



## **Aged Care Income Testing Act 1997**

**No. 103, 1997**





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**An Act to provide for determining the ordinary  
income of certain persons, and for related purposes**



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## **An Act to provide for determining the ordinary income of certain persons, and for related purposes**

*[Assented to 30 June 1997]*

The Parliament of Australia enacts:

### **Part 1—Preliminary**

#### **1 Short title**

This Act may be cited as the *Aged Care Income Testing Act 1997*.

#### **2 Commencement**

This Act commences on the day on which it receives the Royal Assent.

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### 3 Definitions

In this Act, unless the contrary intention appears:

**CEO** means the Chief Executive Officer of the Services Delivery Agency.

**employee**, in relation to the Services Delivery Agency, has the same meaning as in the *Commonwealth Services Delivery Agency Act 1997*.

**hostel resident** means:

- (a) an existing resident within the meaning of section 10D of the *Aged or Disabled Persons Care Act 1954*; or
- (b) a new resident within the meaning of that section.

**income support payment** means:

- (a) an income support payment within the meaning of subsection 23(1) of the *Social Security Act 1991*; or
- (b) an income support supplement; or
- (c) a payment of farm household support, or a drought relief payment, under the *Farm Household Support Act 1992*; or
- (d) a payment of benefit under Part 2 of the *Student and Youth Assistance Act 1973*.

**income support supplement** means an income support supplement under Part IIIA of the *Veterans' Entitlements Act 1986*.

**nursing home resident** means an approved nursing home patient within the meaning of the *National Health Act 1953*, but does not include a short-term respite care patient within the meaning of that Act.

**officer** has the same meaning as in the *Public Service Act 1922*.

**ordinary income** has the meaning given in section 7. However, section 8 may affect the meaning of this term in certain cases.



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***personal information*** has the same meaning as in the *Privacy Act 1988*.

***protected information*** has the meaning given by section 15.

***receive*** has the same meaning as in subsection 23(1) of the *Social Security Act 1991*.

***Secretary*** means the Secretary to the Department of Health and Family Services.

***service pension*** has the same meaning as in subsection 5Q(1) of the *Veterans' Entitlements Act 1986*.

***Services Delivery Agency*** means the Commonwealth Services Delivery Agency established by the *Commonwealth Services Delivery Agency Act 1997*.

#### **4 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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## Part 2—Determination of ordinary income

### 5 Determining ordinary income

- (1) The Secretary may, in writing, determine the ordinary income of a nursing home resident or a hostel resident.

Note 1: The Secretary can delegate functions related to determinations of ordinary income to the Secretary to the Department of Social Security and to the Secretary to the Department of Veterans' Affairs.

Note 2: Determinations are reviewable under Part 3, except for determinations made by the Secretary to the Department of Social Security which are reviewable under Chapter 6 of the *Social Security Act 1991*.

- (2) A determination takes effect on the day on which the determination is made.

### 6 Request for information

The Secretary may, by notice in writing, request one or more of the following:

- (a) a person whose ordinary income is to be determined under section 5;
- (b) a person acting for or on behalf of that person;
- (c) any other person whom the Secretary believes has information necessary for making the determination;

to give to the Secretary such information as is specified in the notice for the purposes of making the determination.

Note: A person is not obliged to provide the information.

### 7 Ordinary income

- (1) If the nursing home resident or hostel resident is not receiving a service pension or an income support supplement, his or her ordinary income is the amount that would be his or her ordinary income for the purpose of applying Module E of Pension Rate

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Calculator A at the end of section 1064 of the *Social Security Act 1991*.

- (2) If the nursing home resident or hostel resident is receiving a service pension, his or her ordinary income is the amount that would be his or her ordinary income for the purpose of applying Module D of the Rate Calculator at the end of section 41 of the *Veterans' Entitlements Act 1986*.
- (3) If the nursing home resident or hostel resident is receiving an income support supplement, his or her ordinary income is the amount that would be his or her adjusted income for the purpose of applying Module E of the Rate Calculator at the end of section 45X of the *Veterans' Entitlements Act 1986*.

