

# **EXPLANATORY STATEMENT**

## ***Social Security (Declared Program Participant) Determination 2018***

### **Summary**

The *Social Security (Declared Program Participant) Determination 2018* (the Determination) is made by the Secretary of the Department of Jobs and Small Business (the Secretary) under subsection 28C(1) of the *Social Security Act 1991* (the Act).

The purpose of this Determination is to provide that participants in the Community Development Programme (CDP) are 'declared program participants' for the purposes of the social security legislation, and to provide for the operation of the compliance provisions under Divisions 3A and 3AA of Part 3 of the *Social Security Administration Act 1999* (the Administration Act) for people who become or cease to be declared program participants.

### **Background**

This Determination is made under subsection 28C(1) of the Act. Subsection 28C(1) provides that the Secretary may make a determination for the purposes of the definition of declared program participant in subsection 23(1) of the Act. The determination may provide for the operation of the social security law in relation to a person who becomes, or ceases to be, a declared program participant at a particular time including in relation to things that happened before that time (subsection 28C(2)).

Various provisions of the social security legislation, as amended by the *Social Services Legislation Amendment (Welfare Reform) Act 2018* (the Welfare Reform Act), are expressed to apply, or not to apply, to persons in receipt of certain income support payments who are declared program participants.

In particular, from 1 July 2018, people claiming or receiving participation payments who are declared program participants will remain subject to the current compliance framework under Division 3A of Part 3 of the Administration Act while participation payment claimants or recipients who are not declared program participants will be subject to the new targeted compliance framework under Division 3AA of Part 3 of the Administration Act.

Further, from 1 July 2018, certain income support recipients who are not declared program participants will no longer be able to obtain particular exemptions from their activity test or participation requirements in relation to circumstances wholly or predominately attributable to drug or alcohol misuse or dependency (including abuse of drugs or alcohol). However, declared program participants will not be affected by this tightening of exemptions.

The Determination provides that participants in the Community Development Programme (CDP) are 'declared program participants' for the purposes of the social

security legislation, and provides for the operation of the compliance provisions under Divisions 3A and 3AA of Part 3 of the Administration Act for people who become or cease to be CDP participants.

Where a person's payment is suspended because they have committed a failure under Divisions 3A or 3AA of Part 3 of the Administration Act, and they subsequently move into or out of CDP, their suspension will end and they will be taken to have met any reconnection or further reconnection requirements. This is because a job seeker is usually required to re-engage with their activity or provider when given a reconnection requirement. Where a job seeker moves between employment services, this is no longer appropriate, and so their suspension will end.

However, if a person is subject to a serious failure period or an unemployment non-payment period under Division 3A before moving out of CDP, they will be treated as though they remain a declared program participant until that period is served or 'waived' (that is, ended early by the Secretary under a determination). They will also remain subject to deductions of penalty amounts determined before they moved out of CDP. Affected individuals will retain access to waiver and payment pending review provisions, as if they had not moved, and will maintain rights of review under social security law. Likewise, if a person who is not in CDP is subject to a payment reduction, payment cancellation, unemployment preclusion period, or post cancellation non-payment period under Division 3AA, and moves into CDP, the reduction, cancellation, preclusion period or non-payment period will continue as if they had not moved and they will maintain rights of review under social security law as if they had not moved.

These provisions ensure that where a person has committed a failure without reasonable excuse, and moves between CDP and other employment services, they are treated the same as recipients who do not move, or move but remain in the same employment service. The provisions also ensure that there is no incentive to move in order to avoid a penalty.

The policy intent for both measures is that income support claimants or recipients participating in CDP remain subject to existing arrangements, despite the passage of the Welfare Reform Act, given the unique labour market and reduced access to services in the regions in which CDP operates. The Government is currently reviewing the operation of CDP. Until this review is finalised, it is appropriate for existing arrangements to continue to apply to CDP participants.

For clarity, as Disability Support Pension is not a participation payment, people receiving Disability Support Pension are not subject to the compliance frameworks set out in Divisions 3A and 3AA of Part 3 of the Administration Act. These recipients, therefore, are not affected by the arrangements in the Determination relating to movement between compliance frameworks.

## Operation of the provisions

### Section 1 – Name

This section provides that the name of the Determination is the *Social Security (Declared Program Participant) Determination 2018*.

### Section 2 – Commencement

This section provides a table setting out the commencement for the whole of the Determination. The Determination commences on 1 July 2018.

