

## **EXPLANATORY STATEMENT**

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

### ***Social Security Act 1991***

### ***Social Security (Exempt Lump Sum – Settlement of Per- and Poly-fluoroalkyl Class Actions) Determination 2024***

#### **Purpose**

The Social Security (Exempt Lump Sum – Settlement of Per- and Poly-fluoroalkyl Class Actions) Determination 2024 (the Determination) prescribes that certain payments made by the Commonwealth, pursuant to settlements approved by the Federal Court of Australia in class action proceedings *Haswell v Commonwealth of Australia (No. 3)* [2023] FCA 1093 (Haswell proceeding) and *Wreck Bay Aboriginal Community Council v Commonwealth of Australia* [2023] FCA 660 (Jervis Bay proceeding) (together the "class action proceedings"), are exempt lump sums under paragraph 8(11)(d) of the *Social Security Act 1991* (the Act).

By determining that particular settlement payments are exempt lump sums under the Act, the amounts of those payments will not be assessed as income for the purposes of the recipient's social security payment.

#### **Background**

##### *Exempt lump sums*

Paragraph 8(11)(d) of the Act allows the Secretary of the Department of Social Services to determine, by legislative instrument, that an amount, or class of amounts, received by a person is an exempt lump sum for the purposes of the Act. An exempt lump sum is excluded from the definition of "ordinary income" under subsection 8(1) of the Act, meaning the lump sum amount is not taken into account under the social security income test.

The exemption of a payment from the income test does not alter the fact that any ongoing income generated by the lump sum is not exempt from the income test, and any assessable asset produced from the lump sum is counted under the social security assets test. This is consistent with the treatment of other lump sum payments under paragraph 8(11)(d) of the Act.

##### *Per- and Poly-fluoroalkyl Class Actions*

The class action proceedings involved allegations that the Australian Government Department of Defence negligently allowed toxic chemicals known as per- and poly-fluoroalkyl ("PFAS") to escape from defence bases and contaminate local environments. These contaminants were alleged to have negatively impacted properties, land values, livelihoods and cultural practices of surrounding communities.

The class action proceedings sought compensation for affected individuals, including for the diminution in value of their land, the loss of ordinary use of the land and cultural loss.

In 2023, the Federal Court of Australia approved settlement and a settlement distribution scheme for each class action proceeding, including for the provision of compensation payments by the Commonwealth to eligible individuals.

### *Settlement Payments from Per- and Poly-fluoroalkyl Class Actions*

Payments under the settlement distribution schemes are made by Shine Lawyers, who represented the plaintiffs in the class action proceedings.

The settlement payments exempted by this Determination differ regarding each class action proceeding.

The Haswell proceeding settlement included a land diminution payment to affected eligible individuals for the diminution of property value in the relevant area. This Determination exempts the land diminution payments from being considered as ordinary income for the purposes of the Act.

Another type of payment made under the Haswell proceeding settlement is an inconvenience, distress and vexation payment to affected eligible individuals. This non-economic loss component is not included in the Determination as these payments are already exempt from the social security income test by the *Social Security (Exempt Lump Sums—Payments Compensatory in Nature for Non-Economic Loss) Determination 2017*.

The Jervis Bay proceeding settlement included two relevant categories of compensation payment for affected individuals. The first is a compensation payment to eligible individuals for cultural loss. The second is a compensation payment for ordinary loss of the use of specified land. This Determination exempts both types of payments flowing from the settlement from being considered as ordinary income for the purposes of the Act.

Other types of payments made under the settlement distribution schemes, for example, reimbursement payments, are not included in the Determination.

### **Retrospective Commencement**

The Determination retrospectively commences on 6 May 2024. This reflects that eligible persons began to receive payments made pursuant to the Haswell proceeding and the Jervis Bay proceeding from 6 May 2024.

The retrospective commencement is designed to support affected social security recipients and is intended to ensure that payments received by individuals in relation to the class action proceedings are consistently treated as exempt lump sums from when those payments commenced.

The retrospective operation of the instrument does not infringe section 12 of the *Legislation Act 2003* because the retrospective operation does not disadvantage any person or impose a liability on a person other than the Commonwealth.

