EXPLANATORY STATEMENT

Veterans' Entitlements (Modification of Asset 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 5 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 5 contains the Veterans' Entitlements (Modification of Asset Deprivation Rules) Principles 2002.

The instrument has been re-made with no substantive changes from schedule 5 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 52ZZW, 52ZZX, 52ZZZ and 52ZZZA.

This instrument sets out decision-making principles that the Commission must comply with in making determinations under sections 52ZZW, 52ZZX, 52ZZZ and 52ZZZA 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.

Sections 52ZZW, 52ZZX, 52ZZZ and 52ZZZA of the Act define the way in which the 'asset disposal provisions' 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 the disposal provisions, where this is necessary.

The following minor technical changes have been made to the drafting of schedule 5 to the 2014 Instrument:

- an authority provision is added—new section 3;
- the purpose provision in section 4 of schedule 5 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 Asset 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(f) and (g) of the Act.

Section 3A repeals schedule 5 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 assets by an individual– on or after 1 January 2002.***

Section 5 sets out the purpose of Part 2 of the instrument, which is to provide decision-making principles that must be used by the Commission in making a determination, under paragraph 52ZZW(1)(d) or (e), that where an individual:

- disposes of an asset to a trust or company, on or after 1 January 2002, and:
- 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 Subdivision B of Division 11 of Part IIIB and section 45UT, 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 requires 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 asset in any event, being the only attributable stakeholder of the company or trust, which is holding the asset, and therefore it would be unfair on the income support pensioner to also hold the value of the disposal against them for assets test purposes.

Section 8 requires 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 asset in any event, being the only attributable stakeholders of the company or trust which is holding the asset, and therefore it would be unfair on the income support pensioners to also hold the value of the disposal against them for assets test purposes.

Section 9 applies where an attributable stakeholder of a company or trust disposes of an asset 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 an asset 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 an asset to a company or trust, but ends up with an asset 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 asset 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, 12 and 13 which deal with ***disposal of assets by a company or trust– on or after 1 January 2002.***

Section 11 sets out the purpose of Part 3 of the instrument, which is to provide decision-making principles that must be used in making a determination, under paragraph 52ZZX(3)(a) or (b). The effect of subsection 52ZZX(1) is that where a company or trust, in regard to which the individual is an attributable stakeholder, disposes of an asset, then for the purposes of Subdivision B of Division 11 of Part IIIB and section 45UT, of the Act, it will be taken as if the individual had disposed of an asset, or percentage of the asset equal to the individual's asset attribution percentage, that he or she had owned personally. Paragraphs 52ZZX(3)(a) and (b) allow the Commission to exempt a particular asset from the operation of subsection 52ZZX(1), or reduce the percentage of the asset that the individual is taken to have disposed of.

Section 12 applies where a company or trust pays a dividend or distribution to an individual, and subsection 52ZZX(1) applies as if the individual had disposed of a personal asset. In this case the Commission must consider whether the amount of the dividend or distribution was reasonable given the individual's asset attribution percentage both prior to, and as a result of, the disposal. This section exists, in part, so that a person who withdraws their capital from a company or trust, and is consequently no longer an attributable stakeholder, or an attributable stakeholder to a lesser extent, will not be taken to have disposed of an asset, but then also have the value of the asset treated as a personally owned asset, for assets test purposes.

Section 13 applies where a company or trust pays a dividend or distribution to an individual who is not an attributable stakeholder of the company or trust, but who has previously made a genuine transfer of capital to it. A genuine transfer occurs where the individual who makes the transfer receives in return shares or units in the company or trust, together with a right to receive distributions or dividends and to share in the capital if the company or trust is wound up. The individual must also be over 18 years of age.

If this section applies, the Commission must consider whether the dividend or distribution made to the individual is reasonable, taking into account the value of the property transferred to the company or trust by the individual compared to the total value of the company or trust's assets at the time of the investment. This section exists so that an attributable stakeholder of a company or trust that pays a distribution or dividend to a genuine investor, who has a right to the payment, will not be taken to have disposed of an asset.

