

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

Social Security Act 1991

Social Security (Waiver of Debts - Refugees) Specification 2019

Summary

The *Social Security (Waiver of Debts – Refugee) Specification 2018* is a legislative instrument made under subsection 1237AB(1) of the *Social Security Act 1991* (the Act).

The purpose of the legislative instrument is to specify a class of debts that the Secretary may waive under section 1237AB of the Act.

Background

Subsection 1237AB(1) of the Act provides that the Secretary may decide to waive the Commonwealth's right to recover debts arising under the Act that are included in a class of debts specified by the Minister by legislative instrument.

The purpose of this instrument is to specify a class of debts, in relation to which decisions to waive those debts remains a matter for the Secretary's discretion. Having identified a debt falls in a specified class, the Secretary is then able to make a decision based on the circumstances of a particular case.

The class of debts specified by this instrument relates to an overpayment of an income support payment that while consistent with policy intent was not technically correct by the social security law. Administration of the social security law has proceeded upon the basis that a holder of refugee and humanitarian visas is the holder of a permanent protection visa or prescribed visa, and hence a refugee for the purposes of subsection 7(6B) of the Act. However, changes to the *Migration Regulations 1994* which took effect on 5 October 2001 resulted in the class of refugee and humanitarian visas prescribed in the Act (Class BA) being ceased, and a new class of visas issued for these categories (Class XB). From that date, while payments were made consistent with policy intent, refugee and humanitarian visas were not legally covered as refugees by the descriptions of relevant classes in the Act. It was never the policy intention that refugee and humanitarian visa holders would not be treated as refugees for social security purposes.

The exemption which applies to refugees under the Act recognises that most refugee and humanitarian entrants arrive with limited money, assets and social networks to assist them to meet basic living expenses. It also demonstrates Australia's commitment to complying with the provisions of the 1951 United Nations (UN) Refugee Convention and the 1967 UN Protocol, to which Australia is a signatory.

In light of the circumstances, it is considered appropriate to allow the Secretary to waive such debts. This legislative instrument allows the Secretary to waive such debts.

The *Social Security (Class of Visas – Qualifying Residence Exemption – Refugee) Declaration 2018* ensures such visa holders are refugees prospectively.

Commencement

This instrument commences on the day after the end of the period for disallowing it.

Consultation

Public consultation has not been undertaken as this instrument is of a purely beneficial character. Consultation has been undertaken with the Department of Human Services and the Department of Home Affairs.

Retrospectivity

This instrument has prospective operation.

Regulation Impact Statement (RIS)

This instrument is not regulatory in nature and will have no regulatory impact on individuals, business, activity or competition.

Explanation of the Provisions

Section 1 states the name of the legislative instrument.

Section 2 provides that the Specification commences on the day after the end of the period for disallowing it.

Section 3 provides the authority for the legislative instrument, which is subsection 1237AB(1) of the Act.

Section 4 provides definitions of terms used in the legislative instrument.

Section 5 specifies the class of debts for subsection 1237AB(1) that may be waived by the Secretary.

The following class of debts is specified by section 5:

- a debt of a person that arises because the person receives or has received payments on the basis that a person who held a Refugee and Humanitarian (Class XB) visa from 5 October 2001 onwards was the holder of a permanent protection visa within the meaning of subparagraph (c)(i) of subsection 7(6B) of the Act.

Statement of Compatibility with Human Rights

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

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This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The purpose of this instrument is to specify a class of debts, in relation to which decisions to waive those debts remains a matter for the Secretary's discretion. Having identified a debt falls in a specified class, the Secretary is then able to make a decision based on the circumstances of a particular case.

Human rights implications

This legislative instrument is of a beneficial character. It allows the Secretary to waive debts, as specified by this instrument, in relation to an overpayment of a social security payment that while consistent with policy intent was not technically correct by the social security law.

This instrument supports the government policy to consider refugee and humanitarian visa holders as refugees for the purposes of social security law.

It engages or gives effect to the following human rights:

- the right to social security contained in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- the right to an adequate standard of living contained in Article 11(1) of the ICESCR, and Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD).

Conclusion

This instrument is compatible with human rights as it supports the right to social security and an adequate standard of living for refugee and humanitarian visa holders.

The Hon Paul Fletcher MP, Minister for Families and Social Services