

EXPLANATORY STATEMENT

Social Security (Means Test Treatment of Private Trusts – Excluded Trusts) Declaration 2015

Summary

Subsection 1207P(4) of the *Social Security Act 1991* (the Act) provides that the Secretary may, by legislative instrument, declare that a trust in a specified class of trusts is an excluded trust for the purposes of section 1207P.

The *Social Security (Means Test Treatment of Private Trusts — Excluded Trusts) Declaration 2015* (the Declaration) specifies classes of trusts that are excluded trusts.

The effect of a trust being an excluded trust is that the assets and income generated within such a trust will not be attributed to an individual for the purposes of ascertaining the person's assets or income for means testing purposes under Part 3.18 of the Act. However, a trust excluded under this instrument may still be assessed as an asset of a person for social security purposes under any other part of the Act.

The Declaration sets out which trusts are to be classified as excluded trusts for the purposes of Part 3.18 of the Act.

Background

In 2000 the means test treatment of private companies and private trusts was revised and the Act and the *Veterans' Entitlements Act 1986* were amended by the *Social Security and Veterans' Entitlements Legislation Amendment (Private Trusts and Private Companies – Integrity of Means Testing) Act 2000*. As a result, the Secretary of DSS can declare that a Private Trust is an excluded trust for the purposes of means tests under the Act.

The measure aims to ensure that people who hold their assets in private companies or private trusts receive comparable treatment under the means test to those people who hold their assets directly. The assets and income of the structure will be attributed to the person or persons who control the company or trust, or to the person or persons who were the source of the capital or corpus of the company or trust.

One of the conditions for attributing an asset or the income of a trust to an individual under the Act is that the trust is a 'designated private trust'. Subsection 1207P(1) of the Act provides that a trust is a designated private trust if certain criteria are satisfied. One of these criteria is that 'the trust is not an excluded trust'. In short, a designated private trust cannot be an excluded trust.

The Declaration excludes certain classes of trusts from the definition of designated private trust. The result is that the assets and income generated within such an excluded trust will not be attributed, under Part 3.18 of the Act, to the individual for means testing purposes. A trust excluded under this Declaration may still be assessed as an asset of a person for social security purposes under any other part of the Act.

There are two classes of trusts which broadly benefit from being excluded under the Declaration. Firstly, trusts whose assets comprise property provided by government for the benefit of a community, or whose assets comprise indigenous-held land or income from that land, and whose sole or dominant purpose is to benefit the community. Secondly, fixed trusts existing prior to the 2000-2001 Budget announcement whose trust deed or assets have remained unchanged since that announcement.

The Declaration has been made as the following declaration made under subsection 1207P(4) of the Act was due to sunset on 1 October 2015:

- the *Social Security (Means Test Treatment of Private Trusts – Excluded Trusts) Declaration 2005*; and

The *Social Security (Means Test Treatment of Private Trusts – Excluded Trusts) (DEEWR) Declaration 2008*, also made under subsection 1207P(4) of the Act, was not due to sunset until 1 October 2018. However, it has been decided that it would be best to revoke this instrument so that there is a single instrument addressing this area of the law.

The Declaration does not change the law in this area and simply remakes the previous declarations. There is only one declaration this time as only the Secretary for DSS has the power to make a declaration under subsection 1207P(4) of the Act.

Explanation of Provisions

Part 1

Section 1 of the instrument states the name of the Declaration.

Section 2 states that the Declaration commences on the day after it is registered.

Section 3 states the purpose of the Declaration.

Section 4 outlines the revocation of former declarations.

Section 5 provides definitions for the purposes of the instrument.

community purpose means a purpose that is intended to benefit primarily the members of a particular community or group.

government body includes a department or agency of the Commonwealth; a department or agency of a State or Territory; a municipal corporation or other local government body; or a body corporate in which the Commonwealth, a State or a Territory body holds a controlling interest.

income has the same meaning as in subsection 1207P(7) of the Act. Subsection 1207P(7) of the *Social Security Act 1991* defines income to have the ordinary meaning of that expression.

Indigenous-held land has the same meaning as in section 4B of the *Aboriginal and Torres Strait Islander Act 2005*. Indigenous-held land is defined in that Act to be indigenous-held land if an interest in the land is held by an Aboriginal or Torres Strait Islander corporation, or an interest in the land is held by an Aboriginal person or Torres Strait Islander. Subsections 4B(2) to 4B(4) provide exceptions to this definition. The *Aboriginal and Torres Strait Islander Act 2005* contains the same definition as the *Aboriginal and Torres Strait Island Commission Act 1989* which was repealed in 2005.

reference time means 7.30 pm, standard time in the Australian Capital Territory, on 9 May 2000. The definition of reference time is the time and date on which the Ministerial announcement about the proposed new means test treatment of private trusts and private companies was made.

Subsection 6(1) specifies that each trust that meets the requirements of subsection 6(2) is an excluded trust. Where the sole or dominant purpose of a trust is to receive, manage and distribute property transferred to it, directly or indirectly, by a government body (as defined in section 5), for a community purpose, then the trust is an excluded trust. A trust will also be an excluded trust if it holds, manages or disposes of indigenous-held land for a community purpose.

Paragraph 6(2)(c) provides that where the sole or dominant purpose of a trust is to receive, manage and distribute income generated from the use of indigenous-held land, for a community purpose, then, that trust is an excluded trust. This will include situations where a trust has its sole or dominant purpose of distributing income which includes mining royalties if that income is applied for a community purpose.

Section 7 specifies that a fixed trust created before 7:30pm (Australian Capital Territory time) on 9 May 2000 will be an excluded trust for the purposes of Part 3.18 of the Social Security Act, unless the trust deed has been varied, or property (other than income generated by the trust) has been transferred into the trust, after the reference time.

Consultation

As the Declaration maintains the existing exclusions, no public consultation on the instrument was undertaken.

Regulatory Impact Analysis

The Declaration does not require a Regulatory Impact Statement. The Declaration 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*

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The *Social Security (Means Test Treatment of Private Trusts — Excluded Trusts) Declaration 2015* (the Declaration) specifies classes of trusts that are excluded trusts.

The effect of a trust being an excluded trust is that the assets and income generated within such a trust will not be attributed to an individual for the purposes of ascertaining the person's assets or income for means testing purposes under Part 3.18 of the Act in relation to payments administered by the Department of Social Services (DSS).

Human rights implications

The Declaration 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.

The Declaration will operate beneficially and support a person's human rights as the effect of the Declaration is to ensure that assets and income generated within certain excluded trusts will not be attributed to an individual for the purposes of ascertaining the person's assets or income for means testing purposes under Part 3.18 of the Act.

Conclusion

This Declaration supports a person's human right to social security and is therefore compatible with human rights.

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