

EXPLANATORY STATEMENT

Issued by the authority of the Secretary, Department of Social Services

Social Security (Administration) Act 1999

Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021

Purpose

The Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021 (the Determination) is made by the Secretary of the Department of Social Services.

The Determination amends the Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019 (the 2019 Determination).

The Determination is made for the purposes of Part 3D of the *Social Security (Administration) Act 1999* (the Act), which relates to cashless welfare arrangements.

The Determination is made under subsections 124PP(1), 124PP(2) and 124PQ(2) of the Act, which provide that the Secretary may, by legislative instrument, determine:

- a kind of bank account (called a 'welfare restricted bank account') to be maintained by a program participant or voluntary participant for the receipt of restrictable payments (that is, payments subject to cashless welfare arrangements);
- the terms and conditions relating to the establishment, ongoing maintenance and closure of the bank account so determined; and
- the kinds of businesses in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution.

The purpose of the Determination is to provide for a new financial institution with which a welfare restricted bank account may be held. It also specifies additional terms and conditions relating to the ongoing maintenance and closure of a welfare restricted bank account. The new terms and conditions also provide for a financial institution administering a welfare restricted bank account to transfer funds to another nominated bank account previously notified to Services Australia in circumstances where a person has ceased to participate in cashless welfare arrangements. Similarly, a financial institution administering a welfare restricted bank account can distribute funds to the executor or administrator of an account holder's estate where the account holder has passed away. The new terms and conditions also permit a financial institution administering a welfare restricted bank account to transfer funds to another welfare restricted bank account held by the same participant, where the participant has indicated they wish to change the financial institution that administers their welfare restricted bank account.

The Determination will also specify two additional kinds of businesses in relation to which transactions, involving money in a welfare restricted bank account, may be declined by a financial institution. The first kind of business specified by the Determination are businesses that engage or have engaged in conduct that facilitates, or is designed to facilitate access to cash or cash-like products. The second kind of business specified are businesses that operate under an incorrect Merchant Category code or Australian and New Zealand Standard Industrial Classification code and who would, if correctly classified, be a kind of business in respect of which transactions could be declined under Schedules 3 or 4 of the 2019 Determination.

The Determination also makes technical amendments to the 2019 Determination following the passage of the *Social Security (Administration) Amendment (Continuation of Cashless Welfare) Act 2020* (the Continuation of Cashless Welfare Act).

Background

Cashless welfare arrangements commenced on 1 February 2016. The purpose of these arrangements is to ensure that welfare payments are not spent on products and services that contribute to social harm and to provide budgeting support for participants.

Generally, participants in cashless welfare arrangements receive a portion of their welfare payments in a welfare restricted bank account, which is accessed by a debit card which does not allow cash withdrawals. Money in a welfare restricted bank account also cannot be used to purchase alcoholic beverages, gambling services, or cash-like products (e.g. gift cards) that could be used to obtain alcoholic beverages or gambling services.

Cashless welfare arrangements currently apply in the Ceduna region (South Australia), East Kimberley region (Western Australia), Goldfields region (Western Australia), and the Bundaberg and Hervey Bay region (Queensland).

From 17 March 2021, cashless welfare arrangements also apply in Cape York. They also apply in the Northern Territory for those who choose to transfer from Income Management.

Following amendments to the Act by the Continuation of Cashless Welfare Act, cashless welfare arrangements have been extended until 31 December 2022. A person who was a trial participant immediately before the commencement of sub-item 49(1) of Schedule 1 to the Continuation of Cashless Welfare Act is taken to be a program participant for the purposes of the Determination. Also, a person who was a voluntary participant immediately before the commencement of sub-item 49(2) of Schedule 1 to the Continuation of Cashless Welfare Act is taken to be a voluntary participant for the purposes of the Determination.

Information sharing

Information about a person that is collected by an officer in relation to the Cashless Debit Card program will have the character of protected information where the information is being obtained for the purposes of the social security law.

