

EXPLANATORY STATEMENT

Social Security Act 1991

Social Security Legislation Amendment (2019 Measures No. 1) Determination 2019

Purpose

The *Social Security Legislation Amendment (2019 Measures No. 1) Determination 2019* (the Amendment Determination) will amend:

- the *Social Security (Retention of exemption for asset-test exempt income streams) (FaHCSIA) Principles 2011* (the 2011 Principles) made under subparagraphs 1118(1A)(a)(iii) and 1118(1A)(b)(ii) of the *Social Security Act 1991* (the Act); and
- the *Social Security (Guidelines for determining whether income stream is asset-test exempt) (FaHCSIA) Determination 2011* (the Guidelines) made under subsections 9A(6) and 9B(5) of the Act; and
- the *Social Security (Partially Asset-test Exempt Income Stream — Exemption) Principles 2017* (the 2017 Principles) made under subparagraph 1118(1A)(a)(iii) of the Act.

Subsections 9A(6) and 9B(5) of the Act allow the Secretary to determine, by legislative instrument, guidelines for the purpose of making a determination under subsections 9A(5) and 9B(4), respectively, that an income stream is an asset-test exempt income stream where it would not otherwise meet the requirements of sections 9A or 9B. The Guidelines generally apply to income streams that are purchased on or after 20 September 2007.

Subparagraphs 1118(1A)(a)(iii) and 1118(1A)(b)(ii) of the Act allow the Secretary to determine, by legislative instrument, circumstances in which certain income streams are fully or partially exempt from the assets test under the Act. In particular, the 2011 Principles provide that certain fully and partially asset-test exempt income streams retain their asset-test exempt status where they have been commuted for particular purposes.

The 2017 Principles provide that certain income streams purchased between 20 September 2004 and 19 September 2007, which would have ordinarily been partially asset-test exempt, will be fully asset-test exempt in certain circumstances.

The purpose of the legislative instruments made under subsections 9A(6) and 9B(5), and subparagraphs 1118(1A)(a)(iii) and 1118(1A)(b)(ii), of the Act is to determine the circumstances in which income streams will be asset-test exempt. These circumstances are contained in delegated legislation, rather than primary legislation, as they relate to administration of the unique circumstances in which an income stream will be asset-test exempt. The instruments provide appropriate flexibility to respond to changing needs and priorities.

The purpose of the Amendment Determination is to specify a new set of circumstances in which certain income streams are fully or partially exempt from the assets test under the Act, in response to submissions made by superannuation providers and industry stakeholders.

Background

Under the social security law, an income and assets test is used to determine whether a person is eligible to be paid a social security payment and the rate payable. Ordinarily, all of a person's assets are assessable in determining whether the value of their assets exceed the set threshold. However, under section 1118 of the Act, some assets are exempt from the assets test. The value of any asset-test exempt income stream of the person, and half of the value of any partially asset-test exempt income stream of the person, are to be disregarded in calculating the value of a person's assets (paragraphs 1118(1)(d) and 1118(1)(da) of the Act).

An asset-test exempt income stream is defined in sections 9A, 9B and 9BA of the Act. These sections provide that lifetime income streams, life expectancy income streams, and market-linked income streams are asset-test exempt income streams in specified circumstances.

Section 1118(1A) of the Act provides that income streams, which comply with the definitions in sections 9A, 9B and 9BA of the Act, that commenced prior to 20 September 2004 are asset-test exempt, whereas income streams that commence between 20 September 2004 and 19 September 2007 are partially asset-test exempt.

If a person purchases or acquires a new income stream on or after 20 September 2004, their new income stream does not obtain full asset-test exempt status. Similarly, if a person purchases or acquires a new income stream on or after 20 September 2007, their new income stream does not obtain partial asset-test exempt status. However, a new income stream may be fully or partially asset-test exempt if it is covered by the 2011 Principles, the Guidelines, or the 2017 Principles.

