

EXPLANATORY STATEMENT

Issued by the authority of the Secretary of the Department of Social Services

Social Security Act 1991

Social Security (Kind, Extent and Purchase Amount for Asset-tested Income Streams (Lifetime)) Determination 2019

Purpose

The *Social Security (Kind, Extent and Purchase Amount for Asset-tested Income Streams (Lifetime)) Determination 2019* (the **Instrument**) is made under subsection 9E(3), subsection 1120AA(7) and subsection 1120AB(15) of the *Social Security Act 1991* (the **Act**).

The Instrument determines the extent to which certain income stream products that contain a lifetime income stream component (a **lifetime component**) are to be assessed as an 'asset-tested income stream (lifetime)' under the new social security means testing rules inserted into the Act by Schedule 1 to the *Social Services and Other Legislation Amendment (Supporting Retirement Incomes) Act 2019* (the **Supporting Retirement Incomes Act**).

Certain income stream products contain a lifetime component but also contain a component that is an account-based pension, account-based annuity, allocated pension or an allocated annuity. The Instrument ensures that it is only the lifetime component of these income stream products that is assessed as an asset-tested income stream (lifetime) for the purposes of the new social security means testing rules.

The Instrument also addresses the circumstance in which an income stream product contains a lifetime component but also contains a component that makes regular payments to an individual for a specified term. The Instrument ensures that it is only the lifetime component of these income stream products that is assessed as an asset-tested income stream (lifetime) for the purposes of the new social security means testing rules.

The Instrument also sets a purchase amount for the lifetime component of these income stream products. This purchase amount is then used for the purposes of the social security assets test.

Background

Schedule 1 to the Supporting Retirement Incomes Act will, from 1 July 2019, amend the Act to establish new means testing rules to accommodate the development of new innovative income streams, resulting from recent changes to the *Superannuation Industry (Supervision) Regulations 1994* (the **SIS Regulations**).

The Schedule also amended the rules for lifetime income streams, to create fairer, more equitable means test outcomes. This was part of the 2018-19 Budget measure 'More Choices for a Longer Life – Finances for a Longer Life'.

Subsection 9E(3) of the Act

Schedule 1 to the Supporting Retirement Incomes Act will, from 1 July 2019, insert new section 9E into the Act.

Section 9E of the Act will establish a new category of income stream called an 'asset-tested income stream (lifetime)'. This new category of income stream will be subject to the new social security means testing rules provided for in Schedule 1 to the Supporting Retirement Incomes Act.

Section 9E of the Act provides:

- (1) *Subject to subsection (2), an income stream is an **asset-tested income stream (lifetime)** if:*
 - (a) *the contract, or governing rules, for the provision of the income stream ensure that, once payments of the income stream start, the income stream is to continue for the remainder of the life of one or more individuals; and*
 - (b) *the contract, or governing rules, for the provision of the income stream ensure that the amounts of those payments are determined by having regard to the age, life expectancy or other factors relevant to the mortality of those individuals; and*
 - (c) *the income stream is not an asset-test exempt income stream; and*
 - (d) *the income stream is not a defined benefit income stream.*
- (2) *If:*
 - (a) *paragraphs (1)(a) to (d) are satisfied in relation to an income stream; and*
 - (b) *the income stream is of a kind determined in an instrument under subsection (3);*

the income stream is an asset-tested income stream (lifetime) only to the extent determined in the instrument.
- (3) *The Secretary may make a legislative instrument for the purposes of subsection (2).*

The Instrument is made under subsection 9E(3) of the Act for the purposes of subsection 9E(2) of the Act and provides that certain kinds of income streams that would otherwise meet the definition of an asset-tested income stream (lifetime) in section 9E are only to be treated as asset-tested income streams (lifetime) to the extent outlined in the Instrument.

The Instrument applies to three kinds of income stream products. These are 'Guaranteed minimum income for life income streams', 'Lifetime income streams packaged with or within an account based income stream' and 'Lifetime income streams packaged with a term-limited income stream'.

These income stream products contain a lifetime component and it is appropriate to assess this component of the income stream as an asset-tested income stream (lifetime) for the purposes of the Act.