### Section 3 – Authority

This section provides that the Determination is made under subsection 28C(1) of the Act.

This Determination is made before the commencement of subsection 28C(1) of the Act in reliance on subsection 4(2) of the *Acts Interpretation Act 1901*.

### Section 4 – Definitions

**Subsection 4(1)** defines terms used in the Determination. The **note** to section 4 alerts the reader to the fact that some expressions used in the Determination are defined in the Act or the Administration Act.

The Determination defines **Community Development Programme provider** to mean an organisation that performs functions or provides services from time to time for the purposes of the social security law under the Funding Agreement 2013-2018 Remote Jobs and Communities Programme, which is now referred to as the Funding Agreement 2013-2018 Community Development Programme, whether or not the organisation also acts in other capacities. This reflects the fact that some Community Development Programme providers (CDP providers) may also perform functions or provide services from time to time for the purposes of the social security law under other agreements, for example, a CDP provider may also perform functions or provider services under the jobactive Deed 2015-2020.

The definition of **relevant payment** is a participation payment or disability support pension.

**Subsection 4(2)** provides that, for the purposes of the Determination, a person is **serviced by a Community Development Programme provider** if a Community Development Programme provider (in its capacity as a CDP provider) is recorded in the Employment Department's Information Technology System (the Department's IT system) as the person's employment services provider.

The reference to the CDP provider being recorded as a person's employment services provider *in its capacity as a CDP provider* reflects the fact that the CDP provider may also act in other capacities. Taken together with the definition of

**Community Development Programme provider**, the effect of this definition is that a person is serviced by a CDP provider only if the Employment Department's IT system records the CDP provider as the person's employment services provider, and the CDP provider is acting in its capacity as a CDP provider.

The Employment Department is defined in subsection 23(1) of the Act to mean the Department administered by the Minister administering the *Fair Entitlements Guarantee Act 2012*. The effect of the Administrative Arrangements Order, read with section 19 of the *Acts Interpretation Act 1901*, is that the Department of Jobs and Small Business is the Employment Department.

## **Section 5 – Declared program participants**

**Subsection 5(1)** sets out who is a declared program participant for the purposes of subsection 28C(1) of the Act. This is a person who has claimed or is receiving a relevant payment, and who is serviced by a Community Development Programme provider (CDP provider). This is subject to sections 6 and 7 of the Determination which provide when a person becomes or ceases to be a declared program participant.

Recipients of relevant payments who have participation requirements or activity test requirements under the Act are usually serviced by employment services providers. Those in remote Australia are predominantly serviced by CDP providers. The effect of subsection 5(1) is that such people will be declared program participants for the purposes of the social security legislation. People who are serviced by other employment services providers (such as jobactive providers) will not be declared program participants for these purposes.

**Subsection 5(2)** provides that, for the purposes of section 5, a person is taken to be 'receiving a relevant payment' during a period in which the person's relevant payment is payable, not payable, or is reduced to nil. This overrides the usual concept of when a person receives a payment under subsections 23(2) and (4) of the Act. It means that, for the purposes of paragraph 5(1)(a), a person whose payment is not payable or reduced to nil for a period will continue to be a declared program participant during that period. For example, if a person who is receiving newstart allowance and who is a declared program participant has had that payment reduced to nil because of compliance action taken under Division 3A of Part 3 of the Administration Act, the person does not cease to be a declared program participant simply due to that compliance action.

## **Section 6 – When a person becomes a declared program participant**

This section sets out when a person becomes a declared program participant.

**Subsection 6(1)** provides that where a person has claimed or is receiving a relevant payment and is serviced by a CDP provider on the day that the Determination commences, the person becomes a declared program participant on that day. For example, this means that a person receiving newstart allowance who is serviced by a CDP provider on 1 July 2018 will become a declared program participant on 1 July 2018 when the Determination commences.

**Subsection 6(2)** provides that where a person has claimed or is receiving a relevant payment and begins to be serviced by a CDP provider after the Determination commences, the person becomes a declared program participant on the day following the day on which the CDP provider (in its capacity as a CDP provider) becomes recorded as the person's employment services provider in the Department's IT system.

**Subsection 6(3)**, essentially is the same as subsection 5(2). It provides that, for the purposes of section 6, a person is taken to be 'receiving a relevant payment' during a period in which the person's relevant payment is payable, not payable, or is reduced to nil.

