EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment, Skills, Small and Family Business

Social Security (Administration) Act 1999

Social Security (Administration) (Payment Pending Review) (Employment) Guidelines 2019

Summary


The purpose of this Instrument is to set out guidelines for the exercise of the Secretary’s power to make a declaration that payment of a person’s participation payment is to continue where the person has applied for a review of an adverse decision that resulted in the application of a compliance penalty period under subsection 42P(1) or 42S(1) of the Act.

Background

The Act generally allows a person to apply for internal review and Administrative Appeals Tribunal (AAT) review of an adverse decision made in relation to a social security payment. An ‘adverse decision’ is a decision to cancel, suspend, or reduce the rate of a social security payment (subsections 131(7) and 145(6) of the Act).

Sections 131 and 145 of the Act provide that the Secretary may declare that the payment of a social security payment is to continue pending the determination of an application for internal review or AAT review (respectively), in the following circumstances:

- an adverse decision is made in relation to a social security payment (other than under Division 3AA of Part 3 of the Act); and
- the adverse decision either:
  - depends on the exercise of a discretion or the holding of an opinion by a person; or
  - would result in the application of a compliance penalty period; and
- a person applies for internal review or AAT review of the decision.

Under sections 132 and 146 of the Act, the Minister is to make a legislative instrument (this Instrument) to assist the Secretary in exercising the power to make such declarations, when a person is subject to a compliance penalty period.

Application of Instrument – Community Development Program participants subject to subsection 42P(1) (serious failure period) or 42S(1) (unemployment non-payment periods)
Under the current Administrative Arrangements Order (AAO), the Minister for Employment, Skills, Small and Family Business administers the social security law in so far as it relates to participation and activity test requirements and compliance obligations for participation payment recipients. This means that the Minister has the power to make guidelines under sections 132 and 142 of the Act in relation to compliance penalty periods affecting participation payment recipients. Participation payments are: newstart allowance, parenting payment (if a person has participation requirements), special benefit (if a person is a nominated visa holder), and youth allowance (if a person is not undertaking full-time study and is not a new apprentice).

The relevant compliance penalty periods are the periods during which a participation payment is not payable because of subsection 42P(1) (serious failure period) or 42S(1) (unemployment non-payment period) of the Act. These compliance penalty periods are in Division 3A of Part 3 of the Act, which sets out the compliance framework that applies to ‘declared program participants’. Currently, only Community Development Program (CDP) participants are ‘declared program participants’. The Secretary cannot make payment pending review declarations in relation to adverse decisions made under the other (targeted) compliance framework, which is set out in Division 3AA of Part 3 of the Act, and which applies to other participation payment recipients (see paragraphs 131(1)(aa) and 145(1)(aa) of the Act).

A person is subject to a ‘serious failure period’ of up to 8 weeks when they persistently fail to comply with their obligations in relation to their payment. A person is subject to an ‘unemployment non-payment period’ of up to 12 weeks if they become unemployed as a result of a voluntary act or misconduct. These are the only periods of non-payment in Division 3A of Part 3 of the Act that a job seeker cannot bring to an end themselves by re-engaging with their requirements.

The effect of the guidelines is that the Secretary may declare a person’s payment is to continue if a person applies for a review of the adverse decision that resulted in the compliance penalty period, before the compliance penalty period ends. The payment is payable from the start of the compliance penalty period, pending determination of the review, as if the adverse decision had not been made.

Any decision made by the Secretary under section 131 or 145 of the Act is subject to the review provisions outlined in Parts 4 and 4A of the Act. Further, any information collected under the Instrument is protected by the information gathering and confidentiality provisions in Part 5 of the Act.

Replacement of sunsetting guidelines

The Instrument replaces the following sunsetting instruments: the Social Security (Administration) (Payment Pending Review) (FaHCSIA) Guidelines 2009 (the FaHCSIA instrument) and the Social Security (Administration) (Payment Pending Review) (DEEWR) Guidelines 2009 (the DEEWR instrument). The FaHCSIA instrument and the DEEWR
instrument sunset on 1 October 2019 in accordance with section 50 of the Legislation Act 2003.

The guidelines set out in the Instrument are substantially the same as those set out in the FaHCSIA instrument and the DEEWR instrument, as the policy underpinning these remains unchanged.

The FaHCSIA instrument deals with adverse decisions made in relation to special benefit and the DEEWR instrument deals with adverse decisions made in relation to participation payments other than special benefit. Given changes to the AAO since the instruments were made in 2009, compliance obligations for special benefit now falls within the portfolio responsibility of the Minister for Employment, Skills, Small and Family Business. This means that the FaHCSIA instrument and DEEWR instrument can be replaced with one legislative instrument.