## **8 Ordinary income of war widows and war widowers**

If:

- (a) a person is receiving a pension under Part II or IV of the *Veterans' Entitlements Act 1986* at a rate determined under or by reference to subsection 30(1) of that Act; and
- (b) the person is also receiving an income support payment, the rate of which is reduced to take account of the pension referred to in paragraph (a);

the person's ordinary income under section 7 is taken to be reduced by an amount equal to 2 times the difference between:

- (c) the rate that would have been the rate of the income support payment if the person was not receiving the pension referred to in paragraph (a) but was receiving an additional amount of other income equal to the rate of that pension; and
- (d) the rate of the income support payment.

## **9 Notice of determination**

- (1) The Secretary must notify a nursing home resident or hostel resident, or a person acting for or on behalf of the resident, of any determination of the resident's ordinary income.

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- (2) The notice must:
- (a) be in writing; and
  - (b) set out the reasons for making the determination; and
  - (c) set out any other information determined in writing by the Minister.

## **Part 3—Reconsideration and review of ordinary income determinations**

### **10 Secretary may reconsider determinations**

- (1) The Secretary may reconsider a determination under section 5 if the Secretary is satisfied that there is sufficient reason to reconsider the determination.

Note :       The Secretary can delegate functions related to reconsidering determinations to the Secretary to the Department of Veterans' Affairs.

- (2) However, this section does not apply to a determination under section 5 by:
- (a) the Secretary to the Department of Social Security; or
  - (b) a person to whom the power to make such a determination is sub-delegated under subsection 20(4).
- (3) The Secretary may reconsider a determination even if:
- (a) an application for reconsideration of the determination has been made under section 11; or
  - (b) if the determination has been confirmed, varied or set aside under section 11—an application has been made under section 14 for review of the determination.
- (4) After reconsidering the determination, the Secretary must:
- (a) confirm the determination; or
  - (b) vary the determination; or
  - (c) set the determination aside and substitute a new determination.
- (5) The Secretary's decision to confirm, vary or set aside a determination takes effect:
- (a) on the day specified in the Secretary's decision; or

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- (b) if a day is not specified—on the day on which the Secretary's decision was made.
- (6) The Secretary must give written notice of the Secretary's decision to the person, or a person acting for or on behalf of that person, whose ordinary income has been determined.

### **11 Reconsideration of determinations on application**

- (1) A person whose interests are affected by a determination made under section 5, or a person acting for or on behalf of that person, may request the Secretary to reconsider the determination.

Note :      The Secretary can delegate functions related to reconsidering determinations to the Secretary to the Department of Veterans' Affairs.

- (2) However, this section does not apply to a determination under section 5 by:
  - (a) the Secretary to the Department of Social Security; or
  - (b) a person to whom the power to make such a determination is sub-delegated under subsection 20(4).
- (3) The request must be made by written notice given to the Secretary within 3 months after the day on which the person first received notice of the determination.
- (4) The notice must set out the reasons for making the request.
- (5) If the Secretary needs further information to reconsider a determination, the Secretary may give the applicant a notice requesting the applicant to give further information within 28 days after receiving the notice.
- (6) The application is taken to be withdrawn if the applicant does not give the further information within the 28 days.
- (7) The notice must contain a statement setting out the effect of subsection (6).

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- (8) After receiving the request, the Secretary must reconsider the determination and:
  - (a) confirm the determination; or
  - (b) vary the determination; or
  - (c) set the determination aside and substitute a new determination.
- (9) The Secretary's decision to confirm, vary or set aside the determination must be made:
  - (a) within 90 days after receiving the request; or
  - (b) if the Secretary has requested further information under subsection (5)—within 90 days after receiving the information.
- (10) The Secretary's decision to confirm, vary or set aside a determination takes effect:
  - (a) on the day specified in the Secretary's decision; or
  - (b) if a day is not specified—on the day on which the Secretary's decision was made.
- (11) The Secretary must give written notice of the Secretary's decision to the person, or a person acting for or on behalf of that person, within 5 business days after making the decision. The notice must include reasons for the decision.