### **Section 7 – When a person ceases to be a declared program participant**

**Section 7** provides that a person stops being a declared program participant at the end of the day on which a CDP provider (in its capacity as a CDP provider) ceases to be recorded as the person's employment services provider in the Department's IT system.

The effect of sections 6 and 7 is that a person may become or cease to be a declared program participant on more than one occasion.

### **Example**

This is one example of the way the Determination will operate:

- Mary is receiving newstart allowance and is serviced by a CDP provider on 1 July 2018. She becomes a declared program participant on 1 July 2018 due to subsections 5(1) and 6(1) of the Determination;
- on 23 July 2018, Mary ceases to be serviced by a CDP provider and, on that day, the CDP provider ceases to be recorded as her employment services provider in the Department's IT system. She ceases to be a declared program participant at the end of 23 July 2018 due to section 7 of the Determination; and
- on 6 August 2018, Mary is still in receipt of newstart allowance and a CDP provider is again recorded as her employment services provider in the Department's IT system on that day. Mary again becomes a declared program participant on 7 August 2018 due to subsection 6(2) of the Determination.

### **Section 8 – Effect of becoming or ceasing to be a declared program participant during a period in which a participation payment is not payable**

**Section 8** deals with the effect of becoming or ceasing to be a declared program participant during a period in which a participation payment is not payable, except as dealt with by section 11 and section 13. Section 11 deals with the effect of becoming or ceasing to be a declared program participant during an unemployment preclusion period, a serious failure period or an unemployment non-payment period. Section 13 deals with the effect of becoming or ceasing to be a declared program participant during a post-cancellation non-payment period.

Essentially, when person's payment is suspended because they have committed a failure under Divisions 3A or 3AA of Part 3 of the Administration Act (which is not a serious failure), and they subsequently move into or out of CDP, their suspension period will end at that time.

**Subsection 8(1)** provides that where:

- a person is not a declared program participant;
- the Secretary makes a determination under Division 3AA of Part 3 of the Administration Act (other than a determination under paragraph 42AF(2)(d) or subsections 42AG(2), 42AH(1) or 42AH(2) of the Administration Act) which results in their participation payment not being payable for a period;
- the person subsequently becomes a declared program participant; and
- the period has not ended on the day on which the person becomes a declared program participant;

then the period is taken to have ended immediately before the day on which the person becomes a declared program participant. The effect of **subsection 8(2)** is that the person may receive back pay for the period the payment was not payable.

### Example

This is one example of the way the Determination will operate:

- Anna is a newstart allowance recipient but is not a declared program participant and on 30 July 2018 the Secretary determines that Anna's participation payment is not payable under paragraph 42AF(1)(a) because she has committed a mutual obligation failure under subsection 42AC(1). This results in Anna's newstart allowance not being payable for a period (section 42AL); and
- on 7 August 2018 Anna becomes a declared program participant while her payment is still not payable;

then the period is taken to have ended on 6 August 2018.

The notes following subsection 8(2) alert the reader to section 13 and subsection 11(1) of the Determination, which deal with the circumstances in which a person's payment is made not payable as a result of a determination made under paragraph 42AF(2)(d) or subsections 42AG(2), 42AH(1) or 42AH(2) of the Administration Act.

**Subsection 8(3)** provides that where:

- a person is a declared program participant;
- either before or after the person becomes a declared program participant the Secretary makes a determination under Division 3A of Part 3 of the Administration Act (other than a determination under sections 42M, 42N and 42NC, or subsection 42S(1) of the Administration Act);
- the determination results in a participation payment not being payable to the person for a period;
- the person subsequently ceases to be a declared program participant; and
- the period has not ended on the day the person ceases to be a declared program participant;

then the period is taken to have ended immediately before the day on which the person ceases to be a declared program participant. The effect of **subsection 8(4)** is that the person may receive back pay for the period the payment was not payable.

The reason paragraph 8(3)(b) refers to the Secretary making a determination 'either before or after the person becomes a declared program participant' is to ensure that the Determination deals with the situation where a person is a declared program participant but where the relevant determination was made under Division 3A of Part 3 of the Administration Act either:

- before 1 July 2018, which is before a person could be a declared program participant; or
- on or after 1 July 2018, when the concept of declared program participant commences.