The 2011 Principles

The purpose of the 2011 Principles is to ensure that a new income stream purchased or acquired as the result of the full commutation or rollover of an existing asset-test exempt (or partially asset-test exempt) income stream, which would otherwise lose asset-test exempt status, retains its asset-test exempt status where it satisfies the conditions set out in the Principles. Part 2 of the 2011 Principles apply to retain the full asset-test exemption for new income streams that derive from asset-test exempt income streams which were purchased before 20 September 2004, whereas Part 3 of the 2011 Principles apply to retain the partial asset-test exemption for new income streams that derive from partially asset-test exempt income streams which were purchased on or after 20 September 2004 and before 20 September 2007.

The Guidelines

The purpose of the Guidelines is to outline circumstances that the Secretary is to have regard to prior to determining that an income stream is fully exempt from the asset-test under the Act. Therefore, new income streams purchased on or after 20 September 2007, which would ordinarily not be asset-test exempt, may be determined to be fully asset-test exempt for the purposes of the Act.

The 2017 Principles

The purpose of the 2017 Principles is to ensure that a new income stream, purchased or acquired between 20 September 2004 and 19 September 2007 (inclusive) as the result of the commutation or rollover of an existing asset-test exempt income stream, which would have ordinarily been a partially asset-test exempt income stream by virtue of subsection 1118(1A) of the Act, is a fully asset-test exempt income stream in the circumstances set out in the 2017 Principles.

The Amendment Determination

However, none of the above instruments currently provide for a new income stream, which has been purchased or acquired as a result of the commutation of an existing asset-test exempt (or partially asset-test exempt) income stream, to retain or obtain (as the case may be) asset-test exempt status where a superannuation fund or sub-fund for the original asset-test exempt income stream is closed by the provider.

Currently, where a person's superannuation fund or sub-fund, which their income stream derives from, is closed in circumstances outside of their control, either the income stream provider or the person will need to purchase or acquire a new income stream. Unless the purchase of the new income stream is otherwise covered by the 2011 Principles, the Guidelines, or the 2017 Principles, the person's new income stream will be assets-tested. In effect, although the person has had no agency over the closure of their fund and their circumstances have not otherwise changed, their new income stream will not be exempt from the assets-test and could potentially reduce the person's social security payment.

The Amendment Determination will insert new sections 2.11 and 3.12 into the 2011 Principles, new section 19 into the Guidelines, and new section 11 into the 2017 Principles, to allow a new income stream, which has been purchased or acquired as a result of the commutation of an existing asset-test exempt (or partially asset-test exempt) income stream, to retain or obtain asset-test exempt status where the superannuation fund or sub-fund for the original asset-test exempt income stream is closed by the provider.

This is a beneficial amendment to the 2011 Principles, the Guidelines and the 2017 Principles to ensure that a person's new income stream will not be asset-tested where they had no other choice than to accept the new income stream offered by their previous income stream provider or to purchase a new income stream after their original asset-test exempt income stream was closed. In short, the new provisions will mean that a person whose new income stream meets the new criteria will not lose entitlement to their social security payment or have the rate of their social security payment reduced (subject to meeting other requirements under the social security law).

The new income stream will also need to meet the other conditions set out in the new sections in order to retain or obtain asset-test exempt status. For example, new section 19 of the Guidelines provides that the new income stream will only retain or obtain asset-test exempt status where it is capable of satisfying the definitions in sections 9A or 9B of the Act, or would have satisfied sections 9A or 9B of the Act if paragraph 9A(1)(aa) or subparagraph 9B(1)(a)(i) of the Act did not apply. That is, an income stream that commenced after 20 September 2007 may be an asset-test exempt income stream provided it meets the other requirements of sections 9A or 9B of the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power is construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The power to make or amend legislative instruments under subsections 9A(6) and 9B(5), and subparagraphs 1118(1A)(a)(iii) and 1118(1A)(b)(ii), of the Act has been delegated by the Secretary to all positions of Deputy Secretary and all positions of Group Manager in accordance with section 234 of the *Social Security (Administration) Act 1999*.

