EXPLANATORY STATEMENT

Social Security (Administration) (Persistent Non-compliance) (DEEWR) Determination 2009 (No. 1)

Summary

The *Social Security (Administration) (Persistent Non-compliance) (DEEWR) Determination 2009 (No. 1)* (the Determination) is made by the Minister for Employment Participation (the Minister) under subsection 42M (4) of the *Social Security (Administration) Act 1999* (the Act).

The purpose of this Determination is to specify the matters that the Secretary must take into account in deciding whether a person has persistently failed to comply with his or her obligations in relation to a participation payment.

Background

Section 42M of the Act sets out the basis upon which the Secretary can determine that a person commits a *serious failure*. Under subsection 42M (1) the Secretary may only determine that a person commits a *serious failure* if the person:

- has persistently failed to comply with their obligations in relation to a participation payment; and
- receives an instalment of a participation payment in the instalment period in which the determination is made.

Under subsection 42M (4), the Minister is required to make a legislative instrument (this Determination) to assist the Secretary in applying the persistent non-compliance test. The Determination sets out the matters (e.g. the number and frequency of failures that could constitute persistent non-compliance) that the Secretary must take into account.

Nevertheless, when deciding whether a person has persistently failed to comply with his or her obligations in relation to their participation payment, the Secretary cannot have regard only to this Determination. Subsection 42M (2) of the Act states that the Secretary:

- must not take into account failures that were outside the person's control; and
- must only take into account failures that occurred intentionally, recklessly or negligently.

Subsection 42M (3) of the Act prevents the Secretary from determining that a person commits a serious failure if the person is:

- already in a serious failure period determined under subsection (1); or
- a new apprentice.

And subsection 42M (5) of the Act provides that the Secretary is not limited to considering the matters set out in the Determination.

The consequences of the Secretary determining that a person has committed a serious failure are set out in section 42P of the Act. In short, the person's participation payment will be suspended for 8 weeks unless one of the exceptions or suspension period reductions in that section apply.

Explanation of Provisions

Section 1 states the name of the Determination.

Section 2 states that the Determination commences on 1 July 2009. This corresponds with the commencement date of the amendments to the Act under which the Specification is made. These amendments are made by the *Social Security Legislation Amendment (Employment Services Reform) Act 2009*.

Section 3 contains interpretation provisions. In particular, the term *failure* is defined for the purposes of determining whether a person's failure to comply with participation-related obligations would be regarded as persistent non-compliance under subsection 42M (1) of the Act.

Section 4 sets out matters that the Secretary must take into account in deciding whether a person has persistently failed to comply with his or her obligations in relation to a 'participation payment'. The term 'participation payment' is defined in Schedule1 to the Act, and includes newstart allowance, youth allowance (except for people undertaking full-time study or new apprentices), parenting payment, and special benefit.

Under section 42NA of the Act, the Secretary must conduct a comprehensive compliance assessment (CCA) in relation to a person before the Secretary can determine that the person has committed a serious failure for persistent non-compliance.

Under paragraph 4 (1) (b) of the Determination, the Secretary is required to look at a person's recent compliance history to determine whether the person has persistently failed to comply with their participation-related obligations.

In looking at a person's recent compliance history, the Secretary is to take into account whether the person has committed three or more failures in the six months prior to the start of the job seeker's current CCA, unless, during that six months, the job seeker has already incurred a serious failure under subsection 42M(1) for persistent non-compliance, in which case the Secretary is only to take into account whether the person has committed three or more failures since the end of the serious failure period applied for that failure. The intention is that once a job seeker incurs a serious failure, the prior failures which resulted in that serious failure should not be taken into account in determining another serious failure. If the assessment of persistent non-compliance was made simply by taking into account the number of failures incurred in the previous six months, a job seeker who had incurred one serious failure could continue to incur serious failures for each single failure committed thereafter, until they had managed to incur no failures for a full six month period. It is not intended that job seekers should incur "rolling" or cumulative eight week penalties in this way.

(A CCA is triggered automatically by the Centrelink computer system once a job seeker has incurred three No Show No Pay failures or three connection or reconnection failures within a six month period. Once a CCA has been automatically triggered, the count of failures required to trigger a further automatic CCA restarts, regardless of the outcome of the CCA. However, a manual CCA can be initiated at any time.)

In considering such failures, the Secretary is to take into account the number of failures, and any particular behavioural pattern that may emerge from such failures (paragraph (c)). The three or more failures need not be failures of the same kind. So, for example, the three failures could comprise one no show no pay failure, one connection failure, and one reconnection failure. And a series of consecutive or closely-related failures – as in the case of a person failing to show up to a particular activity for a whole week – may not demonstrate a pattern of avoidance sufficient to indicate that a person is persistently failing to comply with his or her obligations, but merely be a "single instance of non-compliance" for the purposes of subparagraph (d) (ii).

Of course, the only failures that the Secretary can take into account for these purposes are those that satisfy subsection 42M (2) of the Act; that is, failures that are not outside the person's control and that occurred intentionally, recklessly or negligently.

Paragraph (d) provides that the person's compliance with the general requirements under the social security law is a relevant consideration for the purpose of deciding whether a person has persistently failed to comply with his or her obligations in relation to a participation payment.

Under subsection 4 (2) the Secretary is only required to consider a matter that is relevant to determining persistent non-compliance in relation to a participation payment. That is, subsection 4 (1) does not require the Secretary to take into account a matter set out in that subsection if it is not relevant to whether a person persistently failed to comply with his or her participation-related obligations.

Consultation

Consultations were undertaken with the following organisations.

- Homelessness Australia;
- Catholic Social Services Australia;
- Mission Australia;
- National Employment Services Association;
- National Welfare Rights Network
- Australian Council of Social Service;
- Commonwealth Ombudsman's office; and
- Centrelink

The organisations consulted were provided with a draft of the Determination and were invited to provide comments at a forum held on 12 March 2009.

The Department of Families, Housing, Community Services and Indigenous Affairs was consulted during the preparation of this determination. This was done to ensure a co-ordinated and consistent approach for all social security payments under the Act.

Regulatory Impact Statement and Consultation

This Determination does not require a Regulatory Impact Statement (RIS) nor a Business Cost Calculator Figure. This Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.