

EXPLANATORY STATEMENT

Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)

Summary

The *Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)* (the Determination) is made by the Minister for Jobs and Innovation under subsection 42AR(1) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of this Determination is to determine the circumstances in which the Secretary:

- must, or must not, be satisfied that a person subject to participation requirements has persistently committed mutual obligation failures for the purposes of paragraph 42AF(2)(a) of the Act;
- must make a determination that an instalment of a person's participation payment is to be reduced under paragraph 42AF(2)(c) (and by how much under subsection 42AN(4)); and
- must make a determination that a person's participation payment is cancelled under paragraph 42AF(2)(d).

This Determination underpins the operation of the new Targeted Compliance Framework set out in Division 3AA of Part 3 of the Act.

Background

The targeted job seeker compliance framework will apply to participation payment recipients other than 'declared program participants' from 1 July 2018. Participation payment recipients are recipients of: Newstart allowance; youth allowance (other); parenting payment (where the recipient is subject to participation requirements); and special benefit (Nominated Visa Holder).

In the first phase of this new framework, job seekers will begin in what is administratively known the 'green zone,' and will remain there as long as they meet their requirements. If they fail to meet a mutual obligation requirement without a valid reason, this will result in income support payment suspension until re-engagement (at which point payment is back-paid) and accrual of a demerit. They will then be in the 'warning zone', where each additional failure without a valid reason will incur another demerit, as well as payment suspension. This arrangement recognises that the vast majority of job seekers are genuine in their efforts to meet their requirements.

A small minority of job seekers however are persistently and deliberately non-compliant, and need a strong incentive to change their behaviour. For this reason, under the targeted compliance framework, financial penalties of increasing amounts will apply to those who are assessed as having persistently committed mutual obligation failures. This determination sets out the criteria for this assessment.

After five demerits within six active months these job seekers will enter what is administratively known as the 'penalty zone'. Job seekers who fail to attend a job interview, fail to act on a job opportunity or act in a manner such that an offer of employment would not be offered to them may enter the penalty zone more quickly, recognising the seriousness of these failures.

In the penalty zone, additional mutual obligation failures without reasonable excuse will result in escalating penalties, beginning with loss of 50 per cent of their fortnightly payment for their first mutual obligation failure without reasonable excuse, 100 per cent for their second mutual obligation failure and payment cancellation for four weeks for their third.

However, to ensure that genuine job seekers who are simply having difficulty meeting their requirements do not enter the penalty zone, their employment services provider will be required to assess their capability and requirements generally after their third demerit. The Department of Human Services will also assess the appropriateness of job seekers' requirements, usually after the person's fifth demerit (or earlier, if the failure is a failure to attend a job interview, or act on a job referral, or if they act in a manner such that an offer of employment would not be made). One of the effects of the Determination is that a person must undergo such an assessment, and that assessment must find that the person's requirements are appropriate for them, before the Secretary may be satisfied that the person has persistently committed mutual obligation failures.

In either assessment, if a person is found to be unable to meet their requirements because of some underlying capability issue, those requirements will be adjusted and they will return to the green zone with their demerits reset to zero.

If a job seeker does enter the penalty zone, they will still have a strong incentive to change their behaviour. If they meet their requirements for a period of three 'active months', they will also return to the green zone with zero demerits. As the policy intent is for these job seekers with a history of persistent non-compliance to demonstrate that they are meeting their requirements, if a person is exempt from their requirements, or in a non-payment period due to non-compliance (rather than because they are supporting themselves), such periods would not be considered as demonstrating compliance. For this reason, these periods are generally excluded from the calculation of 'active months'.

Operation of the provisions

Section 1 – Name of Determination

This section provides that the name of the Determination is the *Social Security (Administration) (Non-Compliance) Determination 2018 (No. 1)*.

Section 2 – Commencement

This section provides a table setting out the commencement of the Determination. The Determination will commence on 1 July 2018. This is the same date as Division 3AA of Part 3 of the Act will commence.

Section 3 – Authority

This section provides that the Determination is made under subsection 42AR(1) of the Act.