Note: Section 27A of the *Administrative Appeals Tribunal Act 1975* requires the person to be notified of the person's review rights.

- (12) In subsection (11):

***business day*** means a day that is not a Saturday, Sunday or public holiday in the place concerned.

### **12 Date of effect of certain decisions made under section 1239 of the *Social Security Act 1991***

- (1) If a determination of a person's ordinary income under section 5 of this Act is reviewed under section 1239 of the *Social Security Act*

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*1991*, a decision on review to vary or set aside the determination takes effect:

- (a) on the day specified in the decision; or
  - (b) if a day is not specified—on the day on which the decision was made.
- (2) Subject to subsections (3) and (4), the day specified under paragraph (1)(a) must not be earlier than the day on which the decision on review was made.
- (3) The day specified under paragraph (1)(a) may be earlier than the day on which the decision on review was made if:
  - (a) the decision has the effect of increasing the amount determined as the person's ordinary income; and
  - (b) the amount determined under section 5 as the person's ordinary income was less than what it ought to have been because the person made a false statement or misrepresentation.
- (4) The day specified under paragraph (1)(a) may be earlier than the day on which the decision on review was made if:
  - (a) the decision does not have the effect of increasing the amount determined as the person's ordinary income; and
  - (b) the day specified under paragraph (1)(a) is not more than 3 months before the day on which the decision was made.
- (5) In this section, a reference to setting a determination aside is a reference to setting the determination aside and substituting a new determination.

### **13 Date of effect of certain decisions made under section 1243 of the *Social Security Act 1991***

- (1) Subject to subsections (2) and (3), if:
  - (a) an application under section 1240 of the *Social Security Act 1991* has been made for review of a determination of a person's ordinary income under section 5 of this Act; and



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- (b) a decision is made under section 1243 of the *Social Security Act 1991* to vary or set aside the determination;  
the decision to vary or set aside the determination takes effect on the day on which the determination was made.
- (2) If the application for review of the determination under section 1240 of the *Social Security Act 1991* was made more than 3 months after notice of the determination was given under section 9 of this Act, the decision to vary or set aside the determination takes effect on the day on which the application for review was made.
- (3) If the decision to vary or set aside the determination has the effect of increasing the amount determined as the person's ordinary income, the decision takes effect:
  - (a) on the day specified in the decision; or
  - (b) if a day is not specified—on the day on which the decision was made.
- (4) The day specified under paragraph (3)(a) may be earlier than the day on which the decision was made only if the amount determined under section 5 as the person's ordinary income was less than what it ought to have been because the person made a false statement or misrepresentation.
- (5) In this section, a reference to setting a determination aside is a reference to setting the determination aside and substituting a new determination.

### **14 AAT review of ordinary income determinations**

An application may be made to the Administrative Appeals Tribunal for the review of a determination that has been confirmed, varied or set aside under section 10 or 11.

## Part 4—Protection of information

### 15 Meaning of *protected information*

In this Part, ***protected information*** is information that:

- (a) was acquired under or for the purposes of this Act; and
- (b) either:
  - (i) relates to the affairs of a person; or
  - (ii) is personal information.

### 16 Use of protected information

- (1) A person is guilty of an offence if:
  - (a) the person makes a record of, discloses or otherwise uses information; and
  - (b) the information is protected information; and
  - (c) the information was acquired by the person in the course of exercising powers or performing functions or duties under this Act.

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

- (2) This section does not apply to conduct that is:
  - (a) carried out in the performance of a function or duty under this Act or the exercise of a power under this Act; or
  - (b) otherwise authorised under this Act.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

**17 Limits on use of protected information disclosed to certain Secretaries**

If protected information is disclosed for the purposes of this Act:

- (a) to the Secretary under section 1314 of the *Social Security Act 1991* or section 130 of the *Veterans' Entitlements Act 1986*;  
or
- (b) to the Secretary to the Department of Social Security, the CEO or the Secretary to the Department of Veterans' Affairs;

that Secretary or the CEO must not make a record of, disclose or otherwise use the information for any other purpose.