Part 4 consists of sections 14, 15, 16, 17, 18 and 19 which deal with ***disposal of assets by an individual before 1 January 2002.***

Section 14 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 paragraph 52ZZZ(1)(e) or (f). The effect of subsection 52ZZZ(1) is, that where an individual:

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

then the 5-year disposal period that relates to that asset, which is mandated by Subdivision B of Division 11 of Part IIIB and section 45UT, of the Act, can be determined to:

- cease; or
- only apply to the original asset's value reduced by a percentage equal to the attributable stakeholder's asset attribution percentage, or a higher percentage, on 1 January 2002.

Section 15 provides definitions that are used in this part of the instrument.

Section 16 will apply where:

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

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

Section 17 applies where:

- an individual disposes of an asset to a company or trust prior to 1 January 2002;
- on 1 January 2002 the asset is still owned by the company or trust that received it from the individual;
- the value of the asset has 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 the section applies then the Commission must consider whether, taking all the circumstances into account, it would be unfair or unreasonable to apply the asset deprivation rules to the individual.

Section 18 will apply where an individual disposes of an asset to a company or trust that then transfers that asset 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 asset deprivation rules to the individual.

Section 19 applies where:

- an individual, who is a member of a couple, disposes of an asset to a company or trust prior to 1 January 2002; and
- as a result, 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, then the Commission must consider whether, taking all the circumstances into account, it would be unfair or unreasonable to apply the asset deprivation rules to the individual. Often, in these circumstances, the members of the couple will be attributed with the full value of the disposed asset in any event, being the only attributable stakeholders of the company or trust which is holding the asset, and therefore it would be unfair on the income support pensioners to continue to also take into account the value of the disposal for assets test purposes.

Part 5 consists of sections 20, 21, 22, 23 and 24 which deal with ***disposal of assets by an individual whose spouse is attributable stakeholder before 1 January 2002.***

Section 20 sets out the purpose of Part 5 of the instrument, which is to provide decision-making principles that must be used in making a determination, under paragraph 52ZZZA(1)(e) or (f). The effect of subsection 52ZZZA(1) is, that where:

- an individual disposes of an asset 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 5-year disposal period that relates to that asset, which is mandated by Subdivision B of Division 11 of Part IIIB and section 45UT, of the Act, can be determined to:

- cease; or
- only apply to the original asset's value reduced by a percentage equal to the spouse's asset attribution percentage, on 1 January 2002.

Section 21 provides definitions that are used in this part of the instrument.

Section 22 will apply where:

- an individual disposes of an asset to a company or trust prior to 1 January 2002;
- on 1 January 2002 the asset is still owned by the company or trust that received it from the individual; and
- the value of the asset 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 asset deprivation rules to the individual.

Section 23 applies where:

- an individual disposes of an asset to a company or trust prior to 1 January 2002;
- on 1 January 2002 the asset is still owned by the company or trust that received it from the individual;
- the value of the asset 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 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 asset deprivation rules to the individual.

Section 24 will apply where an individual disposes of an asset to a company or trust that then transfers that asset 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 asset 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 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 52ZZW, 52ZZX, 52ZZZ and 52ZZZA 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

<u>Attachment A</u>

Statement of Compatibility with Human Rights

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

Veterans' Entitlements (Modification of Asset 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 Asset Deprivation Rules) Principles 2025 (the instrument) repeals schedule 5 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 52ZZW, 52ZZX, 52ZZZ and 52ZZZA 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 attribute the assets and liabilities of a company or trust to a Veterans' Entitlements income support pensioner.

Sections 52ZZW and 52ZZX of the Act allow the Commission to determine that certain assets are excluded from the rules that apply to disposal of assets without adequate consideration. A determination under section 52ZZW or 52ZZX ensures a person's assets are not double-counted, by preventing the same amount from being treated as both a disposed asset and an attributed asset under the trusts and companies rules.

Sections 52ZZZ and 52ZZZA of the Act allow the Commission to terminate or reduce the period during which certain assets that a person has disposed of to a company or trust would otherwise continue to be attributed to the person.

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.

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[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