

EXPLANATORY STATEMENT

Social Security (Administration) Legislation Amendment and Repeal (Reasonable Excuse - Participation Payments) Determination 2018

Summary

The *Social Security (Administration) Legislation Amendment and Repeal (Reasonable Excuse - Participation Payments) Determination 2018* (the Determination) is made by the Secretary of the Department of Jobs and Small Business (the Secretary) under subsection 42U(1) of the *Social Security (Administration) Act 1999* (the Act).

From 1 July 2018, a new instrument, the *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* (the Reasonable Excuse Determination) will set out the matters that the Secretary must, and must not, take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligation in relation to a participation payment for the purposes of subsections 42AI(1), 42AI(3), 42U(1) and 42U(3) of the Act.

The purpose of the Determination is to ensure that the Reasonable Excuse Determination is the sole instrument governing reasonable excuse matters relevant to participation payments. As such, the Determination:

- amends the *Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)* (the DEEWR Determination) so that, from 1 July 2018, the DEEWR Determination will no longer apply, for the purposes of subsection 42U(1) of the Act, to recipients of the following participation payments: newstart allowance, youth allowance (if the recipient is not a new apprentice or a full-time student), and parenting payment (if the recipient is subject to participation requirements). The DEEWR Determination will continue to apply for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*, to recipients of youth allowance for full-time students and Austudy; and
- repeals the *Social Security (Reasonable Excuse – Participation Payment Obligations) (FaHCSIA) Determination 2009 (No. 1)* (the FaHCSIA Determination) so that from 1 July 2018, the FaHCSIA Determination no longer applies, for the purposes of subsection 42U(1) of the Act, to special benefit (if the recipient is a nominated visa holder) (which is also a participation payment).

Background

The DEEWR Determination

The DEEWR Determination applies to recipients of the following participation payments:

- newstart allowance;
- youth allowance (if the recipient is not a new apprentice or a full-time student); and
- parenting payment (if the recipient is subject to participation requirements).

It sets out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to those participation payments for the purposes of subsection 42U(1) of the Act.

It also sets out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a participation failure in relation to youth allowance (if the person is a full-time student) or Austudy, for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*.

The FaHCSIA Determination

The FaHCSIA Determination applies to recipients of special benefit (nominated visa holders), which is also a participation payment.

It sets out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to that participation payment for the purposes of subsection 42U(1) of the Act.

It also sets out the matters that the Secretary must take into account in deciding whether a person had a reasonable excuse for committing certain special benefit failures that were previously set out in the *Social Security Act 1991* (the 1991 Act special benefit failures). However, these 1991 Act special benefit failures and applicable compliance provisions (including the sections providing for the Secretary to determine, by legislative instrument, the matters to be taken into account in deciding whether a person had a reasonable excuse for committing the 1991 Act special benefit failures) were repealed on 1 July 2009 (see the *Social Security Legislation Amendment (Employment Services Reform) Act 2009* (No. 7, 2009)). The effect of this is that the FaHCSIA Determination is now largely redundant.

Reason for amending and repealing the DEEWR and FaHCSIA Determinations – the Reasonable Excuse Determination

From 1 July 2018, a new single instrument, the Reasonable Excuse Determination, will set out the matters that the Secretary must, and must not, take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to all participation payments.

The Reasonable Excuse Determination effectively consolidates the reasonable excuse considerations for participation payment recipients into one instrument. It does this by:

- replicating, with some modifications, most of the matters that the Secretary must currently take into account in deciding if a participation payment recipient has a reasonable excuse for a failure for the purposes of subsection 42U(1) of the Act, as set out in the DEEWR Determination and the FaHCSIA Determination; and
- implementing the 2017-18 Budget measure to prevent the Secretary from taking certain matters into account when deciding whether a participation payment recipient has a reasonable excuse for not meeting their obligations (new subsections 42AI(3) and 42U(3) of the Act).