The Determination is made before the commencement of subsection 42AR(1) of the Act in reliance on subsection 4(2) of the *Acts Interpretation Act 1901*.

Section 4 – Definitions

Section 4 defines terms used in the Determination. The **note** to section 4 alerts the reader to the fact that words and phrases used in the Determination that are defined in the Act or the *Social Security Act 1991* (the 1991 Act), have the meaning given by those Acts.

The definitions of **3 active months** and **6 active months** expand the usual concept of 3 months and 6 months. For **3 active months**, paragraph (1) of the definition provides that this means the shorter of: 91 consecutive days plus any days equal to the number of days a person spends in certain periods during those 91 days; and twelve months These periods are:

- periods where a person is exempt or relieved from the activity test in certain circumstances;
- a one week period for each occasion a person has had an instalment of their participation payment reduced by the amount specified in paragraph 42AN(3)(a) (that is, an amount equal to half of the instalment that would otherwise have been payable);
- a two week period for each occasion a person has had an instalment of their participation payment reduced by the amount specified in paragraph 42AN(3)(b) (that is, an amount equal to the whole of the instalment that would otherwise have been payable);
- a post-cancellation non-payment period under subsection 42AP(5). Post-cancellation non-payment periods are either 4 or 6 weeks long, depending on the circumstances; and
- the time between a person's referral to the Human Services Department for an assessment regarding the suitability of their employment pathway plan, and the completion of that assessment.

Paragraph (2) of the definition of **3 active months** clarifies that if two or more of the periods mentioned above overlap, the number of days that overlap will only count once when calculating the days equal to the number of days the person spends in those periods.

The effect of the definition of **3 active months** is that the relevant periods mentioned above will be added on to 91 days, so **3 active months** will be more than 3 months for some people. However, **3 active months** cannot be more than 12 months.

Similarly, in relation to the definition of **6 active months**, this is the shorter of: 182 consecutive days plus periods equal to the periods mentioned above that occur within those 182 days; and 12 months. This means that **6 active months** will be more than 6 months for some people, but cannot be more than 12 months. In the event two or more of the periods mentioned above overlap, the number of days in

the overlap will only be counted once when calculating the days equal to the number of days the person spends in those periods.

The reason **3 active months** is defined in this way is that the policy intent is for people to demonstrate that they are complying with their mutual obligation requirements for 3 months following entry to the penalty zone. Where a person is temporarily exempt from requirements, or serving a penalty period, they are not demonstrating compliance. This is why the ordinary concept of '3 months' may be expanded in some circumstances. Where a person is fully meeting their mutual obligation requirements or is supporting themselves without accessing payment (except during a penalty period) this counts as demonstrating compliance.

Similarly, the reason **6 active months** is defined in this way is that job seekers must demonstrate compliance in order for their demerits to expire. Where a person is temporarily exempt from requirements, or in a cancellation period for a work refusal failure, they are not demonstrating compliance in those periods.

The Determination defines **demerit** as a record on the Employment Department's Information Technology System that the person has committed a mutual obligation failure without a valid reason. (Note that the term 'Employment Department' is defined in subsection 23(1) of the 1991 Act, and the effect of the definition is that it refers to the Department of Jobs and Small Business). Whether or not a person has a valid reason for a mutual obligation failure is assessed by the person's employment services provider at the time of, or immediately after, the failure.

The definition of **relevant failure** is the relevant failure described in subsection 42AF(1) of the Act. This is the mutual obligation failure for which compliance action must usually be taken under subsection 42AF(1), and if relevant, subsection 42AF(2).

Section 5 – Circumstances where a person has, and has not, persistently committed mutual obligation failures.

Section 5 sets out the circumstances in which the Secretary must be satisfied that a person has, or has not, persistently committed mutual obligation failures for the purposes of paragraph 42AF(2)(a) of the Act. If the Secretary is satisfied the person has persistently committed mutual obligation failures and does not have a reasonable excuse for the relevant failure, the Secretary must usually determine that an instalment of the person's payment is to be reduced or cancelled under paragraphs 42AF(2)(c) or (d) of the Act, respectively.

Section 5 is made for the purposes of paragraph 42AF(2)(a) of the Act.