Division 4 of Part 3D of the Act allows for the disclosure of information in relation to program participants and voluntary participants in limited circumstances, such as the disclosure of information to the Secretary by a financial institution under section 124PN. If such a disclosure is made, the Secretary has the discretion to disclose information about the person to an officer or employee of the financial institution for the purposes of the performance of the duties or the exercise of the powers of the officer or employee (that is, the sharing of information necessary for the operation and administration of the Cashless Debit Card program).

Apart from the specific provisions under Division 4 of Part 3D in which protected information under the Cashless Debit Card program may be disclosed, the Act has further protections in place that limit the way in which protected information is treated. Under Division 3 of Part 5 of the Act a person may make a record of protected information, disclose that information or otherwise use the information for the purposes as set out under Division 3. For instance, recording, disclosing or using protected information is authorised for the purposes of the social security law, the family assistance law, with consent or where it is in the public interest. If the making of a record, disclosure or use of protected information is not authorised in accordance with Division 3 of Part 5 and the person knows or ought reasonably to know that the information is protected, the person commits an offence which is punishable on conviction by imprisonment for a term not exceeding two years.

Availability of independent review

Under section 23(17) of the *Social Security Act 1991*, legislative instruments made under the Act form part of the social security law. Accordingly, decisions made under the 2019 Determination, including the amendments made by this Determination to the Cashless Debit Card program are subject to internal and external merits review under Parts 4 and 4A of the Act (unless specified as a decision that is not reviewable under sections 127 and 144 of the Act).

Commencement

The Determination commences on the day after it is registered on the Federal Register of Legislation.

Disallowable instrument

The Determination is a disallowable instrument for the purposes of the *Legislation Act 2003*.

Consultation

Consultation and engagement processes were undertaken leading up to the implementation of the cashless welfare arrangements. Consultation and engagement continues with stakeholders, merchants, community members and participants in each site, including discussion on program operations. While face to face consultation has occurred when permitted by COVID-19 arrangements, contact with stakeholders has also been progressed electronically during this period. The offer to participants of an additional financial institution responds to survey findings that some participants felt there was a stigma associated with the cashless debit card. Stakeholder consultations have been supportive of Government efforts such as this to reduce perceived stigma.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required for the Determination (OBPR ID 43784).

Explanation of the provisions

Section 1 provides that the name of the Determination is the *Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021*.

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

Section 3 provides that the authority for making the Determination is subsections 124PP(1), 124PP(2) and 124PQ(2) of the Act.

The Determination amends the 2019 Determination. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that the power to make a legislative instrument 'shall be 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'. In making the Determination, the Secretary is relying upon this subsection in conjunction with the instrument-making powers in subsections 124PP(1), 124PP(2) and 124PQ(2) of the Act.

Section 4 provides that the 2019 Determination is amended as set out in Schedule 1 to the Determination.

Schedule 1 – Amendments to the Social Security (Administration) (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019

Item 1 is a minor, technical change to the title of the 2019 Determination that removes trial parameters to reflect the establishment of the Cashless Debit Card as a program following the passage of the Continuation of Cashless Welfare Act. The title, as amended, is the Social Security (Administration) Cashless Welfare

Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2019.

Items 2, 5, 9, 10 and 12 make minor, technical changes to the 2019 Determination that removes trial parameters to reflect the establishment of the Cashless Debit Card as a program following the passage of the Continuation of Cashless Welfare Act. References to ‘trial participant’ have been replaced by references to ‘program participant’, consistent with the amendments made by that Act.

Item 3 amends section 4 of the 2019 Determination to repeal the definition of *trial period*. This definition is no longer required due to the repeal of item (10) of Schedule 5 to the 2019 Determination and the substitution of a new item (10) (discussed below). The new item (10) does not use the expression ‘trial period’.

Item 4 amends section 4 of the 2019 Determination to insert a new definition of *Traditional Credit Union* to reflect that Traditional Credit Union Limited is being included as a new financial institution with which a welfare restricted bank account may be held.