However, these income stream products also contain a component that is either an account-based pension, account-based annuity, allocated pension, an allocated annuity or a term-limited income stream. It is not appropriate that this component of the income stream product should be assessed as an asset-tested income stream (lifetime) under the Act as this component does not have the characteristics of a lifetime income stream.

The instrument ensures that it is only the lifetime component that will be assessed as an asset-tested income stream (lifetime) under the Act.

Subsection 1120AA(7) and subsection 1120AB(15) of the Act

Schedule 1 to the Supporting Retirement Incomes Act will, from 1 July 2019, insert new sections 1120AA and 1120AB into the Act.

Subsection 1120AA(7) and subsection 1120AB(15) of the Act allow the Secretary to determine the circumstances in which an asset-tested income stream (lifetime) is to have a purchase amount that differs from the standard purchase amount for an asset-tested income stream (lifetime) (determined under subsection 1120AA(4) and subsection 1120AB(12) of the Act).

The Instrument sets out a specific method for determining a purchase amount for the lifetime component of the three categories of income streams to which the section 9E(3) determination made under the Instrument applies (detailed above under the heading 'Subsection 9E(3) of the Act').

The purchase amount is used when ascertaining the value of an asset-tested income stream (lifetime) for the purposes of assessing the income stream under the social security assets test.

Commencement

The Instrument commences on 1 July 2019.

Section 4 of the *Acts Interpretation Act 1901* applies to the Instrument. This is because the Instrument is made after the Supporting Retirement Incomes Act received Royal Assent but before it commences (on 1 July 2019).

Consultation

There has been widespread consultation on the policy enacted by the Instrument. This included a preliminary discussion paper released publicly for comment in early 2017, a position paper released publicly for comment in early 2018, and a consultation on Schedule 1 to the Supporting Retirement Incomes Act. Stakeholders from the financial product and seniors advocacy sectors engaged in these consultations. Additionally, government agencies including the Treasury (including the Australian Government Actuary), the Department of Veterans' Affairs, and the Department of Human Services were consulted.

The Department of Veterans' Affairs, the Department of Human Services and key stakeholders in the financial product sector were consulted on the text of the Instrument. This included the Institute of Actuaries of Australia and members of the Australian Taxation Office's Superannuation Industry Stewardship Group.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation has advised that the new means test rules for lifetime income streams are non-regulatory/machinery in nature and have a zero regulatory cost (OBPR reference 23186). The Instrument is a part of the implementation of the new means test rules for lifetime income streams.

Explanation of the provisions

Section 1 provides that the name of the Instrument is the *Social Security (Kind, Extent and Purchase Amount for Asset-tested Income Streams (Lifetime)) Determination 2019*.

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

Section 3 provides that the authority for making the Instrument is subsection 9E(3), subsection 1120AA(7) and subsection 1120AB(15) of the Act.

Section 4 contains various definitions used in the Instrument. The following expressions in the Instrument are defined by reference to the meanings given in the SIS Regulations:

- ***account-based annuity***;
- ***account-based pension***;
- ***allocated annuity***;
- ***allocated pension***.

The references to these expressions in the SIS Regulations are references to those expressions as in force from time to time (see section 14 of the *Legislation Act 2003*).

Section 4 also defines the expressions **Act** and **lifetime component** for the purposes of the Instrument.

Act is defined as the *Social Security Act 1991*.

Lifetime component is defined as having the meanings given by section 5 of the Instrument.

A note to section 4 notes that a number of expressions used in the Instrument are defined in the Act.

Section 5 is made under subsection 9E(3) of the Act and determines three kinds of income streams for the purposes of paragraph 9E(2)(b) of the Act.

These are 'Guaranteed minimum income for life income streams', 'Lifetime income streams packaged with or within an account based income stream' and 'Lifetime income streams packaged with a term-limited income stream'.

These are the three kinds of income streams to which the Instrument applies. The Instrument will determine the extent to which these three kinds of income streams are to be assessed as an asset-tested income stream (lifetime) (see paragraph 6(2)(a) of the Instrument) and will determine a purchase amount for the lifetime component of these three kinds of income streams (see paragraph 6(2)(b), subsection 6(3), subsection 6(4) and subsection 6(5) of the Instrument).

