

## EXPLANATORY STATEMENT

### *Social Security Act 1991*

#### *Social Security (Assurances of Support) Amendment Determination 2024*

#### **Purpose**

The *Social Security (Assurances of Support) Amendment Determination 2024* (the Amendment Determination) amends the *Social Security (Assurances of Support) Determination 2018* (the Determination) to remove the self-repeal date and make minor changes to improve the administration of certain assurance of support settings.

#### **Background**

An assurance of support, under Chapter 2C of the *Social Security Act 1991* (the Act), is an undertaking by a person (individual or body) (the assurer) to pay the Commonwealth the amount of any specified social security payments received by another identified person (the assuree) while the assurance is in force.

An assurance of support may be required as a condition of the grant of a visa under the *Migration Act 1958*. Assurances of support are designed to ensure that migrants who may have a higher likelihood of claiming specified social security payments are financially supported by their assurer for the duration of the assurance rather than seeking taxpayer-funded social security payments.

In most instances, an individual or body will need to meet an income or capacity test before they can give an assurance of support. These requirements mitigate the risk of those individuals or bodies being unable to support their assurees and meet their assurance obligations if called upon to do so.

Subsection 1061ZZGH(1) of the Act provides that the Minister must, by legislative instrument, make a determination specifying the following matters:

- social security payments for the purposes of the definition of “assurance of support” in section 1061ZZGA and section 1061ZZGG of the Act;
- requirements to be met for persons (individual or body) to be permitted by section 1061ZZGB of the Act to give assurances of support;
- requirements to be met in relation to persons giving assurances of support for the Secretary to be permitted by subsection 1061ZZGD(2) of the Act to accept such assurances;
- values of securities to be given for the Secretary to be permitted to accept assurances of support under paragraph 1061ZZGD(3)(b) of the Act;
- periods for which assurances of support accepted under Chapter 2C of the Act remain in force in respect of persons under section 1061ZZGF of the Act;
- circumstances in which assurances of support accepted under Chapter 2C of the Act cease to be in force under subparagraph 1061ZZGF(1)(b)(iii) of the Act.

The Determination specifies the matters listed above.

The Amendment Determination amends the Determination to:

- repeal section 2A of the Determination which provides for the repeal of the Determination on 31 March 2024;
- increase the flexibility of the income assessment process for individuals who wish to provide an assurance of support to allow for a reduction in their assessable income in the previous financial year due to a temporary change in circumstances; and

- provide that an assurance of support provided by a body corporate may be cancelled in the event that the body corporate is deregistered.

## **Commencement**

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

## **Authority**

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that 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 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. The Minister has the power under subsection 1061ZZGH(1) of the Act to amend the Determination.

## **Consultation**

The Department of Social Services has consulted with Services Australia and the Department of Home Affairs on the text of the proposed amendments.

External consultation on the text of the proposed amendments was undertaken with the Federation of Ethnic Communities' Council of Australia, the Migration Council Australia, the Migration Institute of Australia, the Settlement Council of Australia, the Refugee Council of Australia, the Australian Council of Social Service and Economic Justice Australia.

## **Impact Analysis**

The Department of Social Services consulted with the Office of Impact Analysis (OIA) who confirmed the Amendment Determination is unlikely to have a more than minor impact and, as such, an Impact Analysis is not required (OIA Reference: OIA24-06360).

## **Availability of independent review**

A decision made under the Act, as informed by the Determination, is subject to internal and external review under Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

The Amendment Determination is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to disallowance.

## **Explanation of the provisions**

**Section 1** states that the name of the Amendment Determination is the *Social Security (Assurances of Support) Amendment Determination 2024*.

**Section 2** specifies that the Amendment Determination commences on the day after it is registered.

**Section 3** provides that the Amendment Determination is made under subsection 1061ZZGH(1) of the *Social Security Act 1991*.

**Section 4** sets out the operation of the Schedules and provides that any instrument specified in a Schedule to the Amendment Determination is amended or repealed according to the terms of the relevant Schedule.

**Schedule 1** outlines the following amendments to the Determination.

**Item 1** repeals section 2A which had provided that the Determination would be repealed with effect from 31 March 2024. This enables the Determination and the assurance of support scheme more broadly to continue to operate on the current basis, subject to the two minor amendments below.

The repeal of section 2A will make the Determination subject to the sunset provisions of the *Legislation Act 2003*. Under the provisions of that Act, the Determination will sunset on 1 October 2028, unless repealed earlier.