Subsection 5(1) provides that the Secretary must be satisfied that a person has persistently committed mutual obligation failures if:

- the relevant failure was committed within 3 active months beginning on a day worked out under subsections 5(2) or 5(3) of the Determination (paragraph 5(1)(a)); or

- in the 3 active months prior to the relevant failure, the person has committed at least 1 mutual obligation failure without a reasonable excuse where the Secretary was satisfied that the person had persistently committed mutual obligations failures (paragraph 5(1)(b)).

The effect of paragraph 5(1)(a) is to create the 3 active month 'penalty zone'. If a person commits the relevant failure while in that penalty zone, the person's payment will be reduced or cancelled (see section 6 of the Determination).

The effect of paragraph 5(1)(b) is that once a person is found to have persistently committed mutual obligation failures, any mutual obligation failure the person commits without a reasonable excuse in the following 3 active months will result in the person being found to have persistently committed mutual obligation failures again. This means that the penalty zone will be extended by 3 active months each time the person commits a mutual obligation failure without a reasonable excuse while in the penalty zone.

Subsection 5(2) calculates the day, subject to subsection 5(3), the 3 active months referred to in paragraph 5(1)(a) of the Determination will start for a person who has committed a certain number of mutual obligation failures to which a demerit is attached; that is, when the penalty zone will start for these people. When the penalty zone starts will depend on whether they commit a certain number of mutual obligation failure to which a demerit is attached in a certain period, and whether they undergo a DHS assessment in that period.

The effect of subparagraph 5(2)(a)(i) and paragraph 5(2)(b) of the Determination, is that if a person commits at least 5 mutual obligation failures to which a demerit is attached in any 6 active months, and they undergo a DHS assessment in that period where DHS considers the person's job plan is suitable for them, then the penalty zone starts on the day the DHS assessment is complete.

The effect of subparagraph 5(2)(a)(ii) and paragraph 5(2)(b) is that if a person commits 2, 3 or 4 mutual obligation failures to which a demerit is attached in any 6 active months, where at least 1 of those failures was the person:

- failing to attending a job interview; or
- failing to act on a job opportunity when requested to do so by an employment services provider; or
- intentionally acting in a manner, and it is reasonably foreseeable that acting in that manner could result in an offer of employment not being made to them

and they undergo a DHS assessment in that 6 active month period where DHS considers the person's job plan is suitable for them, then the penalty zone starts on the day the DHS assessment is complete.

The reason why a person only needs to commit 2, 3 or 4 mutual obligation failures where at least 1 is a 'job opportunity failure' – that is, one of the three failures listed above – before they enter the penalty zone is because of the seriousness of these

failures which, while not as serious as outright refusal of work, call into question the job seeker's commitment to finding work. Where a job seeker commits a 'job opportunity failure' they are fast-tracked to the next assessment to determine if they are able to meet their requirements.

Subsection 5(3) calculates the day the 3 active months referred to in paragraph 5(1)(a) of the Determination will start for a person who has committed a certain number of mutual obligation failures to which a demerit is attached, but who has one or more of their demerits reversed after they undergo the DHS assessment. Subsection 5(3) operates despite subsection 5(2).

Subsection 5(3) sets out what happens when the circumstances set out in paragraphs 5(2)(a) and 5(2)(b) apply to a person – that is, where in any 6 active months a person commits at least:

- 5 mutual obligation failures to which a demerit is attached; or
- 2, 3 or 4 mutual obligation failures to which a demerit is attached where at least 1 is a 'job opportunity failure',

and where the person undergoes a DHS assessment in that period – but where one or more of the person's demerits is reversed after the person undergoes the DHS assessment, and the person subsequently commits one or more mutual obligation failures to which a demerit is attached and not reversed. In those cases, the 3 active month penalty zone starts on the day on which the person commits:

- the fifth mutual obligation failure in 6 active months to which a demerit is attached that is not subsequently reversed; or
- the second, third or fourth mutual obligation failure in 6 active months to which a demerit is attached that is not subsequently reversed, where at least 1 of these failures is a 'job opportunity' failure.