### **Example**

This is one example of the way the Determination will operate:

- Kasey is a newstart allowance recipient. On 25 June 2018, Kasey fails to attend an appointment she is required to under her employment pathway plan. On this day the concept of a declared program participant does not exist and the only compliance framework for participation payment recipients is in Division 3A of Part 3 of the Administration Act;
- on 27 June 2018 the Secretary determines that Kasey committed a connection failure under paragraph 42E(2)(c), that her newstart allowance is suspended (that is, not payable for a period – paragraph 42SA(1)(b) and subsection 42SA(2)), and imposes a reconnection requirement (section 42G);
- on 1 July 2018, Kasey becomes a declared program participant due to the operation of subsections 5(1) and 6(1) of the Determination; and
- on 9 July 2018 Kasey ceases to be a declared program participant while her newstart allowance is still not payable;

then the suspension period is taken to have ended on 8 July 2018.

The notes following subsection 8(4) alert the reader to subsections 11(2), (3) and (4) of the Determination, which deal with the circumstance in which a person's payment is made not payable as a result of a determination made under sections 42M, 42N and 42NC, or subsection 42S(1) of the Administration Act.

### **Section 9 – Reconnection requirements taken to be complied with when a person becomes a declared program participant**

The effect of sections 9 and 10 of the Determination is that if a person is subject to a reconnection or further reconnection requirement under Divisions 3A or 3AA of Part 3 of the Administration Act, and they subsequently move into or out of CDP, that requirement will be taken to be met at that time. This is because a job seeker is usually required to re-engage with their activity or provider when given a reconnection requirement. Where a job seeker moves between employment services, this is no longer appropriate.

**Section 9** provides that where:

- a person is not a declared program participant;
- the Secretary imposes a reconnection requirement under section 42AM of the Administration Act;
- the person subsequently becomes a declared program participant; and
- on the day the person becomes a declared program participant the person has not complied with the requirement, the suspension period has not ended early, and 4 weeks has not passed since the person was notified of the reconnection requirement;

then the person is taken, immediately before the day the person becomes a declared program participant, to have complied with the reconnection requirement.

### **Section 10 – Reconnection requirements and further reconnection requirements taken to be complied with when a person ceases to be a declared program participant**

**Section 10** provides that where:

- a person is a declared program participant;
- either before or after the person becomes a declared program participant the Secretary imposes a reconnection requirement under section 42G of the Administration Act or a further reconnection requirement under section 42J of the Administration Act;
- the person subsequently ceases to be a declared program participant; and
- the person has not complied with either requirement (as is relevant) at the time the person ceases to be a declared program participant; and
- the period for complying has not elapsed;

then, the person is taken to have complied with the reconnection requirement or further reconnection requirement immediately before the day the person ceases to be a declared program participant.

For the same reason discussed in relation to paragraph 8(3)(b), section 10 refers to the Secretary making a determination ‘either before or after the person becomes a declared program participant’. This is to ensure that the Determination deals with the situation where a person is a declared program participant but where the relevant determination was made under Division 3A of Part 3 of the Administration Act either:

- before 1 July 2018, which is before a person could be a declared program participant; or
- on or after 1 July 2018, when the concept of declared program participant commences.

### **Section 11 – Effect of becoming or ceasing to be a declared program participant during a period in which a participation payment is not payable for certain failures**

**Section 11** deals with the effect of becoming or ceasing to be a declared program participant during an unemployment preclusion period, a serious failure period or an unemployment non-payment period. The effect of section 11 is that these periods continue as if the person had not moved ensuring that they are treated the same as recipients who do not move, or move but remain in the same employment service.



This is so that there is no incentive to move between employment services in order to avoid these periods.

**Subsection 11(1)** sets out what happens when a person becomes or ceases to be a declared program participant when in an unemployment preclusion period. It provides that where:

- a person is not a declared program participant and makes a claim for a participation payment;
- the Secretary makes a determination under subsection 42AH(2) of the Administration Act because the person commits an unemployment failure and the result is that a participation payment is not payable to the person for a period (the 'unemployment preclusion period'); and
- the person subsequently becomes a declared program participant and the unemployment preclusion period had not ended when the person becomes a declared program participant;

then the participation payment (whether or not the same as the participation payment that was claimed) is not payable for the unemployment preclusion period.

Further, section 42AQ of the Administration Act (with the exception of paragraph 42AQ(a)) applies to the person as though the person was not a declared program participant until the end of the unemployment preclusion period.

Paragraphs 42AQ(b) and (c) respectively provide that a person is taken to be receiving the participation payment for the unemployment preclusion period for the purposes of:

- sections 63 and 64 of the Administration Act (section 63 deals with a requirement to attend the Department or to undergo a medical examination and notifying of such a requirement and section 64 deals with the effect of failing to comply with such a requirement); and
- any other provisions of the social security law or the *A New Tax System (Family Assistance) Act 1999* determined by the Minister under subsection 42AR(2) for the purposes of paragraph 42AQ(c).