Item 5 also amends section 7 of the 2019 Determination to provide that a debit card account established with the Traditional Credit Union is a kind of bank account that can be maintained by a program participant or voluntary participant for the receipt of restrictable payments during the cashless debit card program.

Traditional Credit Union is an Indigenous-owned credit union providing essential banking and financial services in communities in the Northern Territory and has been engaged by the Commonwealth to provide welfare restricted bank accounts for the receipt of restrictable payments by program participants and voluntary participants in the Northern Territory for the purposes of the cashless debit card program.

Item 6 makes a minor, technical change to section 8 of the 2019 Determination to address a typographical error in the section. The word ‘includes’ is replaced with the word ‘include’.

Item 7 amends Schedule 2 to the 2019 Determination to add two new table items (table items 3 and 4). These new table items set out two new kinds of businesses in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution under section 124PQ of the Act. The inclusion of these new table items means that a financial institution, in declining transactions with businesses covered by these new table items, will not contravene Part IV of the *Competition and Consumer Act 2010*.

The two new kinds of businesses are:

- businesses which there are reasonable grounds for believing engage or have engaged in transactions with a program participant or voluntary participant that facilitate, or are designed to facilitate, access by the participant to cash or cash-like products (new table item 3); and
- businesses that would, if they were operating their business under the correct Merchant Category code or Australian and New Zealand Standard Industrial

Classification code, be a kind of business to which Schedule 3 or 4 to the 2019 Determination would apply (new table item 4).

Transactions under new table item 3 include, for example, transactions in which a business provides refunds in cash for permitted items purchased using a welfare restricted bank account, regardless of whether a fee is provided in return. This could include practices such as overcharging program participants or voluntary participants for permitted goods, and then refunding the amount of any overpayment in cash or cash-like product. Such practices undermine the objects of the cashless welfare program by increasing access to cash or cash-like products for program participants and voluntary participants.

New table item 4 is intended to address situations in which a business operates under a kind of Merchant Category code or Australian and New Zealand Standard Industrial Classification code that is not listed in Schedule 3 or Schedule 4 to the 2019 Determination but the business would, if properly categorised, be a business that operates under one of those codes. This new table item is intended to support the operation of Schedules 3 and 4 to address situations where businesses hold themselves out as operating under a code not listed in Schedule 3 or Schedule 4 to the 2019 Determination but provide the same kinds of goods and services as those that are provided by businesses that operate under a code listed in Schedule 3 or Schedule 4 to the 2019 Determination.

Item 8 repeals paragraph (b) of item (1) of Schedule 5 to the 2019 Determination and substitutes a new paragraph (b). Current paragraph (b) of item (1) provides that a welfare restricted bank account can only be operated by the holder of the account. The effect of this amendment is to ensure that a welfare restricted bank account can also be operated by the person's payment nominee, if they have one. This is in line with changes made by the Continuation of Cashless Welfare Act that allow a person subject to cashless welfare arrangements to have a payment nominee (provided the nominee is subject to cashless welfare arrangements or Income Management).

Item 11 repeals item (10) of Schedule 5 to the 2019 Determination and substitutes a new item (10). This is partly due to a minor, technical change designed to replace a reference to 'trial participant' with a reference to 'program participant' and simplify the provision.

The revised provision also clarifies that where a voluntary participant ceases to be subject to cashless welfare arrangements their welfare restricted bank account may be closed. A voluntary participant may withdraw from cashless welfare arrangements at any time under section 124PH of the Act and ceases to be subject to cashless welfare arrangements following their withdrawal.

Furthermore, the revised provision allows a financial institution administering a welfare restricted bank account to close that account (**first account**) where: (a) a program participant or voluntary participant who holds the first account has given notice to the Secretary that they wish to change the financial institution that administers their welfare restricted bank account; (b) the participant has had a new welfare restricted bank account established; and (c) the first account has a nil balance.

