

EXPLANATORY STATEMENT

Issued by the authority of the Group Manager of the Pensions, Housing and Homelessness Group, Department of Social Services

Social Security Act 1991

Social Security (Exempt Lump Sum – ACT Loose-Fill Asbestos Disease Support Scheme Payments) Determination 2022

Purpose

Paragraph 8(11)(d) of the *Social Security Act 1991* (the Act) allows the Secretary of the Department of Social Services, or their delegate, to determine by legislative instrument that an amount, or class of amounts, received by a person is an exempt lump sum under social security law.

The Social Security (Exempt Lump Sum – ACT Loose-Fill Asbestos Disease Support Scheme Payments) Determination 2022 (Determination) provides that certain payments under the ACT Loose-Fill Asbestos Disease Support Scheme are exempt lump sums for the purposes of paragraph 8(11)(d) of the Act.

Background

Income earned, derived or received for a person's own use or benefit is generally assessable as income under social security law. An amount, or class of amounts, received by a person may be specifically exempt under paragraph 8(11)(d) of the Act. This paragraph allows the Secretary or their delegate to determine that an amount or class of amounts is an exempt lump sum. An exempt lump sum is excluded from the definition of 'ordinary income' under subsection 8(1) of the Act, meaning the exempt lump sum amount is not taken into account as part of the social security income test.

The exemption of a lump sum payment from the income test does not alter the fact that any ongoing income generated, or any assessable asset produced, by the lump sum is counted under the social security income or assets tests.

ACT Loose-Fill Asbestos Disease Support Scheme

The ACT Loose-Fill Asbestos Disease Support Scheme (the Scheme) provides ex gratia lump sum payments to individuals who have contracted a loose-fill asbestos-related disease after living in a loose-fill asbestos insulation affected property in the ACT in a non-work related capacity. This assists individuals who cannot otherwise receive support through workers' compensation, because they did not contract the disease as a result of occupational exposure to asbestos.

Under the Scheme, payments are made to individuals for out of pocket medical or related expenses and loss of earning capacity due to their asbestos-related disease. Where the individual has died, payments are apportioned between their surviving

financial dependants. Payments are made for claims diagnosed on or after 1 January 2014.

The Determination provides that amounts paid in relation to certain expenses as part of the Scheme are exempt lump sums for the purposes of paragraph 8(11)(d) of the Act:

Gratuitous attendant care expenses: An amount paid to the individual to offset required attendant care services, provided by a family member who has incurred expenses or financial costs.

Attendant care and household services by third parties: An amount paid to offset required household and attendant care services, provided by a third-party provider approved by the claim manager.

Home and vehicle modifications: An amount paid to offset any home and vehicle modifications necessary as a result of the asbestos disease.

Funeral expenses: A lump sum amount of up to \$12,492 (indexed) paid to the individual or apportioned between their financial dependants if the individual is deceased.

Financial advice: An amount of up to \$500 per financial dependant to reimburse for financial advice relating to management of Scheme payments.

Dependant lump sum payment (paid to the individual before death): An amount paid to the individual based on their age when they are diagnosed with a terminal loose-fill asbestos-related disease, and who is alive at the date of payment. This payment is made if the individual has a financial dependant or dependants. This payment is included as an exempt lump sum to prevent the possibility that the individual has their income support payment cancelled in the period before their death.

Amounts paid under the following classes as part of the Scheme are *not* exempt lump sums under this instrument:

Medical costs: These are exempt under paragraph 8(8)(v) of the Act.

Loss of earning capacity: These payments are subject to the compensation recovery provisions in Part 3.14 of the Act. This is because payments made wholly or partly for lost capacity to earn resulting from personal injury are considered compensation pursuant to subsection 17(2) of the Act.

Dependant lump sum payment (paid to the dependant): An amount paid to the financial dependant or dependants of the individual where the individual has died. The amount is based on the individual's age at the time of death. These payments would be considered income for the purposes of the social security income test. This is because the dependant is no longer receiving support from the individual and they have discretion as to how they use this amount to support themselves.