The Determination, therefore, amends the DEEWR Determination and repeals the FaHCSIA Determination (which is largely redundant) so that, from 1 July 2018, these two Determinations no longer apply to participation payment recipients. This ensures the Reasonable Excuse Determination is the sole instrument governing reasonable excuse matters relevant to participation payments.

As youth allowance for full-time students and Austudy are not participation payments, the amendments made by the Determination ensure the DEEWR Determination continues to apply to recipients of youth allowance for full-time students and Austudy for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*.

Operation of the provisions

Section 1 – Name

Section 1 provides that the name of the Determination is the *Social Security (Administration) Legislation Amendment and Repeal (Reasonable Excuse - Participation Payments) Determination 2018*.

Section 2 – Commencement

Section 2 provides a table setting out the commencement date for the whole of the Determination. The Determination commences on 1 July 2018.

Section 3 – Authority

Section 3 provides that the Determination is made under subsection 42U(1) of the Act. The Determination is made under subsection 42U(1) in reliance on subsection 33(3) of the *Acts Interpretation Act 1901* because it amends and repeals other instruments.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule is amended or repealed as set out in that Schedule.

Schedule 1 – Amendments

Schedule 1 amends the DEEWR Determination so that it no longer applies to participation payments for the purposes of subsection 42U(1) of the Act but continues to apply to youth allowance for full-time students and Austudy for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*.

Items 1, 2, and 5 of Schedule 1 amend the DEEWR Determination so that it no longer contains references to section 42U of the Act.

Item 3 of Schedule 1 makes a minor technical amendment to the heading of section 5 of the DEEWR Determination by replacing the words “determining if” with “deciding whether”. The relevant heading should be “Matters to be taken into account in deciding whether a person had a reasonable excuse” to reflect the wording used in subsections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*.

Item 4 of Schedule 1 amends subsection 5(1) of the DEEWR Determination by removing the reference to subsection 42U(1) of the Act from that subsection. It repeals subsection 5(1) of the DEEWR Determination, which contains a reference to subsection 42U(1) of the Act, and replaces it with a subsection that does not refer to subsection 42U(1) of the Act.

The effect of this amendment is that section 5 of the DEEWR Determination will continue to set out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a participation failure in regard to youth allowance (if the person is a full-time student) or Austudy for the purposes of subsections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*. However, the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with obligations in relation to a participation payment for the purposes of subsection 42U(1) of the Act will no longer be set out in section 5 of the DEEWR Determination.

Schedule 2 – Repeals

Item 1 of Schedule 2 repeals the whole of the FaHCSIA Determination. As the FaHCSIA Determination is no longer required for the purposes of subsection 42U(1) of the Act (given the intention is for the Reasonable Excuse Determination to be the sole instrument governing reasonable excuse matters relevant to participation payments), and the compliance provisions of the *Social Security Act 1991* applicable to the 1991 Act special benefit failures were repealed on 1 July 2009, the FaHCSIA Determination is now redundant.

Consultation

The Department of Jobs and Small Business consulted with affected Government departments and also provided an electronic copy of the draft determination and invited comment from: 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.

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 (Administration) Legislation Amendment & Repeal (Reasonable Excuse - Participation Payments) 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 (Administration) Legislation Amendment and Repeal (Reasonable Excuse - Participation Payments) Determination 2018* (the Determination) is made by the Secretary of the Department of Jobs and Small Business (the Secretary) under subsection 42U(1) of the *Social Security (Administration) Act 1999* (the Act).

From 1 July 2018, a new instrument, the *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* (the Reasonable Excuse Determination) will set out the matters that the Secretary must, and must not, take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligation in relation to a participation payment for the purposes of subsections 42A(1), 42A(3), 42U(1) and 42U(3) of the Act.