This gives program participants and voluntary participants a greater opportunity to:

- have a welfare restricted bank account at the same financial institution as their other personal accounts;
- have a welfare restricted bank account with a financial institution that has an ATM network in the person's remote community; and
- have a welfare restricted bank account at a financial institution which has a local branch that can provide 'face to face' support to the person.

The changes to the provision also mean that a welfare restricted bank account may be closed if the holder of the account has died (new item (10)(b) of Schedule 5 to the 2019 Determination).

The Secretary may request that a financial institution administering a welfare restricted bank account delay closing that account under new item (10) of Schedule 5 to the 2019 Determination until the Secretary is satisfied that any transaction or subsequent payment of funds will be captured and duly dealt with in relation to the new account.

Item 13 adds three new terms and conditions into Schedule 5 to the 2019 Determination. These three new terms and conditions relate to the ongoing maintenance and closure of welfare restricted bank accounts.

The new terms and conditions are as follows:

- New item (15) provides that when a person ceases to be a program participant or voluntary participant, any remaining funds in a welfare restricted bank account may be transferred by the financial institution administering that account to a nominated bank account that the person has provided to Services Australia. This is intended to address situations in which a person ceases to participate in cashless welfare arrangements and any remaining funds are to be transferred to a different account before the person's welfare restricted bank account can be closed. If a person does not provide an alternative account, a financial institution named in the Determination would be able to transfer the remaining funds to an account nominated by the person for the receipt of payments from Services Australia.
- New item (16) is intended to facilitate the administration of a deceased person's estate by allowing a financial institution administering a deceased person's welfare restricted bank account to transfer any remaining funds in that account to the person's executor or administrator. This will then enable the funds to be distributed in accordance with the deceased person's will or the laws of intestacy.
- New item (17) provides that where a program participant or voluntary participant has funds held in a welfare restricted bank account (**first account**), they have given notice to the Secretary of the decision to have their welfare restricted account administered by another financial institution named in this Determination (**second account**), and the second account is

established, the financial institution administering the first account may transfer funds held in that account to the second account.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Social Security (Administration) Amendment (Trial of Cashless Welfare Arrangements) (Declinable Transactions and Welfare Restricted Bank Account) Determination 2021

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

This Determination is made by the Secretary of the Department of Social Services, under subsections 124PP(1) and 124PQ(2) of the *Social Security (Administration) Act 1999* (the Act).

Section 124PM of the Act sets out limitations on the use of a restrictable payment for a Cashless Debit Card program participant or voluntary participant, namely that these portions may not be used to purchase alcoholic beverages, gambling, or cash-like products. The Determination supports arrangements for the Cashless Debit Card program (the program) under Part 3D of the Act, by setting out further details to support the implementation of limitations imposed under section 124PM.

Subsection 124PP(1) of the Act provides that the Secretary may, by legislative instrument, determine a kind of bank account to be maintained by a program participant or voluntary participant for the receipt of restrictable payments. This Determination sets out the kind of bank account to be maintained by a participant in the program by including the Traditional Credit Union in addition to Indue as a kind of bank account.

Subsection 124PP(2) of the Act provides that the legislative instrument determining a kind of bank account may also prescribe terms and conditions relating to the establishment, ongoing maintenance and closure of the bank account. This Determination prescribes these terms and conditions.

In accordance with subsection 124PQ(2) of the Act, the Secretary may, by legislative instrument, declare a kind of business, whether by reference to merchant category codes, terminal identification codes, card accepted identification codes or otherwise, in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution. The Determination declares the kinds of business in relation to which transactions may be declined by a financial institution.

Human rights implications

Objectives

The objectives of this Determination, are to determine:

- (a) a kind of bank account (called a 'welfare restricted bank account') to be maintained by a program participant or voluntary participant for the receipt of restrictable payments (that is, payments subject to cashless welfare arrangements);
- (b) the terms and conditions relating to the establishment, ongoing maintenance and closure of the bank account so determined; and
- (c) the kinds of businesses in relation to which transactions involving money in a welfare restricted bank account may be declined by a financial institution.