The purpose of subsection 5(3) is to ensure that if a person has one (or more) of their demerits reversed after they enter the penalty zone, their penalty zone will not start until they commit the requisite number of mutual obligation failures to which a demerit is attached that is not subsequently reversed.

Subsection 5(4) sets out when a demerit is reversed for the purposes of section 5. It provides that demerit is **reversed** if it is removed from the Employment Department's Information Technology System, including because:

- it was recorded in respect of a mutual obligation failure by a person who subsequently underwent a DHS assessment, or a capability assessment with their employment provider, and the outcome of that assessment was that the person's employment pathway plan was not suitable for the person;
- it was recorded in respect of a mutual obligation failure by a person and the person was subsequently found to have a valid reason for committing the failure; or

- it was recorded in error.

The note to subsection 5(4) states that if the outcome of the DHS assessment is that the person's employment pathway plan is not suitable for them, then all the person's demerits will be removed at that time.

Subsections 5(5) and (6) sets out the circumstances where the Secretary must not be satisfied that the person has persistently committed mutual obligation failures, despite subsections 5(1) – (3) of the Determination.

Subsection 5(5) provides that the Secretary must not be satisfied that a person has persistently committed mutual obligation failures if the person has not committed a mutual obligation failure to which a demerit is attached, or a mutual obligation failure without a reasonable excuse, in the 3 active months prior to the relevant failure. This means that if a person is fully compliant for 3 active months, they cannot have their payments reduced or cancelled the next time they commit a mutual obligation failure.

The intention of this provision is to provide an incentive for those who have a history of non-compliance to change their behaviour. If a person remains fully compliant with their requirements for 3 active months in the penalty zone, they will be returned to the green zone with their demerits reset to zero.

Subsection 5(6) is included in the Determination for the avoidance of doubt. It provides that the Secretary must not be satisfied that a person has persistently committed mutual obligation failures if one or more of the person's demerits referred to in subparagraphs 5(2)(a)(i) or (ii) is reversed, with the result that that a person has not committed the requisite number of mutual obligation failures to which a demerit is attached for the purposes of those sections.

This subsection confirms that the Secretary must not be satisfied that a person has persistently committed mutual obligation failures (and therefore cannot reduce or cancel a person's payment under paragraphs 42AF(2)(c) and (d) of the Act), where a person had committed the requisite number of mutual obligation failures to which a demerit is attached to enter the penalty zone, but where one or more of those demerits is later reversed with the result that the person has not committed the requisite number of mutual obligation failures to which a demerit is attached.

Section 6 – Circumstances where a person's participation payment is to be reduced (and by how much), or cancelled.

Section 6 sets out the circumstances in which the Secretary must determine that a person's participation payment is to be reduced under paragraph 42AF(2)(c) of the Act (and by how much under paragraph 42AN(4)), or cancelled under paragraph 42AF(2)(d).

Section 6 is made for the purposes of subsections 42AF(2) and 42AN(4) of the Act.

Subsection 6(1) provides that if the Secretary is satisfied the circumstances set out in paragraphs 5(1)(a) or (b) of the Determination apply to a person, then, for the purposes of paragraph 42AF(2)(c) and subsection 42AN(4) of the Act, the Secretary must determine an instalment of a person's participation payment is to be reduced

by the amount specified in paragraph 42AN(3)(a) of the Act – that is, an amount equal to half of the instalment that would otherwise have been payable.

The effect of this is that, subject to the subsequent subsections, a person's participation payment will be reduced by an amount equal to half their payment if they commit a mutual obligation failure without a reasonable excuse while in the penalty zone.

Subsection 6(2) sets out what happens for the purposes of paragraph 42AF(2)(c) and subsection 42AN(4) of the Act if, in the 3 active months prior to the relevant failure, an instalment of person's participation payment has been reduced by the amount specified in paragraph 42AN(3)(a) (that is, by an amount equal to half of the instalment that would otherwise have been payable), and where that reduction was the last reduction determination made under paragraph 42AF(2)(c) in relation to the person. In these circumstances, despite subsection 6(1) of the Determination, the Secretary must determine that an instalment of a person's payment is to be reduced by the amount specified in paragraph 42AN(3)(b) of the Act (that is, by an amount equal to the whole of the instalment that would otherwise have been payable).