This means that a person can be required to comply with certain provisions of the social security law that apply to a person 'receiving' a relevant payment even though the person is in a unemployment preclusion period.

## **Example**

This is one example of the way the Determination will operate:

- on 2 July 2018, Stephen makes a claim for newstart allowance. He is not a declared program participant;
- on 3 July 2018, Stephen resigns from his job and commits an unemployment failure;
- on 6 July 2018 the Secretary makes a determination under section 42AH(2) with the effect that newstart allowance or any other participation payment is not payable for four weeks beginning on 3 July 2018, the day Stephen committed the unemployment failure (the 'unemployment preclusion period'); and

- on 17 July 2018 Stephen becomes a declared program participant but newstart allowance, and any other participation payment, is still not payable for the period of the unemployment preclusion period;
- however, Stephen is still taken to be receiving newstart allowance for that period for the purposes of sections 63 and 64 of the Administration Act and any of the provisions of the social security law determined by the Minister.

**Subsection 11(2)** sets out what happens when a person is in a serious failure period. It provides that where:

- a person is a declared program participant;
- either before or after the person becomes a declared program participant the Secretary has made a determination that the person has committed a serious failure under sections 42M (for persistently failing to comply with certain obligations) or 42N (for refusing or failing to accept an offer of suitable employment) and has made a determination section 42NC of the Administration Act (a determination must be made unless the person does not have capacity to undertake a serious failure requirement and serving the serious failure period would cause severe financial hardship), that results in a participation payment not being payable to a person for a period under subsection 42P(2) (the 'serious failure period'); and
- the person subsequently ceases to be a declared program participant and the serious failure period has not ended;

then a participation payment (whether or not the same as the participation payment that was claimed) is not payable for the serious failure period.

Further, the Secretary may continue to exercise the powers in sections 42Q, 42R, 131 and 145 in relation to a person to whom subsection 11(2) applies:

- section 42Q of the Administration Act provides that the Secretary may end a person's serious failure period early;
- section 42R of the Administration Act provides that the Secretary may determine that a participation payment is payable to a person during the serious failure period in some circumstances; and
- sections 131 and 145 of the Administration Act provide that the Secretary may declare that a payment is to continue pending the determination of a review of certain decisions, including decisions to cancel or suspend a social security payment.

The effect of this subsection is that the serious failure period does not end simply because the person ceases to be a declared program participant.

### **Example**

This is one example of the way the Determination will operate:

- Dom is a youth allowance (other) recipient, who has persistently failed to comply with his obligations in relation to his youth allowance (other);
- on 20 June 2018 the concept of a declared program participant does not exist and the only compliance framework in relation to participation payments is in Division 3A of Part 3 of the Administration Act;

- on 20 June 2018 the Secretary makes determinations under sections 42M and 42NC in relation to Dom with the result that his newstart allowance is not payable for a serious failure period of 8 weeks;
- on 1 July 2018 Dom becomes a declared program participant by operation of subsections 5(1) and 6(1) of the Determination; and
- on 23 July 2018, Dom ceases to be a declared program participant but his youth allowance (other) or any other participation payment are still not payable until the end of the serious failure period;
- however, on 24 July 2018 the Secretary exercises the power in section 42Q to end Dom's serious failure period with effect from that day.

**Subsection 11(3)** sets out that, where a person to whom subsection 11(2) of the Determination applies is subject to a 'serious failure requirement' under subsection 42P(3) of the Administration Act when they cease to be a declared program participant, the person is taken to have complied with the serious failure requirement when the serious failure period ends.

**Subsection 11(4)** sets out that where:

- a person is declared program participant;
- either before or after the person became a declared program participant, the Secretary makes a determination under subsection 42S(1) of the Administration Act (the person is unemployed as a result of their voluntary act or misconduct as an employee) that results in a participation payment not being payable to a person for a period (the 'unemployment non-payment period'); and
- the person subsequently ceases to be a declared program participant and the unemployment non-payment period has not ended on the day the person ceases to be a declared program participant;

then a participation payment (whether or not the same as the participation payment that was claimed) is not payable to the person for the unemployment non-payment period.