Subsection 5(1) of the Instrument provides that section 5 applies to an income stream in relation to which paragraphs 9E(1)(a) to (d) of the Act are satisfied. These paragraphs are set out above under the heading 'Subsection 9E(3) of the Act'.

Subsection 5(2) of the Instrument provides that an income stream (called a 'Guaranteed minimum income for life income stream') is a kind of income stream for the purposes of paragraph 9E(2)(b) of the Act if, under the contract or governing rules for the provision of the income stream, the income stream includes:

- (a) a part that is an 'account based annuity', an 'account based pension', an 'allocated annuity' or an 'allocated pension' (these expressions are defined in section 4 of the Instrument - as noted above, these definitions are consistent with meaning of those expressions in the SIS Regulations); and
- (b) a part (the **lifetime component**) that makes regular payments to an individual and has the following elements:
 - (i) once they start, the payments are payable for the remainder of the life of one or more individuals;
 - (ii) the payments become payable only after the account balance of the individual's annuity or pension mentioned in paragraph (a) is reduced below a threshold specified in the contract or governing rules;
 - (iii) the value of the payments is specified in the contract or governing rules.

Subsection 5(3) of the Instrument provides that an income stream (called a 'Lifetime income stream packaged with or within an account based income stream') is a kind of income stream for the purposes of paragraph 9E(2)(b) of the Act if, under the contract or governing rules for the provision of the income stream, the income stream includes:

- (a) a part that is an 'account based annuity', an 'account based pension', an 'allocated annuity' or an 'allocated pension'; and
- (b) a part (the ***lifetime component***) that makes regular payments to, or for the benefit of, an individual and has the following elements:
 - (i) once they start, the payments are payable for the remainder of the life of one or more individuals;
 - (ii) the value of the payments is determined by having regard to the age, life expectancy or other factors relevant to the individual's mortality;
 - (iii) in order to obtain the payments, the individual is (directly or indirectly) required to pay an amount or amounts into a specified fund or investment option held for the collective benefit of individuals who have invested in that fund or investment option;
 - (iv) amounts paid into the specified fund or investment option (whether by the individual or any other individual) can be forfeited if an income stream is commuted or a person dies;
 - (v) payments made by the specified fund or investment option are financed partly from amounts so forfeited.

Subsection 5(4) of the Instrument provides that an income stream (called a 'Lifetime income stream packaged with a term-limited income stream') is a kind of income stream for the purposes of paragraph 9E(2)(b) of the Act if, under the contract or governing rules for the provision of the income stream, the income stream includes:

- (a) a part that makes regular payments to an individual for a specified term; and
- (b) a part (the ***lifetime component***) that makes regular payments to an individual and has the following elements:
 - (i) once payments start, the payments are payable for the remainder of the life of one or more individuals;
 - (ii) the value of the payments is determined by having regard to the age, life expectancy or other factors relevant to the individual's mortality.

Section 6 is also made under subsection 9E(3) of the Act as it determines the extent to which the three categories of income stream products referred to in section 5 of the Instrument are to be treated as an asset-tested income stream (lifetime) (see paragraph 6(2)(a) of the Instrument).

Section 6 is also made under subsection 1120AA(7) and subsection 1120AB(15) as it determines a purchase amount for the lifetime component of the three categories of income stream products referred to in section 5 of the Instrument (see paragraph 6(2)(b), subsection 6(3), subsection 6(4) and subsection 6(5) of the Instrument).

Subsection 6(1) of the Instrument provides that section 6 of the Instrument is made for the purposes of the following provisions of the Act:

- (a) subsection 9E(2);
- (b) paragraph 1120AA(4)(b);
- (c) paragraph 1120AB(12)(b).