The effect of this is that if a person commits a mutual obligation failure without a reasonable excuse while in the penalty zone, and they have already had their participation payment reduced by an amount equal to half their payment less than 3 active months ago because of a determination under paragraph 42AF(2)(c), their payment will be reduced by an amount equal to the whole amount of the payment. In short, this means that where a person commits a second mutual obligation failure without a reasonable excuse in the penalty zone, their payment will be reduced by an amount equal to the whole amount of the payment.

Subsection 6(3) sets out when the Secretary must determine that a person's participation payment is cancelled for the purposes of paragraph 42AF(2)(d) of the Act. This will occur if, in the 3 active months prior to the relevant failure, an instalment of the person's participation payment has been reduced by the amount specified in paragraph 42AN(3)(b) (that is, by an amount equal to the whole of the instalment that would otherwise have been payable), where that reduction was the last reduction determination made under paragraph 42AF(2)(c) in relation to the person. Subsection 6(3) applies despite subsections 6(1) and (2) of the Determination.

The effect of this is that if a person commits a mutual obligation failure without a reasonable excuse while in the penalty zone, and they have already had their participation payment reduced by an amount equal to the whole amount less than 3 active months ago because of a determination under paragraph 42AF(2)(c), their payment will be cancelled. In short, this means that where a person commits a third mutual obligation failure without a reasonable excuse in the penalty zone, their payment will be cancelled. In that case, a four week post-cancellation non-payment period will apply.

Subsection 6(4) sets out a special rule for when a person previously received a participation payment that was cancelled under paragraph 42AF(2)(d) of the Act, and where the relevant failure is the first mutual obligation failure without a reasonable excuse in the 3 active months since that cancellation. In those circumstances, the

Secretary must determine that an instalment of a person's participation payment is to be reduced by the amount specified in paragraph 42AN(3)(a) of the Act (that is, by an amount equal to half of the instalment). The rule in subsection 6(4) of the Determination applies regardless of subsections 6(1), (2) or (3).

The reason there is a special rule in these circumstances is to ensure that a person's participation payment is not cancelled again after the first mutual obligation failure without a reasonable excuse that a person commits after they return to payment.

The usual rules in subsections 6(2) and (3) of the Determination will apply in relation to subsequent mutual obligation failures without a reasonable excuse that the person commits after they return to payment.

Example

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

Annika is a Newstart allowance recipient. Between 1 July 2018 and 14 September 2018 she commits five mutual obligation failures. Her employment services provider decides Annika does not have a valid reason for her failures and so demerits are recorded on the Department of Jobs and Small Business' IT System for each of these failures. After the third failure, her provider assesses her Newstart Employment Pathway Plan (Job Plan) to ensure it is suitable for her and after her fifth demerit the Department of Human Services also conduct an assessment. Both assessments find that Annika is able to meet her requirements and Annika's Job Plan is appropriate for her. On 19 September 2018, the date her assessment by the Department of Human Services is finalised, Annika moves into the penalty zone for 3 active months. If she commits no further mutual obligation failures, Annika will be in the penalty zone for 3 active months (that is, until at least 19 December 2018 – which is 91 consecutive days from 19 September 2018 – plus any additional time incurred as a result of further failure, period of temporary exemption from requirements, or cancellation for a work refusal failure).

Annika is undertaking a National Work Experience Program placement with a local business, and participating in this placement is a requirement of her job plan. On 1 October 2018, Annika fails to show up to her placement as required. This is a mutual obligation failure under paragraph 42AC(1)(d) of the Act, and Annika has no reasonable excuse for this failure. Among other decisions made in relation to this failure (the 'relevant failure'), a delegate of the Secretary within the Department of Human Services:

- *decides he is satisfied, under paragraph 42AF(2)(a) of the Act, that Annika has persistently committed mutual obligation failures. This is because the relevant failure was committed within 3 active months beginning on 19 September 2018 (as per paragraph 5(1)(a) and subsection 5(2) of the Determination);*
- *determines, under paragraph 42AF(2)(c) and subsection 42AN(4) of the Act, that an instalment of Annika's Newstart allowance is to be*

reduced by an amount equal to half of the instalment that would otherwise have been payable to her for the relevant reduction period. This is due of the operation of subsection 6(1) of the Determination, which applies because the circumstances set out in paragraph 5(1)(a) applies to Annika.