This Determination is designed to continue the protection of Cashless Debit Card participants against fraudulent activities and social harm.

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, including social insurance'. The United Nations Committee of Economic, Social and Cultural Rights (the UN Committee) has stated that implementing this right requires a country, within its maximum available resources, to provide '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 form of education'.

The Determination does not detract from the eligibility of a person to receive welfare, nor reduce the amount of a person's social security entitlement that can be used to acquire the benefits set out by the UN Committee. Rather, the Determination continues to restrict the spending of welfare payments on alcohol, gambling, or cash-like products and limits the amount that can be withdrawn as cash. Transactions with businesses that engage or have engaged in circumvention activities that facilitate access to cash or cash-like products will still be able to be blocked.

The right to social security is limited only in the participant's ability to use a proportion of their payment to purchase harmful goods, in areas chosen for the program due to demonstrated high levels of social harm in those areas.

Given the objectives of the Cashless Debit Card, and the prevalence of social harm in the areas these schemes operate, any continued limitation on the right to social security is reasonable and proportionate.

The right to self-determination

Article 1 of the ICESCR states that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

The Determination continues to allow participants to spend their restricted funds on any goods or services except alcohol, gambling and illegal drugs. The consumption of alcohol and drugs and partaking in gambling activities can have a negative impact on a person's capacity to provide for themselves and their children, and can lead to long-term welfare dependency. The ongoing limitation on these products and services ensures that welfare recipients are protected from abuse of these substances, and any associated harm and violence, and will not impact on or interfere with a person's right to pursue freely their economic, social or cultural development.

It remains the case that access to some discretionary cash is available to ensure that people can still participate in cash economies to purchase items or services.

The right to a private life

Article 17 of the International Covenant on Civil and Political Rights sets out the right to a private life. It prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

The Determination is directed towards the legitimate objectives of supporting welfare recipients in managing their financial affairs, ensuring they are able to purchase basics and essential items, and encouraging socially responsible behaviour.

Limitations remain in place to block transactions involving illegal activity or restricted products that contribute to social harm, seeks to promote positive social norms, and build a culture of opportunity and personal responsibility for people to provide for themselves and their children.

Any limitation on a person's right to a private life continues to be reasonable and proportionate given the extensive social harm that exists.

The Cashless Debit Card program also engages the right to privacy. Section 124PN of the Act allows the disclosure of information to the Secretary by a financial institution. Section 124PN does not provide a blanket exemption from privacy laws. It merely allows the sharing of information necessary for the operation and administration of the Cashless Debit Card program. As a result, there are still safeguards in place to protect an individual's privacy. Information collected by the Department or Services Australia about a person will be protected information that is subject to the secrecy provisions in the Act.

Both Government and the card provider are required to act in accordance with the *Privacy Act 1988*, more generally, and the Australian Privacy Principles (APPs). The APPs set out strict rules around how personal information can be used. For example, they prohibit the disclosure of personal information for direct marketing.

The Determination continues to ensure that the Cashless Debit Card program achieves a legitimate objective. In order to establish bank accounts for participants, Services Australia must transfer customer information to the card provider. The card provider in turn provides new account details back to Services Australia. While the program is operating, the card provider must also transfer information about participants to the Department. The Department uses this information to run and evaluate the program. Without this sharing of information, new accounts cannot be set up and the Cashless Debit Card program could not proceed.

Any ongoing limitation on a person's right to privacy is reasonable and proportionate given the extensive social harm that exists.

Conclusion

The Determination is compatible with human rights. The Determination advances the protection of human rights by continuing to ensure that income support payments are spent in the best interests of welfare payment recipients and their family and children.

To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objectives of the welfare quarantining measures.

Raymond Griggs, AO, CSC, Secretary, Department of Social Services