Commencement

The Amendment Determination commences on the day after this instrument is registered on the Federal Register of Legislation.

Consultation

The department has consulted with the Treasury, Services Australia, and industry stakeholders. These stakeholders support the proposed changes introduced by the Amendment Determination.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted on 29 October 2019 and confirmed that the Amendment Determination does not require a Regulatory Impact Statement (OBPR Reference: 25791).

Explanation of the provisions

Section 1 provides that the name of the Amendment Determination is the *Social Security Legislation Amendment (2019 Measures No. 1) Determination 2019*.

Section 2 provides that the Amendment Determination commences on the day after this instrument is registered on the Federal Register of Legislation.

Section 3 provides that the Amendment Determination is made under subsections 9A(6) and 9B(5), and subparagraphs 1118(1A)(a)(iii) and 1118(1A)(b)(ii) of the Act.

Section 4 provides that the instruments that are specified in a Schedule to the Amendment Determination are amended or repealed as set out in the applicable items of the Schedule, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 to the Amendment Determination sets out the amendments to the 2011 Principles.

Items 1 and 2 operate to amend the title of the 2011 Principles by omitting “(FaHCSIA)” and substituting “(DSS)”. This is a minor editorial amendment to reflect the change in the name of the department that is responsible for the administration of sections 9A, 9B and 1118 of the Act, being the Department of Social Services (DSS).

Item 3 inserts a new definition in section 1.4 of the 2011 Principles to define a ‘sub-fund’ for the purposes of new sections 2.11 and 3.12 as outlined below. A ‘sub-fund’ is defined have the meaning given by section 69A of the *Superannuation Industry (Supervision) Act 1993*. Inserting a new definition of ‘sub-fund’ to the 2011 Principles ensures that a person’s new income stream will retain asset-test exempt status if it results from the commutation of their original income stream where the ‘sub-fund’ level of product closes, as opposed to restricting new sections 2.11 and 3.12 to the closure of the entire regulated superannuation fund.

Item 4 inserts new section 2.11 into Part 2 of the 2011 Principles. Income streams covered by Part 2 of the 2011 Principles retain 100% of the asset-test exemption where the income stream is purchased as a result of the circumstances set out in Part 2.

New section 2.11 provides that the 2011 Principles will cover an income stream if:

- the income stream is purchased or acquired on or after 20 September 2004 and is covered by section 9A or 9B of the Act; and
- it results from another asset-test exempt income stream (the original income stream) being commuted as a result of the closure of a regulated superannuation fund or sub-fund (except in instances where the original income stream has been commuted as a result of the closure of a self managed superannuation fund); and
- the original income stream was also covered by section 9A or 9B of the Act and was sourced from a regulated superannuation fund; and
- the original income stream was covered by the legislative instruments as described in paragraph 2.11(f).

Item 5 inserts new section 3.12 into Part 3 of the 2011 Principles. Income streams covered by Part 3 of the 2011 Principles retain 50% of the asset-test exemption where the income stream is purchased as a result of the circumstances set out in Part 3.

New section 3.12 provides that the 2011 Principles will cover an income stream if:

- it is purchased or acquired on or after 20 September 2007; and
- it results from another asset-test exempt income stream (the original income stream) being commuted as a result of the closure of a regulated superannuation fund or sub-fund (except in instances where the original income stream has been commuted as a result of the closure of a self managed superannuation fund); and
- the original income stream was also covered by section 9A, 9B or 9BA of the Act or would have been covered by those sections if paragraph 9A(1)(aa), subparagraph 9B(1)(a)(i) or subparagraph 9BA(1)(a)(i) of the Act did not apply; and
- the original income stream was sourced from a regulated superannuation fund; and
- the original income stream was covered by the legislative instruments as described in subparagraph 3.12(d)(iii).

Schedule 2 to the Amendment Determination sets out the amendments to the Guidelines.