Annika's time in the Penalty Zone is also adjusted. Annika will stay in the penalty zone for a 3 active month period from 1 October 2018 (91 days plus an additional 1 weeks for incurring a reduction equal to half of her instalment). This extends Annika's time in the Penalty Zone until 7 January 2019, plus any additional time incurred as a result of further failure, period of temporary exemption from requirements, or cancellation for a work refusal failure.

On 15 November 2018, Annika fails to satisfy her employment provider that she has undertaken adequate job search as required by her job plan. This is a mutual obligation failure under paragraph 42AC(1)(e) of the Act, and Annika has no reasonable excuse for this failure. Among other decisions made in relation to this failure (the 'relevant failure'), a delegate of the Secretary within the Department of Human Services:

- decides she is satisfied, under paragraph 42AF(2)(a) of the Act, that Annika has persistently committed mutual obligation failures. This is because the circumstances set out in subsection 5(1)(b) of the Determination apply to Annika – that is, in the 3 active months prior to the relevant failure, Annika has committed at least 1 mutual obligation failure without a reasonable excuse, where the Secretary was satisfied that Annika had persistently committed mutual obligation failures; and*
- determines, under paragraph 42AF(2)(c) and subsection 42AN(4) of the Act, that an instalment of Annika's Newstart allowance is to be reduced by an amount equal to the whole amount of the instalment that would otherwise have been payable to Annika for the relevant reduction period. This is due to the operation of subsection 6(2) of the Determination, which applies because in the 3 active months prior to the relevant failure, the Secretary made a determination under paragraph 42AF(2)(c) to reduce an instalment of Annika's Newstart allowance by half, and this was the last determination made under paragraph 42AF(2)(c) in relation to Annika.*

Annika's time in the Penalty Zone is also adjusted. Annika will stay in the penalty zone for a 3 active month period from 15 November 2018 (91 days plus two weeks due to the reduction of the whole amount of her payment instalment). This extends Annika's time in the Penalty Zone until 28 February 2019, plus any additional time incurred as a result of further failure, period of temporary exemption from requirements, or cancellation for a work refusal failure.

On 28 February 2019 Annika leaves the Penalty Zone, having served three active months in the Penalty Zone since her last failure (91 days plus two weeks due to the reduction of the whole amount of her payment instalment). Annika is returned to the Green Zone with her demerits reset to zero.

On 15 March 2019, Annika again fails to satisfy her employment provider that she has undertaken adequate job search as required by her Job Plan. However, it has been more than 3 active months since she committed her last mutual obligation failure without a reasonable excuse. The Secretary/delegate cannot be satisfied that Annika has persistently committed mutual obligation failures, so Annika's Newstart allowance is therefore not reduced or cancelled as a result of her failure on 15 March 2019.

Consultation

The Department of Jobs and Small Business consulted the Department of Human Services, the Department of Social Services, and also 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 Administrative Appeals Tribunal, the National Employment Services Association and the National Social Security Rights Network.

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

This 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) (Non-Compliance) Determination 2018 (No. 1)

This legislative instrument (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 Determination is made by the Minister for Jobs and Innovation under subsection 42AR(1) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of this Determination is to determine the circumstances in which the Secretary:

- must be satisfied that a person subject to participation requirements has, or has not, persistently committed mutual obligation failures for the purposes of paragraph 42AF(2)(a) of the Act;
- must make a determination that an instalment of a person's participation payment is to be reduced under paragraph 42AF(2)(c) (and by how much under subsection 42AN(4)); and
- must make a determination that a person's participation payment is cancelled under paragraph 42AF(2)(d).

This Determination underpins the operation of the new targeted compliance framework set out in Division 3AA of Part 3 of the Act.

