**EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

*Social Security Act 1991*

*Social Security (Actuarial Certificate – Life Expectancy Income Stream and Lifetime Income Stream Guidelines) Determination 2019*

**Purpose**

The Social Security (Actuarial Certificate – Life Expectancy Income Stream and Lifetime Income Stream Guidelines) Determination 2019 (the instrument) is made for the purposes of subsections 9A(1B) and 9B(1D) of the Social Security Act 1991 (the Act), by the delegate of the Secretary of the Department of Social Services.

The instrument sets out the guidelines to be complied with when determining whether an actuarial certificate is in force and what constitutes a high probability that the provider of an income stream will be able to pay the income stream as required under a contract, or governing rules, for paragraphs 9A(1)(b) and 9B(1A)(b) of the Act, in order for that income stream to be an asset-test exempt income stream.

The instrument also specifies the classes of providers of income streams who must provide an actuarial certificate for section 9A and 9B of the Act.

**Background**

Sections 9A and 9B of the Act set out the meaning of an ***asset-test exempt income stream*** for lifetime income streams and life expectancy income streams. This term is relevant to determining what assets are to be disregarded in calculating the value of a person’s assets for the purposes of the asset test under the Act.

Subsections 9A(1) and 9B(1) provide that an income stream provided to a person is an asset-test exempt income stream if certain requirements are met.

One of these requirements is that, at paragraphs 9A(1)(b) and 9B(1A)(b) and subject to other specified provisions, the Secretary is satisfied, in relation to an income stream provided by a class of provider specified by the Secretary for the purposes of these paragraphs, there is in force a relevant current actuarial certificate certifying that the income stream can reasonably meet its payment obligations. The actuarial certificate must state that the actuary is of the opinion that, for the financial year in which the certificate is given, there is a high probability that the provider of the income stream will be able to pay the income stream as required under the contract or governing rules for the income stream. Among other things, the instrument specifies classes of provider for paragraphs 9A(1)(b) and 9B(1A)(b).

Subsections 9A(1B) and 9B(1D) of the Act provide that the Secretary may determine, in writing, guidelines to be complied with when determining whether an actuarial certificate is in force and what constitutes a high probability that the provider of the incomes stream will be able to pay the income stream as required under the contract or governing rules for the income stream. The instrument sets out guidelines under subsections 9A(1B) and 9B(1D).

The instrument replaces the *Social Security (Actuarial Certificate – Lifetime Income Stream Guidelines) Determination 2012* and the *Social Security (Actuarial Certificate – Life Expectancy Income Stream Guidelines) Determination 2012* (the 2012 Determinations). The 2012 Determinations are able to be replaced by a single instrument as the specified classes of provider and guidelines, as described above, that apply for lifetime income streams under section 9A of the Act and life expectancy income streams under section 9B of the Act are the same.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

In consolidating the content of the 2012 Determinations into a single instrument, changes are made to simplify the form of instrument and to reflect the introduction of the Institute of Actuaries of Australia Professional Standard 410 (Statements of Opinion Relating to Defined Benefit Provisions) on 1 January 2018.

The instrument is a legislative instrument.

**Commencement**

The instrument commences on the day after it is registered.

**Consultation**

Consultation on the instrument was undertaken with the Australian Government Actuary and the Institute of Actuaries of Australia.

**Regulation Impact Statement (RIS)**

This instrument does not require a Regulatory Impact Statement (RIS). This instrument will have no more than a minor regulatory impact on business, community organisations or individuals and will have no, or minimal, compliance costs or competition impact.

**Explanation of the provisions**

**Section 1** section states the name of the instrument.

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

**Section 3** states that the instrument is made under subsections 9A(1B) and 9B(1D) of the Act.

**Section 4** sets out definitions that are relevant to the instrument.

**Section 5** provides that an instrument specified in a Schedule to the instrument is amended or repealed as set out in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

**Section 6** described the purpose of the instrument.

**Section 7** specifies the following classes of provider of income streams for the purposes of paragraphs 9A(1)(b) and 9A(1A)(b) of the Act:

1. self managed superannuation fund income stream providers – other than providers of income streams from ‘annuity backed self managed superannuation funds’ (defined in section 4 of the instrument) and
2. small APRA fund income stream providers – other than providers of income streams from ‘annuity backed small APRA funds’ (defined in section 4 of the instrument).

Where paragraphs 9A(1)(b) and 9A(1A)(b) of the Act apply and an income stream is provided to a person by a provider in a specified class, the Secretary must be satisfied there is an actuarial certificate, in the terms set out in these paragraphs.

**Section 8** sets out the guidelines that apply to the Secretary when determining, for the purposes of sections 9A and 9B of the Act, whether an actuarial certificate is in force and what constitutes a high probability that the provider of the income stream will be able to pay the income stream as required under the contract or governing rules for the income stream.

Requirements for in force actuarial certificate

Subsection 8(1) provides that an actuarial certificate is in force if specified requirements are met.