The Minister for Families and Social Services replaced part of the DEEWR instrument that previously fell within her portfolio responsibility (before she repealed it) with the Social Security (Administration) (Payment Pending Review) (DSS) Guidelines 2019 on 6 August 2019. That instrument applies to adverse decisions made in relation to youth allowance payable to a person who is undertaking full-time study or is a new apprentice, and austudy payment.

Explanation of the provisions

Section 1 provides that the name of the Instrument is the Social Security (Administration) (Payment Pending Review) (Employment) Guidelines 2019.

Section 2 provides that the Instrument commences on 1 October 2019.

Section 3 states that the authority for making the Instrument is sections 132 and 146 of the Act.

Section 4 defines terms used in the Instrument. The note to section 4 alerts the reader to the fact that certain words and phrases used in the Instrument are defined in the Act and the Social Security Act 1991, and have the meanings given by those Acts.

Section 5 provides that for sections 131 and 145 of the Act, the guidelines in section 6 apply to adverse decisions made under subsections 42P(1) and 42S(1) of the Act in relation to participation payments.

Section 6 provides guidelines for the exercise of the Secretary’s power to make declarations under sections 131 and 145 of the Act. Section 6 provides that if a person:

- is subject to an adverse decision under subsection 42P(1) or 42S(1) that results in a the application of compliance penalty period; and
- applies for a review of that decision before the compliance penalty period ends,
the Secretary may declare that the payment of the social security payment is to continue from
the start of the compliance penalty period pending the determination of the review, as if the
adverse decision had not been made.

The first note section 6 provides that a declaration under section 131 or 145 of the Act takes
effect on the day it is made or on an earlier day if specified in the declaration. This is stated in
paragraphs 131(5)(a) and 145(4)(a) of the Act.

The second note to section 6 provides that a declaration made under section 131 or 145 of the
Act ceases to have effect on the day the application for review is withdrawn or dismissed;
when the declaration is revoked by the Secretary; or 13 weeks after a decision reviewing the
adverse decision is made (or an earlier day if specified by the Secretary). This is stated in
paragraphs 131(5)(b) and 145(4)(b) of the Act.

Consultation

The National Indigenous Australians Agency was consulted, given their policy responsibility
for the CDP. In addition, the Department of Social Services and Services Australia were
consulted during the preparation of the Instrument. This was done to ensure a co-ordinated
and consistent approach for all social security payments under the social security law.

The Instrument is beneficial in nature, as it provides for payments to be made to social
security recipients while their payments would ordinarily be reduced, suspended or cancelled,
pending the outcome of a review of an adverse decision. The Instrument maintains the
existing policy in prior instruments and, therefore, no public consultation was necessary.

Regulation Impact Statement (RIS)

The Instrument does not require a Regulatory Impact Statement (RIS). The Instrument is not
regulatory in nature, will not impact on business activity and will have no, or minimal,
compliance costs or competition impact.
Statement of Compatibility with Human Rights

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

Social Security (Administration) (Payment Pending Review) (Employment) Guidelines 2019

This Instrument 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 purpose of this Instrument is to set out guidelines for the exercise of the Secretary’s power to make a declaration that payment of a person’s participation payment is to continue where the person has applied for a review of an adverse decision that resulted in the application of a compliance penalty period under subsection 42P(1) or 42S(1) of the Act.

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Any decision made by the Secretary under section 131 or 145 of the Act is subject to the review provisions outlined in Parts 4 and 4A of the Act. Further, any information collected under the Instrument is protected by the information gathering and confidentiality provisions in Part 5 of the Act.

**Human rights implications**

This Instrument engages the following human rights:

- the right to social security in Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
the right to an adequate standard of living in Article 11 of the ICESCR.

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides 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.

The right to social security is important in realising many of the other rights in the ICESCR, including the right to an adequate standard of living under Article 11. Article 11(1) of the ICESCR recognises the right of everyone to an adequate standard of living, including adequate food, water and housing, and to the continuous improvement of living conditions.

Article 4 of the ICESCR provides that countries may only subject economic, social and cultural rights to such limitations ‘as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. The Committee on Economic, Social and Cultural Rights has stated that such limitations must be proportionate and the least restrictive alternative should be adopted where several types of limitation are available. Where such limitations are permitted, they should be of limited duration and subject to review.

Where a person is subject to a compliance penalty period as a result of an adverse decision, the person ordinarily ceases to be paid for up to 8 weeks (for a serious failure period) and up to 12 weeks (for an unemployment non-payment period). The Instrument provide guidelines for the Secretary to exercise her power to declare that a person’s payment is to continue while the person is seeking internal or AAT review of the relevant adverse decision. The Instrument provides that a person’s payment may continue from the start of the compliance penalty period, pending determination of the review, as if the adverse decision had not been made. In doing so, the Instrument increase access to social security, and, therefore, promotes the rights to social security and an adequate standard of living.

Conclusion

The Instrument is compatible with human rights because it promotes the rights to social security and an adequate standard of living.