The targeted job seeker compliance framework will apply to participation payment recipients other than 'declared program participants' from 1 July 2018. Participation payment recipients are recipients of: Newstart allowance; youth allowance (other); parenting payment (where the recipient is subject to participation requirements); and special benefit (Nominated Visa Holder).

In the first phase of this new framework, job seekers will begin in what is administratively known the 'green zone,' and will remain there as long as they meet their requirements. If they fail to meet a mutual obligation requirement without a valid reason this will result in income support payment suspension until re-engagement (at which point payment is back-paid) and accrual of a demerit. They will then be in the 'warning zone', where each additional failure without a valid reason will incur another demerit, as well as payment suspension. This arrangement recognises that the vast majority of job seekers are genuine in their efforts to meet their requirements.

A small minority of job seekers however are persistently and deliberately non-compliant, and need a strong incentive to change their behaviour. For this reason, financial penalties of increasing amounts will apply to those who are assessed as

having persistently committed mutual obligation failures. This determination sets out the criteria for this assessment.

After the accumulation of five demerits within a short period (generally six months), these job seekers will enter what is administratively known as the 'penalty zone'. Job seekers who fail to attend a job interview, fail to act on a job opportunity or act in a manner such that an offer of employment would not be offered to them may enter the penalty zone more quickly, recognising the seriousness of these failures.

In the penalty zone additional mutual obligation failures without reasonable excuse will result in escalating penalties, beginning with loss of 50 per cent of their fortnightly payment for their first mutual obligation failure without reasonable excuse, 100 per cent for their second strike and payment cancellation for four weeks for their third.

However, to ensure that genuine job seekers who are simply having difficulty meeting their requirements do not enter the penalty zone, their employment services provider will be required to assess their capability and requirements generally after their third demerit. The Department of Human Services will also assess the appropriateness of job seekers' requirements, usually after the person's fifth demerit (or earlier, if the failure is a failure to attend a job interview, or act on a job referral, or if they act in a manner such that an offer of employment would not be made). One of the effects of the Determination is that a person must undergo such an assessment, and that assessment must find that the person's requirements are appropriate for them, before the Secretary may be satisfied that the person has persistently committed mutual obligation failures.

In either assessment, if a person is found to be unable to meet their requirements because of some underlying capability issue, those requirements will be adjusted and they will return to the green zone with their demerits reset to zero.

If a job seeker enters the penalty zone, they will still have a strong incentive to change their behaviour. If they meet their requirements for a period of three 'active months', they will also return to the green zone with zero demerits. As the policy intent is for these job seekers with a history of persistent non-compliance to demonstrate that they are meeting their requirements, if a person is exempt from their requirements, or in a non-payment period due to non-compliance (rather than because they are supporting themselves), such periods would not be considered as demonstrating compliance. For this reason, these periods are generally excluded from the calculation of 'active months'.

Human rights implications

The Determination engages the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right of the child to benefit from social security in Article 26 of the Convention on the Rights of the Child (CRC) and the obligation to provide protection and assistance to the family in Article 10 of the ICESCR;

- the right to an adequate standard of living in Article 11 of the ICESCR and Article 27 of the CRC;

The right to social security, the right to an adequate standard of living, and the obligation to provide protection and assistance to the family

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, taking into account the resources and circumstances of both the child and the person responsible for the child.

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, and the obligation in Article 10 to provide protection and assistance to the family.

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 27 of the CRC also recognises the right of the child to an adequate standard of living for the child's physical, mental, spiritual, moral and social development.

Article 10(1) of the ICESCR recognises that 'the widest possible protection and assistance should be accorded to the family', particularly for its establishment, and 'while it is responsible for the care and education of dependent children'. The Committee on Economic, Social and Cultural Rights (CESCR) has noted that the provision of family benefits by way of cash payments and services is crucial for the realisation of the rights under Articles 9 and 10, thereby acknowledging that Article 10(1) may require provision of financial assistance (this may require the provision of family benefits as a measure of assistance).

Article 4 of the ICESCR provides that countries may 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 CESCR has stated that such limitations must be proportionate and the least restrictive alternative should be adopted where several types of limitations are available; and where such limitations are permitted, they should be of limited duration and subject to review.