**18 Misusing protected information**

A person is guilty of an offence if:

- (a) the person makes a record of, discloses or otherwise uses information; and
- (b) the information is protected information of a kind referred to in section 17; and
- (c) the record, disclosure or use of the information is not for the purposes of this Act.

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

**19 Disclosure to court**

A court, or any other body or person having power to require the production of documents or the answering of questions, may require a person to disclose protected information only if:

- (a) the disclosure is required for the purposes of this Act; or
- (b) the person to whom the information relates has consented, in writing, to the disclosure.

## Part 5—Miscellaneous

### 20 Delegations

- (1) The Secretary may, by writing, delegate to an officer of the Department all or any of the powers of the Secretary under this Act.
- (2) In exercising his or her powers under subsection (1), the Secretary is to have regard to the powers to be exercised by the delegate and the responsibilities of the officer to whom the power is delegated.
- (3) The Secretary may, by writing, delegate one or more of the following:
  - (a) the Secretary's powers relating to making a determination under section 5 to the Secretary to the Department of Social Security or the Secretary to the Department of Veterans' Affairs or both;
  - (b) the Secretary's powers relating to reconsidering a determination under section 10 to the Secretary to the Department of Veterans' Affairs;
  - (c) the Secretary's powers relating to reconsidering a determination under section 11 to the Secretary to the Department of Veterans' Affairs.
- (4) If the Secretary delegates a power mentioned in paragraph (3)(a) to the Secretary to the Department of Social Security, the Secretary to the Department of Social Security may, by writing, sub-delegate the power to any or all of the following:
  - (a) an officer of that Department;
  - (b) subject to subsection (5), the CEO;
  - (c) subject to subsection (5), an employee of the Services Delivery Agency.

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- (5) A sub-delegation under paragraph (4)(b) or (c) must not be made before 1 July 1997.
- (6) If the Secretary delegates a power mentioned in subsection (3) to the Secretary to the Department of Veterans' Affairs, the Secretary to the Department of Veteran Affairs may, by writing, sub-delegate the power to an officer of that Department.
- (7) Sections 34AA, 34AB and 34A of the *Acts Interpretation Act 1901* apply in relation to a sub-delegation in a corresponding way to the way in which they apply to a delegation.

**21 Giving false or misleading information relating to income**

A person is guilty of an offence if:

- (a) the person gives to the Secretary information requested by the Secretary for the purpose of determining the person's ordinary income under section 5; and
- (b) the information is false or misleading in a material particular.

Penalty: 30 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

**22 Application of the *Criminal Code***

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

**23 Act ceases operation on 1 January 1998**

This Act ceases to be in force on 1 January 1998, unless it is sooner repealed.

**24 Regulations**

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or

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- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## **Schedule 1—Amendment of the Social Security Act 1991**

### **1 After paragraph 1239(1)(d)**

Insert:

- or (e) a decision under section 5 of the *Aged Care Income Testing Act 1997* by the Secretary, or by a person to whom the Secretary has sub-delegated power under section 20 of that Act;

### **2 After paragraph 1240(1)(d)**

Insert:

- or (e) a decision under section 5 of the *Aged Care Income Testing Act 1997* by the Secretary, or by a person to whom the Secretary has sub-delegated power under section 20 of that Act;

### **3 At the end of subsection 1245(1)**

Add:

- ; and (d) all decisions under section 5 of the *Aged Care Income Testing Act 1997* by the Secretary, or by a person to whom the Secretary has sub-delegated power under section 20 of that Act.

### **4 Subsection 1282(1)**

Repeal the subsection, substitute:

- (1) Unless otherwise stated, the provisions of this Part apply to:
  - (a) all decisions of an officer under this Act, the *Farm Household Support Act 1992* and subsection 91A(3) of the *Child Support (Assessment) Act 1989*; and
  - (b) all decisions under section 5 of the *Aged Care Income Testing Act 1997* by the Secretary, or by a person to whom the Secretary has sub-delegated power under section 20 of that Act.

*[Minister's second reading speech made in—  
House of Representatives on 27 February 1997  
Senate on 26 March 1997]*

(15/97)