## **Impact Analysis**

The Department of Social Services consulted with the Office of Impact Analysis who confirmed an Impact Analysis is not required (OIA24-06426). The Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

## **Consultation**

Shine Lawyers was consulted on the text of this Determination.

The Department of Agriculture, Fisheries and Forestry and the Department of Veterans' Affairs were consulted on the intention to make this Determination, given the potential effect on income support recipients.

## **Availability of independent review**

A decision on the assessment of an individual's income as part of the social security income test, which may involve a payment covered by this Determination, is subject to internal and external merits review under Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

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

## **Explanation of the provisions**

**Section 1** provides that the Determination is to be cited as the *Social Security (Exempt Lump Sum – Settlement of Per- and Poly-fluoroalkyl Class Actions) Determination 2024*.

**Section 2** provides that the Determination commences on 6 May 2024. This is the date the "Settlement Payments" (as defined in section 4 below) began to be paid to eligible persons. This commencement date ensures that all payments made pursuant to the class action proceedings will be captured by this Determination.

**Section 3** provides that the Determination is made under paragraph 8(11)(d) of the *Social Security Act 1991*.

**Section 4** contains definitions of certain terms used in the Determination.

"**Act**" is defined as the *Social Security Act 1991*.

"**Settlement Payment**" is defined to mean a payment made pursuant to the Haswell proceeding class action settlement relating to property value diminution, or a payment

made pursuant to the Jervis Bay proceeding class action settlement relating to cultural loss or ordinary loss of the use of land.

The Haswell proceeding class action settlement was approved by the Federal Court in *Haswell v Commonwealth of Australia (No. 3)* [2023] FCA 1093 on 25 August 2023. The Court also approved the settlement distribution scheme relating to this settlement at that time.

The Jervis Bay proceeding class action settlement was approved by the Federal Court in *Wreck Bay Aboriginal Community Council v Commonwealth of Australia* [2023] FCA 660 on 19 June 2023. The settlement distribution scheme relating to this settlement was approved by the Federal Court in *Wreck Bay Aboriginal Community Council v Commonwealth of Australia (No. 3)* [2023] FCA 1132 on 8 September 2023.

**Section 5** specifies that the amount of a “Settlement Payment” is an exempt lump sum for the purposes of paragraph 8(11)(d) of the *Social Security Act 1991*.

The effect of section 5 is that a payment made to relevant persons under the class action settlements, that is defined as a “Settlement Payment” in section 4 above, will not be assessed as income under the Act. This means that the amount of the payment will not have any impact on a recipient’s social security payments, in terms of the social security income test.

## 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 (Exempt Lump Sum – Settlement of Per- and Poly-fluoroalkyl Class Actions) Determination 2024**

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 (Exempt Lump Sum – Settlement of Per- and Poly-fluoroalkyl Class Actions) Determination 2024 (the Determination) prescribes that certain payments made by the Commonwealth, pursuant to settlements approved by the Federal Court of Australia in class action proceedings *Haswell v Commonwealth of Australia (No. 3)* [2023] FCA 1093 and *Wreck Bay Aboriginal Community Council v Commonwealth of Australia* [2023] FCA 660, are exempt lump sums under paragraph 8(11)(d) of the *Social Security Act 1991* (the Act).

By determining that particular settlement payments are exempt lump sums under the Act, the amounts of those payments will not be assessed as income for the purposes of the recipient's social security payment.

#### **Human rights implications**

The Determination engages the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). 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 scheme must 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 forms of education.

Under the Act, social security payments are subject to a means test which assesses the person's income and assets to determine their eligibility for the payment, and their rate of payment. The Determination will operate beneficially as compensation in recognition of property value diminution, cultural loss and ordinary loss of land use as a result of the class actions will not be taken into account when assessing a person's eligibility or rate of social security entitlements under the social security income test. If these payments are not exempted, a person in receipt of that payment may not be eligible for a social security payment or, if they are eligible, their rate of payment might be reduced. The Determination is therefore consistent with promoting the right to social security.

## **Conclusion**

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

**Gillian Beer**

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Delegate of the Secretary of the Department of Social Services**