**Item 2** repeals paragraph 14(2)(a) and substitutes a new paragraph.

Paragraph 1061ZZGD(2)(a) of the Act provides that the Secretary may accept an assurance only if satisfied that the requirements specified in a determination made under section 1061ZZGH and relate to the potential assurer are met.

The assurance of support income test is a requirement specified in section 14 of the Determination, for the Secretary to be permitted to accept assurances of support. The income test is used to ensure that the assurer has the financial capacity to support the assuree.

Under section 14, the potential assurer must meet an income threshold for the current financial year and one of the two previous financial years, with the requirement that the year immediately before the current financial year is to be used if an income tax assessment notice is available for that year.

It is only in the circumstances where an income tax assessment notice is unavailable for the financial year immediately before the current financial year (the first financial year) that the income from the financial year prior to that year (the second financial year) is used with the income from the current financial year for the purposes of the income test.

The lack of flexibility in the application of the income test has meant that potential assurers who have a reduced income in the first financial year, for example, because they were temporarily outside the workforce for a period, have not been able to meet the income threshold. In these situations, the assurances could not be accepted even if the income of the potential assurers would have been above the threshold both before and after the first financial year, as it was not possible to take the second financial year into account.

The new paragraph 14(2)(a) retains the current content in new subparagraph (i), and inserts a new subparagraph (ii). This applies in situations where the potential assurer's assessable income for the first financial year was reduced because of a temporary change in their circumstances. This scenario may arise, for example, where the potential assurer has been on parental leave, was ill or was a carer for a time and this reduced their income during the first financial year.

Where this is determined to be the case, the income requirement about providing evidence acceptable to the Secretary can be met by providing evidence of the potential assurer's assessable income for the current and the second financial years.

However, if neither of the circumstances in subparagraph 14(2)(a)(i) or (ii) are satisfied in a particular case, the income requirement can be met by providing acceptable evidence of assessable income for the current and the first financial years, as specified in paragraph 14(2)(b).

**Item 3** amends section 25 of the Determination to insert new paragraph (ca).

Under subparagraph 1061ZZGF(1)(b)(iii) of the Act, the Secretary may determine a time at which an assurance of support ceases because of a circumstance specified in a determination made under section 1061ZZGH.

Section 25 of the Determination specifies the circumstances in which an assurance of support ceases to be in force, for the purposes of subparagraph 1061ZZGF(1)(b)(iii). This subparagraph provides some discretion for the Secretary as to the timing of the cancellation of an assurance of support where the circumstances set out in section 25 of the Determination have been met.

There are currently no circumstances that specifically relate to assurers that are body corporates, specifically where a body corporate has been deregistered, for example, following the body corporate becoming insolvent. As a deregistered body corporate is no longer a legal entity, it is not possible to seek recovery of any assurance of support debts under the Act in these circumstances. However, it has not been possible to stop any such debts from potentially accruing, as there has not been a specified circumstance enabling the assurance of support to cease to be in force. New paragraph 25(ca) is intended to address this. The amendment will also provide greater certainty of the status of assurances of support in these situations, and will enable these assurances and any social security debts to be administered more efficiently and effectively.

New paragraph 25(ca) provides that an assurance of support ceases to be in force in the circumstances where an assurer that is a body corporate is deregistered under the *Corporations Act 2001*, and it is the opinion of the Secretary that the circumstances are such that the cancellation of the assurance of support is justified.

New paragraph 25(ca) allows the Secretary to take into account relevant circumstances, such as those relating to the deregistration of the body corporate, in deciding whether the assurance of support should be cancelled. For example, where the body corporate has been deregistered for technical or other reasons and has sought to be re-registered, it would be open to the Secretary to consider that cancelling the assurance of support is not justified. In this case new paragraph 25(ca) would not be satisfied, and the assurance of support would remain in force.

**Item 4** is an application provision, which relates to the amendments made by **items 2 and 3** above.

**Subitem 4(1)** clarifies that the amendment to section 14 of the Determination, made by **item 2** of the Amendment Determination, applies to assurances of support given on or after the Amendment Determination commences. However, the amendment can be applied in respect of relevant financial years that began before, on or after the Amendment Determination commences. This will enable new assurances of support to be considered by reference to the potential assurer's assessable income in previous financial years, as specified in this amendment.

**Subitem 4(2)** provides that the amendment to section 25 of the Determination, made by **item 3** of the Amendment Determination, applies to assurances of support given before, on or after the Amendment Determination commences. Similarly, the amendment can be applied where the body corporate's deregistration occurred before, on or after the Amendment Determination commences. This will enable current assurances of support given by deregistered body corporates to cease to be in force, so that appropriate administrative action can be taken to address these.