The purpose of the Determination is to ensure that the Reasonable Excuse Determination is the sole instrument governing reasonable excuse matters relevant to participation payments. As such, the Determination:

- amends the Social Security (Reasonable Excuse – Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1) (the DEEWR Determination) so that, from 1 July 2018, the DEEWR Determination will no longer apply, for the purposes of subsection 42U(1) of the Act, to recipients of the following participation payments: newstart allowance, youth allowance (if the recipient is not a new apprentice or a full-time student), and parenting payment (if the recipient is subject to participation requirements). The DEEWR Determination will continue to apply for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the Social Security Act 1991, to recipients of youth allowance for full-time students and Austudy; and
- repeals the Social Security (Reasonable Excuse – Participation Payment Obligations) (FaHCSIA) Determination 2009 (No. 1) (the FaHCSIA Determination) so that from 1 July 2018, the FaHCSIA Determination no longer applies, for the purposes of subsection 42U(1) of the Act, to special benefit (if the recipient is a nominated visa holder) (which is also a participation payment).

The DEEWR Determination

The DEEWR Determination applies to recipients of the following participation payments:

- newstart allowance;
- youth allowance (if the recipient is not a new apprentice or a full-time student); and
- parenting payment (if the recipient is subject to participation requirements).

It sets out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to those participation payments for the purposes of subsection 42U(1) of the Act.

It also sets out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a participation failure in relation to youth allowance (if the person is a full-time student) or Austudy, for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*.

The FaHCSIA Determination

The FaHCSIA Determination applies to recipients of special benefit (nominated visa holders), which is also a participation payment.

It sets out the matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for committing a failure to comply with their obligations in relation to that participation payment for the purposes of subsection 42U(1) of the Act.

It also sets out the matters that the Secretary must take into account in deciding whether a person had a reasonable excuse for committing certain special benefit failures that were previously set out in the *Social Security Act 1991* (the 1991 Act special benefit failures). However, these 1991 Act special benefit failures and applicable compliance provisions (including the sections providing for the Secretary to determine, by legislative instrument, the matters to be taken into account in deciding whether a person had a reasonable excuse for committing the 1991 Act special benefit failures) were repealed on 1 July 2009 (see the *Social Security Legislation Amendment (Employment Services Reform) Act 2009* (No. 7, 2009)). The effect of this is that the FaHCSIA Determination is now largely redundant.

Reason for amending and repealing the DEEWR and FaHCSIA Determinations – the Reasonable Excuse Determination

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- replicating, with some modifications, most of the matters that the Secretary must currently take into account in deciding if a participation payment recipient has a reasonable excuse for a failure for the purposes of subsection 42U(1) of the Act, as set out in the DEEWR Determination and the FaHCSIA Determination; and

- implementing the 2017-18 Budget measure to prevent the Secretary from taking certain matters into account when deciding whether a participation payment recipient has a reasonable excuse for not meeting their obligations (new subsections 42AI(3) and 42U(3) of the Act).

The Determination, therefore, amends the DEEWR Determination and repeals the FaHCSIA Determination (which is largely redundant) so that, from 1 July 2018, these two Determinations no longer apply to participation payment recipients. This ensures the Reasonable Excuse Determination is the sole instrument governing reasonable excuse matters relevant to participation payments.

As youth allowance for full-time students and Austudy are not participation payments, the amendments made by the Determination ensure the DEEWR Determination continues to apply to recipients of youth allowance for full-time students and Austudy for the purposes of sections 550(2A), 550B(2A), 576(2A) and 576A(2A) of the *Social Security Act 1991*.

Human rights implications

The Determination does not engage any of the applicable rights or freedoms. The amendments to the DEEWR Determination and the repeal of the FaHCSIA Determination simply consolidate into one instrument (the *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018*) the reasonable excuse matters relevant to participation payment recipients. The Statement of Compatibility with Human Rights to the *Social Security (Administration) (Reasonable Excuse – Participation Payments) Determination 2018* addresses the human rights implications of that instrument.

Conclusion

The Determination is compatible with human rights as it does not raise any human rights issues.