Subsection 6(2) provides that if, under section 5 of the Instrument, an income stream is determined to be a kind of income stream for the purposes of paragraph 9E(2)(b) of the Act:

- (a) the lifetime component of the income stream is an asset-tested income stream (lifetime); and
- (b) the purchase amount for the lifetime component is:
 - (i) if the lifetime component is financed, wholly or partly, by fees or charges—the amount of any such fees or charges paid by the individual; and
 - (ii) if the lifetime component is financed, wholly or partly, by a specified fund or investment option into which the individual was required (directly or indirectly) to pay an amount or amounts in order to obtain the payments made by the lifetime component—the amount worked out in accordance with subsection 6(3) or subsection 6(4).

For an income stream that has the characteristics detailed above in subparagraph 6(2)(b)(ii), it is necessary to look to either subsection 6(3) or subsection 6(4) to work out the purchase amount for the lifetime component of the income stream.

Subsection 6(3) will apply where an income stream is subject to section 1120AA of the Act. Section 1120AA applies to a person's asset-tested income stream (lifetime) that does not arise under arrangements that are regulated by SIS Regulations. Section 1120AA only applies to a person in relation to a day that is before the person's assessment day (within the meaning of section 1120AB of the Act) for the income stream.

Subsection 6(3) provides that, for the purposes of paragraph 1120AA(4)(b) of the Act, the amount is the sum of each compounded amount in relation to amounts paid by the individual into the specified fund or investment option. For the purposes of subsection 6(3), a 'compounded amount' is worked out by applying the formula set out in subsection 1120AA(5) of the Act, as if references in that subsection to an amount paid for the income stream were references to an amount paid into the specified fund or investment option.

Subsection 6(4) will apply where an income stream is subject to section 1120AB of the Act. Section 1120AB applies to a person's asset-tested income stream (lifetime) in relation to a day that is on or after the person's assessment day for the income stream.

Subsection 6(4) provides that, for the purposes of paragraph 1120AB(12)(b) of the Act, the amount is the sum of:

- (a) each compounded amount in relation to amounts paid by the individual into the specified fund or investment option; and
- (b) each amount paid by the individual into the specified fund or investment option on or after the assessment day.

For the purposes subsection 6(4) a 'compounded amount' is worked out by applying the formula set out in subsection 1120AB(13) of the Act, as if references in that subsection to an amount paid for the income stream were references to an amount paid into the specified fund or investment option.

Subsection 6(5) provides that, if the Secretary is satisfied that the lifetime component is not wholly financed by means specified in paragraph 6(2)(b) of the Instrument, the purchase amount is the value that is certified by an actuary who is a Fellow or Accredited Member of the Institute of Actuaries of Australia as being attributable to the individual in relation to the lifetime component under the contract or governing rules for the income stream.

Statement of Compatibility with Human Rights

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

Social Security (Kind, Extent and Purchase Amount for Asset-tested Income Streams (Lifetime)) 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 Instrument is made under subsection 9E(3), subsection 1120AA(7) and subsection 1120AB(15) of the *Social Security Act 1991* (the **Act**). Subsection 9E(3) of the Act gives the Secretary of the Department of Social Services the power to make, by way of legislative instrument, conditions covering certain asset-tested income stream products (lifetime) where apportionment is required due to the hybrid nature of the income product. The Instrument ensures that only the lifetime component of these hybrid income stream products is assessed for the purposes of the social security law income and assets tests.

The Instrument also sets out a specific method for determining a purchase amount for the lifetime component of these income stream products. The purchase amount is used when ascertaining the value of an asset-tested income stream (lifetime) for the purposes of assessing the income stream under the social security assets test.

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 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 has been created to ensure fair and equitable means test outcomes for asset-tested income streams (lifetime) products.

If the Instrument were not in place, hybrid income stream products would be wholly assessed as an asset-tested income stream (lifetime), rather than being assessed as their separate components.

This would result in a person's means for self-support not being accurately captured by the social security means test. This would be unfair and inequitable when compared with those who purchase discrete lifetime products and account-based products.

By making sure only the lifetime component of these hybrid products are assessed as asset-tested income streams (lifetime), the Instrument promotes an accurate and fair assessment under the social security means test. This supports the aims of the social security system in appropriately recognising an individuals' capacity for self-support when determining their rate of income support. It also supports the social security system to remain 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.

Kathryn Campbell AO CSC

Secretary of the Department of Social Services