Paragraphs 8(1)(a) and (b) require a certificate to be prepared in accordance with specified standards. Paragraph 8(1)(a) permits certificates for the financial years commencing 1 July 2017 and 1 July 2018 to be prepared in accordance with the Institute of Actuaries of Australia Guidance Note 465 (GN 465) or the Institute of Actuaries of Australia Professional Standard 410 (Statements of Opinion Relating to Defined Benefit Provisions) (PS 410). The flexibility in paragraph 8(1)(a) provides for the transition from GN 465 to PS 410, which came into effect on 1 January 2018. Consistent with the transition to PS 410, paragraph 8(1)(b) provides that a certificate for the financial year commencing 1 July 2019 and any later financial year is to be prepared in accordance with PS 410.

GN 465 and PS 410 are incorporated as in existence at the date the instrument commences, in accordance with paragraph 14(1)(b) of the Legislation Act 2003. These standards are issued by the Institute of Actuaries of Australia and provide professional standards for actuaries in making statements of opinion relating to the payment of defined benefit pensions from a defined benefit superannuation fund. Adopting the standards ensures appropriate professional standards are applied in the preparation of actuarial certificates that will be used in assessing whether an income stream is an exempt income stream for the purposes of the Act. GN 465 and PS 410 are freely available on the Institute of Actuaries of Australia website: [www.actuaries.asn.au](http://www.actuaries.asn.au).

Paragraph 8(1)(c) requires that a certificate be certified by an actuary no later than 26 weeks after the start of the financial year to which the certificate applies and be provided to the Department of Human Services no later than 3 weeks after the end of this 26 week period. A certificate will not be in force for the purposes of sections 9A and 9B of the Act if the timeframes in paragraph 8(1)(c) are not met, even if the other requirements of section 8 are met.

Paragraph 8(1)(d) requires a certificate to state the actuary’s opinion (expressed as a percentage) whether there is a high probability, at the valuation date, of the provider of the income stream meeting the income stream payments arising under the contract or governing rules for the income stream, for the financial year to which the certificate applies. Subsection 8(2) deals with what constitutes a high probability a provider of an income stream will be able to pay that income stream.

Note 1 to paragraph 8(1)(d) directs the reader to paragraphs 9A(1)(b) and 9B(1A) of the Act, which have the effect that an income stream provided to a person is only an asset-test exempt income stream for the purposes of the Act if the Secretary is satisfied there is a high probability that the provider of the income stream will be able to pay the income stream as provided by the contract or governing rules.

Note 2 to paragraph 8(1)(d) directs the reader to subsection 9A(1D) of the Act, which provides that only the first certificate given to the Secretary in relation to an income stream for a financial year can have effect for that financial year.

Paragraph 8(1)(e) requires that a certificate specifies an in force period for the financial year to which the certificate applies.

High probability

Subsection 8(2) sets out when there is a high probability a provider of an income stream (being a provider in a class specified in section 7 of the instrument) will be able to pay the income stream as required under the contract or governing rules for provision of the income stream.

For there to be a high probability in accordance with subsection 8(2), the actuary must certify that in their opinion:

1. the provider has a probability of at least 70 per cent of being able to pay; or
2. the provider has a probability of at least 50 per cent of being able to pay and there are special circumstances which:
3. gave rise to the probability of less than 70 per cent; and
4. but for those circumstances, the provider would have had a probability of at least 70 per cent of being able to pay.

PS 410 defines special circumstances for the purposes of high probability as described in paragraph 8(2)(b) as follows:

*“Special circumstances” for this purpose might arise, for example, owing to investment returns earned or contributions paid after the valuation date, but before the date of certification, such that the actuary determines that the probability would have been 70% or more had such investment returns or contributions been taken into consideration as at the valuation date. These two examples are not intended to limit the actuary in determining what constitutes a “special circumstance” however, it is expected that the range of situations which give rise to a “special circumstances” would be relatively limited.*

**Statement of Compatibility with Human Rights**

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

***Social Security (Actuarial Certificate – Life Expectancy Income Stream and Lifetime Income Stream Guidelines) Determination 2019***

The 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 legislative instrument provides guidelines to be complied with when determining whether an income stream is an asset-test exempt income stream that is generally exempt from the asset testing requirements of the *Social Security Act 1991* (the Act). The instrument also provides detail in relation to the requirement to provide an annual actuarial certificate ensure that payments from an income stream are likely to continue for the remainder of the income support recipient’s lifetime. Where these guidelines are not satisfied, the income stream will lose its asset-test exemption. The instrument may ultimately affect the rate of social security payable to a person.

**Human rights implications**

The instrument engages the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights. 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 instrument is compatible with Australia’s obligations not to take any backward steps in relation to the right to social security. The instrument does not unreasonably restrict a person’s eligibility to receive a social security benefit or reduce the benefits to which a person may be entitled.

The instrument provides guidelines to be complied with when determining whether an income stream is an asset-test exempt income stream that is generally exempt from the asset testing requirements of the *Social Security Act 1991* (the Act). The new guidelines ensure fair and equitable means test outcomes for asset‑test exempt income streams assessed under the social security means test.

If the instrument were not in place, it could result in income streams not being accurately or fairly assessed under the social security means test.

By making sure income streams are accurately and fairly assessed under the social security means test, the social security system appropriately recognises individuals’ capacity for self‑support when determining their rate of income support, and remains sustainable for future generations.

For these reasons the instrument is compatible with the right to social security.

**Conclusion**

The instrument is compatible with human rights.

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