Further, subsection 42S(4) and sections 131 and 145 of the Administration Act apply to the person as though the person remains a declared program participant for the person's unemployment non-payment period:

- subsection 42S(4) of the Administration Act provides that the Secretary may end the person's serious failure period early; and
- sections 131 and 145 of the Administration Act provide that the Secretary may declare that a payment is to continue pending the determination of a review of certain decisions, including decisions to cancel or suspend a social security payment.

The effect of this subsection is that the unemployment non-payment period does not come to an end simply because the person ceases to be a declared program participant.

## **Section 12 – Effect of becoming or ceasing to be a declared program participant during an instalment period in which an instalment is to be reduced or a penalty is to be deducted**

**Section 12** deals with the effect of becoming or ceasing to be a declared program participant during an instalment period in which an instalment is to be reduced or a penalty is to be deducted. The effect of section 12 is that these payment reductions or penalties continue as if the person had not moved ensuring that they are treated the same as recipients who do not move, or move but remain in the same employment service. This is so that there is no incentive to move between employment services in order to avoid these reductions or penalties.

**Subsection 12(1)** provides that where:

- a person is not a declared program participant;
- the Secretary makes a determination under Division 3AA of Part 3 of the Administration Act that results in one or more instalments of a person's participation payment being reduced; and
- the person subsequently becomes a declared program participant and one or more of the instalment periods has not ended when the person becomes a declared program participant;

then the instalment of the person's participation payment for one or more instalment periods is reduced in accordance with the provisions in Division 3AA.

Further, subsection 42AN(6) of the Administration Act continues to apply to the person as though the person was not a declared program participant. That subsection provides that the participation payment remains payable for the reduction period even if the amount of the instalment is reduced to nil.

The effect of this subsection is that the reduction in the person's participation payment still occurs after the person becomes a declared program participant.

**Subsection 12(2)** provides that where:

- a person is a declared program participant;
- either before or after the person becomes a declared program participant, the Secretary makes a determination under Division 3A of Part 3 of the Administration Act that results in a penalty amount being deducted from one or more instalments of the person's participation payment; and
- the person subsequently ceases to be a declared program participant and one or more of the instalment periods has not ended when the person becomes a declared program participant;

then the penalty amount is deducted in accordance with the provisions in Division 3A.

Further, sections 42W and 42X of the Administration Act continue to apply to the person as though the person remained a declared program participant until the end of the instalment period or periods:

- section 42W provides that, to avoid doubt, a penalty amount is not a debt owed to the Commonwealth. If this did not apply, in some circumstances, a penalty would become a debt; and

- section 42X provides that a participation payment remains payable even if it is reduced to nil as a result of deducting a penalty amount for certain failures. This has advantages for a person in respect of other payments, for example, a person is exempt from means testing for Family Tax Benefit if a participation payment is payable.

The effect of this subsection is that a penalty amount continues to be deducted where a person ceases to be a declared program participant.

### **Section 13 – Effect of becoming a declared program participant during a period in which a participation payment is cancelled**

**Section 13** provides that where:

- a person is not a declared program participant;
- the Secretary makes a determination under Division 3AA of Part 3 of the Administration Act in relation to the person which results in the cancellation of the person's payment; and
- the person subsequently becomes a declared program participant and the 'post cancellation non-payment' period has not ended on the day the person becomes a declared program participant;

then the participation payment remains cancelled and a participation payment (whether or not the same as the participation payment that was cancelled) is not payable to the person for the person's post cancellation non-payment period.

Further, subsection 42AP(6) and section 42AQ of the Administration Act apply to the person as though the person was not a declared program participant until the end of the post-cancellation non-payment period. Those provisions provide that the person is still taken to be receiving a participation payment during the period for certain purposes, including provisions of the social security law that confer certain entitlements on income support recipients.

The effect of this subsection is that the cancellation of a participation payment continues where a person becomes a declared program participant.

### **Consultation**

The Department of Jobs and Small Business provided an electronic copy of the draft Determination to the following bodies and organisations and invited comment: Jobs Australia, the Australian Council of Social Service, the Australian National Advisory Council on Alcohol and Drugs, the Administrative Appeals Tribunal, the National Employment Services Association and the National Social Security Rights Network.

More broadly, the Department of Social Services (DSS) met with a range of stakeholders following the announcement of the measure to tighten exemptions due to drugs or alcohol (as later reflected in the Welfare Reform Act). This included expert stakeholders from the alcohol and other drug, health and community/social services sectors across Australia.

