

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Families and Social Services

Social Security Act 1991

Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DSS) Specification 2021

Purpose

The Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DSS) Specification 2021 (the Specification) is made under section 1237AB of the *Social Security Act 1991* (the Act).

The purpose of the instrument is to specify a class of debts that may be waived.

The instrument replaces two existing instruments which are due to sunset:

- Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds (FaHCSIA) Specification 2011, and
- Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds (DEEWR) Specification 2011.

The instrument is beneficial in nature, and allows for the waiving of any social security debts raised against income support recipients who hold a particular type of assets-test exempt income stream product and choose to commute the entirety of that product into a 100 per cent assets tested market-linked income stream product.

Background

Subsection 1237AB(1) of the Act provides the Secretary may decide to waive the Commonwealth's right to recover debts arising under the Act that are included as a class of debts specified by the Minister by legislative instrument.

Income streams sourced from a self managed superannuation fund or a small Australian Prudential Regulation Authority (APRA) fund:

- before 20 September 2004 (or that were commuted and rolled over on or after 20 September 2004 from those income streams and retained their 100 percent exemption); or
- between 20 September 2004 and 19 September 2007 (or that were commuted and rolled over on or after 20 September 2007 from those income streams and retained their 50 percent asset-test exemption); and

which comply with the requirements of section 9A or 9B of the Act, are 100 per cent or 50 per cent asset-test exempt. If these income streams are commuted, the asset-test exemption may be retained provided the new income stream complies with the requirements of the following instruments (in force from time to time):

- Social Security (Guidelines for determining whether income stream is asset-test exempt) (DSS) Determination 2011; or
- Social Security (Retention of exemption for asset-test exempt income streams) (DSS) Principles 2011; or
- Social Security (Guidelines for determining whether income stream is asset-test exempt) (DEEWR) Determination 2011 (No. 1).

These requirements include commuting the income stream and purchasing a similar income stream product from a retail provider. This option is available at any time to the owner of the income stream under this instrument.

These income streams are required, among other things, to meet a 'high probability' actuarial test that the provider of the income stream will be able to pay the income stream as required, so as to comply with the requirements of section 9A or 9B of the Act. However, some self managed superannuation funds or small APRA funds may no longer be able to meet this requirement due to changes in the value of assets backing their income stream.

Where an income stream does not meet the high probability test, it may be restructured by purchasing a retail asset-test exempt product (which will comply with the requirements of the social security law). In these circumstances, the income stream will continue to be assessed as asset-test exempt.

Alternatively, the income stream may be restructured into a market-linked income stream either from a retail provider or within the self-managed superannuation fund. However, this new income stream will no longer meet the requirements of section 9A or 9B of the Act. The new market-linked income stream will also not meet the requirements of section 9BA as the income stream's commencement day would not meet the requirements of subparagraph 9BA(1)(a)(i) of the Act. Accordingly, the market-linked income stream will be 100 percent asset tested.

Under the social security law, a consequence of restructuring an income stream which was sourced from a self managed superannuation fund or small APRA fund to a market-linked income stream, will mean the difference between the amount that has been paid by way of income support where the income stream was asset-test exempt and the amount that would have been payable had the income stream been asset-tested, is a debt due to the Commonwealth under section 1223A of the Act.

This is a purely beneficial instrument that will allow for this class of debts to be waived. This will enable the Secretary to waive the Commonwealth's right to recover debts arising under the Act, incurred by persons whose income streams, sourced from a self managed superannuation fund or a small APRA fund before 20 September 2004 (or were commuted and rolled over on or after 20 September 2004 from those income streams and retained their 100 per cent exemption) and which complied with the requirements of sections 9A and 9B of the Act, are commuted to a market-linked income stream. This waiver applies irrespective of whether the asset-test exempt income stream does or does not meet the high probability test. In other words, this waiver is available at any time, provided it is commuted to a 100 per cent asset tested market-linked income stream.

A decision made as informed by this instrument under section 1237AB as to waiver of a debt is reviewable both internally and externally under the enabling Act and Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

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 is 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. Accordingly, this instrument repeals the Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (FaHCSIA) Specification 2011 and the Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DEEWR) Specification 2011.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to disallowance.

Commencement

The instrument commences on the day after the end of the period for disallowing it, in accordance with section 42 of the *Legislation Act 2003*. Subsection 1237AB(3) of the Act provides that an instrument made under subsection 1237AB(1) is of no effect until the time allowed for its disallowance has passed. This instrument will commence on the day after the end of the disallowance period.