Determining that a person has persistently committed mutual obligation failures after they have committed a mutual obligation failure without a reasonable excuse necessitates that their payment be reduced or cancelled. Accordingly, the Determination may limit the right to social security, the right to an adequate standard of living, and the obligation to provide protection and assistance to the family.

Reasons for limitation – legitimate objective

The purpose of the Determination is to enable the Secretary to determine when a person has persistently committed mutual obligation failures, and to determine that the person's payment is to be reduced or cancelled. The underlying objective is to encourage a person to do all they are reasonably able to do to remain connected to employment services and meet their mutual obligation requirements, which are designed to facilitate participation in the workforce. This objective is legitimate because of the benefits workforce participation brings to a job seeker and their families.

Rational connection between the limitation and the objective

Limiting a person's rights through payment reduction and cancellation provides the necessary incentive for persistently non-compliant jobseekers to meet their mutual obligation requirements and remain connected to employment services. This will encourage job seekers to do all that they are able to move quickly into paid work. Paid work will increase the financial ability of individuals to provide themselves with an adequate standard of living.

Limitation is reasonable, necessary and proportionate

Any limitation on the right to social security, right to an adequate standard of living, and assistance to the family is necessary because, without the possibility of a penalty for a relevant participation failure, there is less incentive for a person to do all they are reasonably able to do to meet their mutual obligation requirements, which are designed to facilitate participation in the workforce. An ineffective compliance framework has a detrimental impact on job seekers as they are not given a sufficient incentive to take active steps to meet their requirements and therefore increase their chances of moving off income support and experiencing the benefits of participation in the work force.

Further, the Determination, and the administrative policy surrounding the policy ensure that only those who are deliberately and persistently not complying with their mutual obligation requirements will face payment reduction or cancellation.

Job seekers would generally need to commit six mutual obligation failures in a six month period before being determined to have persistently committed mutual obligation failures and facing financial penalty. Job seekers also would not face financial penalty if they had a reasonable excuse for their failure. Likewise, calculation of when a person may be determined to be persistently non-compliant is dependent on the number of mutual obligation requirements which have resulted in demerits being recorded in the Department of Jobs and Small Business' IT system. Where a person has committed a mutual obligation failure, but the employment service provider judges that they had a valid reason for committing that failure, the person would not have a demerit.

In addition, before facing financial penalty for committing mutual obligation failures, job seekers would also be assessed by both their employment services provider and the Department of Human Services to determine if they are able to meet their mutual obligation requirements. The presence of the Department of Human Services

assessment is a prerequisite for finding that the person has persistently committed mutual obligation failures, and the employment services provider assessment is an administrative requirement.

In either assessment, if a job seeker's requirements are inappropriate for their circumstances, their demerits will be reset to zero and their requirements will be adjusted. This means that they would be unable to be determined to have persistently committed mutual obligation failures unless they go on to commit further failures without a valid reason or reasonable excuse.

As a result of these safeguards, job seekers will not face financial penalties unless they have repeatedly demonstrated that they are unwilling to comply with their mutual obligation requirements.

Additionally, any imposed penalties are subject to review, both within the Department of Human Services and by appeal to the Administrative Appeals Tribunal.

Proportionate limitation in relation to the obligation to provide protection and assistance to the family

In relation to Article 10(1) of the ICESCR to provide protection and assistance to the family, the Determination will only apply to a person who has committed a mutual obligation failure without a reasonable excuse. This means that where a parent is genuinely attempting to meet their mutual obligation requirements, they will not be penalised.

If a parent or carer is penalised as a result of being determined to have persistently have committed mutual obligation failures, this may indirectly affect the assistance available for their child. However, if a parent or carer does face a financial penalty, it would only apply to the person's participation payment. Any payments made to parents or carers for the maintenance of their children, such as Family Tax Benefit, or to meet childcare costs, would not be affected by the penalty.

Ensuring that parents and carers on income support are doing all that they can to move into employment will help parents to secure paid work and therefore increase the financial support available to their children.

Conclusion

This Determination is compatible with human rights because, to the extent that it may limit human rights, the impact is for a legitimate objective, and is reasonable, necessary and proportionate.