unfair or unreasonable to apply the income deprivation rules to the individual.

Often, in these circumstances, the members of the couple will be attributed with the full value of the disposed income in any event, being the only attributable stakeholders of the company or trust, which is holding the income, and therefore it would be unfair on the income support pensioners to continue to also hold the value of the disposal against them for income test purposes.

Part 5 consists of sections 19, 20, 21, 22 and 23 which deals with *disposal of ordinary income before 1 January 2002 by individual whose spouse is attributable stakeholder*.

Section 19 sets out the purpose of Part 5 of the instrument, which is to provide decision-making principles that can be used in making a determination under subsection 52ZZZE(1).

The effect of subsection 52ZZZE(1) is that where:

- an individual disposes of income to a trust or company before 1 January 2002; and
- on 1 January 2002 his or her spouse becomes an attributable stakeholder of that trust or company:

then the continuing effect of the income disposal rules (in Division 7 of Part IIIB of the Act) can be taken to cease, or only apply to the original value of the disposed income reduced by a percentage equal to the spouse's asset attribution percentage, on 1 January 2002.

Section 20 provides definitions that are used in this part of the instrument.

Section 21 will apply where:

- an individual disposes of property to a company or trust prior to 1 January 2002; and
- on 1 January 2002 the property is still owned by that company or trust; and
- the value of the property is the same or more than it was on the date of the original disposal.

If this section applies, the Commission must consider whether, taking all the circumstances into account, including the fact that the individual's spouse is an attributable stakeholder of the company or trust, it would be unfair or unreasonable to apply the income deprivation rules to the individual.

Section 22 applies where:

- an individual disposes of income to a company or trust prior to 1 January 2002; and
- on 1 January 2002 the income is still owned by that company or trust; and
- the value of the income decreased from what it was on the date of the original disposal; and
- the decrease is not due to any conduct undertaken to avoid or minimise the trust and company's rules at Division 11A of Part IIIB of the Act.

If the section applies, the Commission must consider whether, taking all the circumstances into account, including the fact that the individual's spouse is an attributable stakeholder of the company or trust, it would be unfair or unreasonable to apply the income deprivation rules to the individual.

Section 23 will apply where:

- an individual disposes of income to a company or trust that then transfers that income to another party for an arms-length price (all prior to 1 January 2002); and
- on 1 January 2002 the company or trust has retained the sale price as a part of its assets.

In this case, the Commission must consider whether, taking all the circumstances into account, including the fact that the individual's spouse is an attributable stakeholder of the company or trust, it would be unfair or unreasonable to apply the income deprivation rules to the individual.

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 subsections 52ZZZB(1), 52ZZZC(1), 52ZZZC(3), 52ZZZD(1) and 52ZZZE(1) 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**.

NAME OF INSTRUMENT MAKER

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 (Modification of Income Deprivation Rules) 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 (Modification of Income Deprivation Rules) Principles 2025 (the instrument) repeals schedule 6 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 Repatriation Commission must comply with in making determinations under sections 52ZZZB, 52ZZZC, 52ZZZD and 52ZZZE of the *Veterans' Entitlements Act 1986* (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.

A determination under section 52ZZZB or 52ZZZC of the Act ensures a person's income is not double counted, by preventing the same amount from being treated as both disposed income and attributed income under the trusts and companies rules.

A determination under section 52ZZZD or 52ZZZE of the Act ensures that the income disposal rules that apply to transfers of income between an individual and a company or trust can be modified to reflect the effective income of the individual.

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 and assets for means testing purposes under Part IIIB of the Act.

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].

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 to assess pensions under the Act are applied flexibly and fairly.

Repatriation Commission

Rule-Maker