In addition, known views from relevant experts and stakeholders were taken into account in development of the Determination. The Welfare Reform Act that inserted

the power to make this Determination was the subject of an Inquiry by the Senate Community Affairs Legislation Committee, in which a large number of stakeholders expressed views about the measures.

### **Regulatory Impact Analysis**

The Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

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

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

### ***Social Security (Declared Program Participant) Determination 2018***

This Determination 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 Determination**

The *Social Security (Declared Program Participant) Determination 2018* (the Determination) is made under subsection 28C(1) of the *Social Security Act 1991* (the Act). Subsection 28C(1) provides that the Secretary may make a determination for the purposes of the definition of declared program participant in subsection 23(1) of the Act. The determination may provide for the operation of the social security law in relation to a person who becomes, or ceases to be, a declared program participant at a particular time including in relation to things that happened before that time (subsection 28C(2)).

Various provisions of the social security legislation, as amended by the *Social Services Legislation Amendment (Welfare Reform) Act 2018* (the Welfare Reform Act), are expressed to apply, or not to apply, to persons in receipt of certain income support payments who are declared program participants.

In particular, from 1 July 2018, people claiming or receiving participation payments who are declared program participants will remain subject to the current compliance framework under Division 3A of Part 3 of the *Social Security (Administration) Act 1999* (the Administration Act) while participation payment claimants or recipients who are not declared program participants will be subject to the new targeted compliance framework under Division 3AA of Part 3 of the Administration Act.

Further, from 1 July 2018, certain income support recipients who are not declared program participants will no longer be able to obtain particular exemptions from their activity test or participation requirements in relation to circumstances wholly or predominately attributable to drug or alcohol misuse or dependency (including abuse of drugs or alcohol). However, declared program participants will not be affected by this tightening of exemptions.

The Determination provides that participants in the Community Development Programme (CDP) are 'declared program participants' for the purposes of the social security legislation, and provides for the operation of the compliance provisions under Divisions 3A and 3AA of Part 3 of the Administration Act for people who become or cease to be CDP participants.

Where a person's payment is suspended because they have committed a failure under Divisions 3A or 3AA of Part 3 of the Administration Act, and they subsequently move into or out of CDP, their suspension will end and they will be taken to have met any reconnection or further reconnection requirements. This is because a job seeker is usually required to re-engage with their activity or provider when given a reconnection requirement. Where a job seeker moves between employment services, this is no longer appropriate, and so their suspension will end.

However, if a person is subject to a serious failure period or an unemployment non-payment period under Division 3A before moving out of CDP, they will be treated as though they remain a declared program participant until that period is served or 'waived' (that is, ended early by the Secretary under a determination). They will also remain subject to deductions of penalty amounts determined before they moved out of CDP. Affected individuals will retain access to waiver and payment pending review provisions, as if they had not moved, and will maintain rights of review under social security law. Likewise, if a person who is not in CDP is subject to a payment reduction, payment cancellation, unemployment preclusion period, or post cancellation non-payment period under Division 3AA, and moves into CDP, the reduction, cancellation, preclusion period or non-payment period will continue as if they had not moved and they will maintain rights of review under social security law as if they had not moved.

These provisions ensure that where a person has committed a failure without reasonable excuse, and moves between CDP and other employment services, they are treated the same as recipients who do not move, or move but remain in the same employment service. The provisions also ensure that there is no incentive to move in order to avoid a penalty.

The policy intent behind declaring CDP participants as 'declared program participants' is that income support claimants or recipients participating in CDP should remain subject to existing arrangements, despite the passage of the Welfare Reform Act, given the unique labour market and reduced access to services in the regions in which CDP operates. The Government is currently reviewing the operation of CDP. Until this review is finalised, it is appropriate for existing arrangements to continue to apply to CDP participants.

For clarity, as Disability Support Pension is not a participation payment, people receiving Disability Support Pension are not subject to the compliance frameworks set out in Divisions 3A and 3AA of Part 3 of the Administration Act. These recipients, therefore, are not affected by the arrangements in the Determination relating to movement between compliance frameworks.

## **Human rights implications**

The Determination engages the following human rights:

- the rights of equality and non-discrimination in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the



- Convention on the Rights of the Child (CRC), and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- the right to social security in Article 9 of the ICESCR, and the right of the child to benefit from social security in Article 26 of the CRC; and
  - the right to an adequate standard of living in Article 11 of the ICESCR.