## Statement of Compatibility with Human Rights

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

### *Social Security Act 1991*

### *Social Security (Assurances of Support) Amendment Determination 2024*

The *Social Security (Assurances of Support) Amendment Determination 2024* (the Amendment 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 Amendment Determination amends the *Social Security (Assurances of Support) Determination 2018* (the Determination) to remove the self-repeal date and make minor changes to improve the administration of certain assurance of support settings. In particular, the Amendment Determination:

- repeals section 2A of the Determination which had provided for the repeal of the Determination on 31 March 2024;
- increases the flexibility of the income assessment process for individuals who wish to provide an assurance of support to allow for a reduction in their assessable income in the previous financial year due to a temporary change in circumstances; and
- provides that an assurance of support provided by a body corporate may be cancelled in the event that the body corporate is deregistered.

The Amendment Determination is made under subsection 1061ZZGH(1) of the *Social Security Act 1991*.

#### Human rights implications

The Amendment Determination engages the following rights:

- the right to social security contained in article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right to an adequate standard of living contained in article 11(1) of the ICESCR;
- the right to equality and non-discrimination as contained in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR);
- the right to freedom of movement as contained in articles 12 and 13 of the ICCPR;
- the right to protection of the family as contained in articles 23 and 17(1) of the ICCPR and article 10 of the ICESCR; and
- the rights of parents and children as contained in article 3 of the Convention on the Rights of the Child and article 24(1) of the ICCPR.

#### Background

The Determination sets out the key requirements underpinning the assurance of support scheme. The primary objective of the assurance of support scheme is to protect social security outlays while allowing the migration of people who might otherwise not normally be permitted to come to Australia. An assurance of support is a legally binding commitment by an eligible Australian resident (the assurer) to support a new visa entrant (the assuree) for the duration of the assurance period and to repay any recoverable social security payments made to the assuree during that period.

The requirements set out in the Determination include the number of assurances an individual or body can have given at any one time and the income or capacity test an individual or body must meet to give an assurance.

#### The right to social security and an adequate standard of living

The Amendment Determination does not limit a permanent visa holder's right to social security and an adequate standard of living after migrating to Australia once an assurance of support has been provided. These visa holders will have access to Australia's social security system where eligible and subject to meeting any existing waiting periods.

If the assurer is not able to provide adequate support to the visa entrant during the assurance period, the visa holder may be eligible for a social security payment. In this event, the assurer will be required to repay any recoverable social security payments made to the visa holder during the assurance period.

The Determination already includes certain requirements designed to ensure that individuals and bodies are able to support their assurees to an adequate standard of living and limit the risk of assurees needing to access a recoverable social security payment.

The Amendment Determination ensures the existing assurance of support requirements will continue, and makes two minor changes to improve current administrative arrangements. In particular, the Amendment Determination introduces greater flexibility for satisfying the income test requirements, and accordingly furthers the opportunities for potential assurers to give an assurance of support.

#### The right to equality and non-discrimination

The Amendment Determination does not change or impact current arrangements with regards to the right of visa holders to equality and non-discrimination. The differential treatment of migrants subject to an assurance of support compared to other migrants, reflects the purpose of the assurance of support scheme, which is to allow migrants with a higher likelihood of needing income support payments (such as parents of Australian residents) entry into Australia, while protecting social security outlays.

#### The right to freedom of movement, the protection of the family, and rights of parents and children

The Amendment Determination does not change or impact current arrangements with regards to the right of visa holders to freedom of movement, the protection of the family, and rights of parents and children. Migrants will continue to be able to apply for a visa to come to, or remain in, Australia permanently (including to reunite with family) and have their visa application granted, subject to meeting the eligibility criteria including, where relevant, obtaining an assurance of support.

#### **Conclusion**

The Amendment Determination is compatible with human rights. It ensures existing assurance of support requirements are continued, and does not limit the right to social security and an adequate standard of living for visa holders. The Amendment Determination does not affect current arrangements in relation to the right to equality and non-discrimination, freedom of movement, the protection of the family, and rights of parents and children. To the extent that the Amendment Determination, and the broader assurance of support scheme provided for in the social security law, limits these rights, this is reasonable and proportionate to achieving the legitimate purpose of the assurance of support scheme.

**The Hon Amanda Rishworth MP, Minister for Social Services**