Consultation

Public consultation has not been undertaken as this instrument is of a purely beneficial character and existing arrangements are unchanged. Consultation was undertaken with Services Australia and the Department of Veterans' Affairs.

Regulation Impact Statement (RIS)

This instrument does not require a Regulatory Impact Statement (OBPR Reference ID: 43680).

Explanation of the provisions

Section 1

This section provides that the instrument is the Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DSS) Specification 2021.

Section 2

This section provides that the instrument will commence on the day after the end of the period for disallowing it, in accordance with section 42 of the *Legislation Act 2003*.

Section 3

This section provides that the authority for making this instrument is subsection 1237AB(1) of the Act.

Section 4

This section provides definitions used in this the instrument.

Act is defined to mean the *Social Security Act 1991*.

APRA is defined to mean the Australian Prudential Regulation Authority.

Market-linked income stream is defined to mean an income stream that meets the requirements of section 9BA of the Act, other than subparagraph 9BA(1)(a)(i) which requires the income stream's commencement day to happen during the period from 20 September 2004 to 19 September 2007 (both dates inclusive). This definition is intended to cover the income streams that are restructured into a market-linked income stream as they do not meet the high probability test.

Self managed superannuation fund is defined to have the same meaning as in section 17A of the *Superannuation Industry (Supervision) Act 1993*.

Small APRA fund is defined to have the same meaning as in subsection 1017BB(6) of the *Corporations Act 2001*.

The note to this section provides that the following terms are defined in the Act:

- **asset-test exempt income stream;** and
- **asset-tested income stream (long term).**

Section 5

This section provides that Schedule 1 repeals the Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (FaHCSIA) Specification 2011 and the Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DEEWR) Specification 2011.

Section 6

This section specifies the class of debt that may be waived.

Paragraphs 6(a) and (b) provide that a debt is in the specified class if a person owes a debt to the Commonwealth under section 1223A of the Act which did not arise because the person knowingly made a false or misleading statement, or knowingly provided false information to the Commonwealth.

The specified class of debts must also meet the requirements of paragraph 6(c), which provides that, before the commencement of this instrument, the income stream that is relevant for the purposes of section 1223A:

- was an asset-test exempt income stream that met the requirements of either section 9A or 9B of the Act (subparagraph 6(c)(i)(A)); or

- was an asset-tested income stream (long term) that was previously an asset-test exempt income stream but due to changes in the value of the assets backing the income stream, failed to meet the high probability actuarial test (subparagraph 6(c)(i)(B)). As these income streams are no longer able to meet the requirements of either paragraph 9A(1)(b) or 9B(1A)(b) of the Act, they are unable to retain their asset-test exemption. In these circumstances, these income streams would be assessed as asset-tested income streams and this change of status would normally trigger the operation of section 1223A of the Act.

Further, paragraph 6(c) provides that a debt is in the specified class if, before the commencement of this instrument, the income stream that is relevant for the purposes of section 1223A was sourced from a self managed superannuation fund or a small APRA fund (subparagraphs 6(c)(ii)(A) and (B)).

Paragraph 6(d) provides that the debt is in the specified class if the relevant income stream for the purposes of section 1223A is commuted and rolled over into a 100 percent asset tested market-linked income stream on or after the commencement of this instrument (paragraph 6(d)).

Schedule 1 – Repeals

Item 1

Item 1 repeals Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (FaHCSIA) Specification 2011.

Item 2

Item 2 repeals Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DEEWR) Specification 2011.

Statement of Compatibility with Human Rights

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

Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DSS) Specification 2021

The Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DSS) Specification 2021 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 Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DSS) Specification 2021 (this instrument) is made under subsection 1237AB(1) of the *Social Security Act 1991* and replaces the previous Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (FaHCSIA) Specification 2011 and the previous Social Security (Waiver of Debts – Self Managed Superannuation Funds and Small APRA Funds) (DEEWR) Specification 2011, which would both sunset on 1 October 2021.

Subsection 1237AB(1) of the Act provides that the Secretary may decide to waive the Commonwealth's right to recover debts arising under the Act that are included as a class of debts specified by the Minister by legislative instrument.

The effect of this instrument is to specify a class of debt that may be waived for the purposes of section 1237 of the Act.

Human rights implications

This 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, and does not restrict a person's eligibility to receive a social security benefit or reduce the benefits to which a person may be entitled.

This instrument is entirely beneficial, as it specifies a class of debts that may be waived by the Secretary.

Conclusion

This instrument is compatible with human rights as its effects are wholly administrative in nature, and do not limit any human rights.

Anne Ruston, Minister for Families and Social Services