Items 1 and 2 operate to amend the title of the Guidelines by omitting “(FaHCSIA)” and substituting “(DSS)”. This is a minor editorial amendment to reflect the change in the name of the department that is responsible for the administration of sections 9A, 9B and 1118 of the Act, being the Department of Social Services (DSS).

Item 3 inserts a new definition in section 4 of the Guidelines to define a ‘sub-fund’ for the purposes of new section 19 (for further explanation as to the meaning of ‘sub-fund’, see Item 3 of Schedule 1 above).

Item 4 inserts new section 19 into Part 3 of the Guidelines. Part 3 of the Guidelines apply to certain income streams purchased on or after 20 September 2007.

New section 19 provides that the Secretary may determine that an income stream is an asset-test exempt income stream for the purposes of the Act if:

- it is purchased on or after 20 September 2007 and is covered by section 9A or 9B of the Act (or would have been covered by those sections if paragraph 9A(1)(aa) or subparagraph 9B(1)(a)(i) of the Act did not apply); and
- it results from another asset-test exempt income stream (the original income stream) being commuted as a result of the closure of a regulated superannuation fund or sub-fund (except in instances where the original income stream has been commuted as a result of the closure of a self managed superannuation fund); and
- the original income stream was also covered by section 9A or 9B of the Act (or would have been covered by those sections if paragraph 9A(1)(aa) or subparagraph 9B(1)(a)(i) of the Act did not apply); and
- the original income stream was purchased before 20 September 2004 or was covered the legislative instruments as described in paragraph 19(f).

Schedule 3 to the Amendment Determination sets out the amendments to the 2017 Principles.

Item 1 inserts a new definition in section 4 of the 2017 Principles to define a ‘sub-fund’ for the purposes of new section 11 (for further explanation as to the meaning of ‘sub-fund’, see Item 3 of Schedule 1 above).

Item 2 inserts new section 11 into the 2017 Principles.

New section 11 provides that the 2017 Principles will cover an asset-test exempt income stream if:

- it is purchased during the period 20 September 2004 to 19 September 2007 (inclusive) and is covered by section 9A or 9B of the Act; and
- it results from another asset-test exempt income stream (the original income stream) being commuted as a result of the closure of a regulated superannuation fund or sub-fund (except in instances where the original income stream has been commuted as a result of the closure of a self managed superannuation fund); and
- the original income stream was also covered by section 9A or 9B of the Act; and
- the original income stream was purchased before 20 September 2004 or was covered by the 2017 Principles.

Emma Kate McGuirk, delegate of the Secretary of the Department of Social Services

Statement of Compatibility with Human Rights

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

Social Security Legislation Amendment (2019 Measures No. 1) Determination 2019

The 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 legislative instrument

The *Social Security Legislation Amendment (2019 Measures No. 1) Determination 2019* (the Amendment Determination) inserts new provisions into three related legislative instruments to allow an income support recipient to retain the asset-test exemption for their income stream where the income stream is transferred to a new regulated superannuation fund due to the closure of the original regulated superannuation fund (or sub-fund). Where an income support recipient satisfies one of the new provisions, their new income stream will retain its asset-test exemption, and have no impact on their rate of income support.

Human rights implications

The Amendment Determination engages the right to social security.

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises the right of everyone to social security.

The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security system must provide a minimum essential level of benefits to all individuals and families that will enable them to cover essential living costs.

The Amendment Determination will operate beneficially as a person's new income stream, which has been commuted as a result of the closure of their superannuation fund or sub-fund, will not be taken into account or a reduced amount will be taken into account when assessing a person's assets (subject to other legislative requirements). If a person's new income stream is not exempted or reduced, a person in receipt of that income stream may not be eligible for social security payment or, if they are eligible, their rate of payment might be reduced. The Amendment Determination is therefore consistent with the right to social security.

Conclusion

The Amendment Determination is compatible with human rights as it preserves a person's right to social security.

Emma Kate McGuirk, delegate of the Secretary of the Department of Social Services