### **The rights to equality and non-discrimination**

Article 2(2) of the ICESCR, Article 26 of the ICCPR and Article 2 of the CRC recognise the right to equality and non-discrimination on a range of grounds including of race, sex, colour, language, national or social origin or 'other status'. Place of residence within a country is considered to fall within 'other status' for the purposes of these articles.

Article 5 of the CERD reinforces this general prohibition and provides that States 'undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'.

This Determination engages the rights to equality and non-discrimination because declared program participants will remain subject to the current compliance framework under Division 3A of Administration Act, while participation payment claimants or recipients who are not declared program participants will be subject to the new targeted compliance framework under Division 3AA of Part 3 of the Administration Act. Another effect of this Determination is that job seekers in the CDP will not be affected by the removal of exemptions wholly or predominantly due to drug or alcohol dependence.

This Determination, therefore, results in differential treatment for people in different locations and in certain employment services programs because CDP supports job seekers in remote Australia. In addition, approximately 83 per cent of job seekers in the CDP identify as Aboriginal and Torres Strait Islander people. On this basis, there may also be differential treatment on the basis of race.

However, the rights to equality and non-discrimination are subject to the international human rights law principle of 'legitimate differential treatment'. This principle allows particular groups of people to be treated differently where the treatment is aimed at achieving a legitimate objective, is based on reasonable and objective criteria and is proportionate to the objective to be achieved.

#### *Legitimate differential treatment*

The CDP provides employment services to job seekers in remote Australia who face unique obstacles such as fewer job opportunities, higher levels of dependence on welfare, lower levels of literacy and numeracy, and persistent and entrenched disadvantage. These factors and the lack of a labour market in remote Australia when compared with the opportunities for employment available in other parts of Australia, mean it is appropriate to further consider the most appropriate and effective arrangements for CDP participants.

As the Government is currently reviewing the operation of the CDP generally, it is appropriate to consider the compliance framework (including related participation requirements and exemptions, such exemptions wholly or predominantly due to drug or alcohol dependence), that should apply to CDP participants as part of that broader review. In the interim, the current compliance framework continues to apply to CDP participants.

The Determination is therefore reasonable, necessary and proportionate to achieve the legitimate objective of applying a compliance framework that the Secretary considers is most appropriate for persons in certain employment services programs.

### **The right to social security and the right to an adequate standard of living**

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC recognises the right of every child to benefit from social security.

The right to social security is important in realising many of the other rights in the ICESCR, including the right to an adequate standard of living under Article 11.

Article 11(1) of the ICESCR recognises the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions.

Article 4 of the ICESCR provides that countries may only subject economic, social and cultural rights to such limitations 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. The Committee on Economic, Social and Cultural Rights has stated that such limitations must be proportionate and the least restrictive alternative should be adopted where several types of limitation are available; and where such limitations are permitted, they should be of limited duration and subject to review.

The Determination provides for what happens in respect of compliance action for social security participation payment recipients that was taken when a person was, or was not, a declared program participant, and what happens when the person then becomes, or ceases to be, a declared program participant. The Determination, therefore, engages the right to social security and the right to an adequate standard of living.

#### *No limitation on a person's right to social security or an adequate standard of living*

For a person who has their payment suspended because they committed a failure under either Division 3A or Division 3AA of Part 3 of the Administration Act, the effect of this Determination is that their suspension ends when they change status and move between compliance frameworks. This does not limit the rights to social security or an adequate standard of living. Rather, this part of the Determination may

promote these rights in providing access to a participation payment when previously there was no such access for a payment suspension period.

Where more serious compliance action was taken under one compliance framework (either Division 3A or 3AA of Part 3 of the Administration Act) and a person subsequently becomes or ceases to be a declared program participant by moving employment services, the effect of the Determination is to continue that action:

- for a person who receives a serious failure penalty or is subject to an unemployment non-payment period under Division 3A before moving out of CDP and ceasing to be a declared program participant, the penalty or non-payment period would continue as if they had not moved. In addition, such a person retains access to waiver and payment pending review provisions, as if they had not moved; and
- for a person who is not in CDP and is subject to a payment reduction or cancellation, an unemployment preclusion period, or post cancellation non-payment period under Division 3AA and moves into CDP, this penalty or non-payment period continues to apply as if the person had not moved.

The effect of the Determination is that no new obligations or new requirements are imposed on a person. While the continuance of certain compliance action engages the rights to social security and an adequate standard of living, those rights are not limited by this Determination.

Further, persons who move into CDP or out of CDP will maintain their rights of review under social security law.

## **Conclusion**

This Determination is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.