Dependent child payment: An amount paid to each of the individual's dependent children, or to the primary carer of the dependent children for the benefit of the children if the children are under 18 years of age. Where the payment is made to a financially dependent child, the payment would be considered income for the purposes of the social security test. This is because the dependant may no longer be receiving support from the individual and they have discretion as to how they use this amount to support themselves. Where the payment is made to the primary carer of the dependent child, the payment would be excluded as income under paragraph 8(8)(j) of the Act as a payment made for or in respect of a dependent child. Dependent child is defined at subsections 5(2) to (8A) of the Act.

The terms and conditions of the Scheme can be found on the ACT Chief Minister, Treasury and Economic Development Directorate website:

<https://www.cmtedd.act.gov.au/industrial-relations-and-public-sector-management/wsir/loose-fill-asbestos-disease-support-scheme>

Commencement

The Determination commences on the day after it is registered.

Consultation

The Department of Social Services consulted the following agencies on the intention to make this legislative instrument:

- The ACT Government: Chief Minister, Treasury and Economic Development Directorate because the ACT Government is responsible for the administration of the Scheme;
- Department of Infrastructure, Transport, Regional Development and Communications, which was working with the ACT Government on the design of the Scheme;
- Department of Veterans' Affairs because section 8(11) determinations apply automatically under the *Veterans' Entitlements Act 1986*; and
- Department of Agriculture, Water and the Environment because section 8(11) determinations apply automatically under the *Farm Household Support Act 2014*.

The ACT Government, Chief Minister, Treasury and Economic Development Directorate, were consulted on the text of the instrument. This is because the ACT Government administers the Scheme, including payments made under the Scheme, and was best placed to provide comments on the proposed provisions.

Regulation Impact Statement (RIS)

A Regulatory Impact Assessment is not required (OBPR Ref No: OBPR22-02019).

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that 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. The Secretary or their delegate has the power under paragraph 8(11)(d) of the Act to make this Determination.

Availability of independent review

The Determination specifies that certain lump sum payments made under the Scheme are exempt from the social security income test.

A decision on the assessment of an individual's income as part of the social security income test, which may involve a payment covered by this Determination, is subject to internal and external review under the Act and Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

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

Explanation of the provisions

Section 1 states that the name of the Determination is the Social Security (Exempt Lump Sum – ACT Loose-Fill Asbestos Disease Support Scheme Payments) Determination 2022.

Section 2 sets out that the Determination commences on the day after it is registered on the Federal Register of Legislation.

Section 3 provides that the authority for making the Determination is paragraph 8(11)(d) of the Act.

Section 4 lists definitions of terms used in the Determination.

The ***ACT Loose-Fill Asbestos Disease Support Payment Scheme*** refers to the Scheme, as described above.

An ***asbestos disease support payment*** means a lump sum payment made by the ACT Government to or on behalf of an individual or their financial dependant in accordance with the Scheme.

Section 5 states that for the purposes of paragraph 8(11)(d) of the Act, certain asbestos disease support payments made under the Scheme are exempt lump sums.

Subsection 5(1) provides that the gross amount of such a payment is an exempt lump sum.

Subsection 5(2) specifies that asbestos disease support payments made in relation to the following expenses are exempt lump sums:

- Gratuitous attendant care expenses, where made to the individual;
- Attendant care and household services by third parties;
- Home and vehicle modifications;

- Funeral expenses;
- Financial advice;
- Dependant lump sum payment, where made to the individual.

Statement of Compatibility with Human Rights

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

Social Security (Exempt Lump Sum – ACT Loose-Fill Asbestos Disease Support Scheme Payments) Determination 2022

The Determination 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 effect of the Social Security (Exempt Lump Sum – ACT Loose-Fill Asbestos Disease Support Scheme Payments) Determination 2022 (Determination) is that an individual who receives certain payments under the ACT Loose-Fill Asbestos Disease Support Scheme (the Scheme) will not have that payment assessed as income under the social security law.

Human rights implications

The Determination 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, foodstuff, and the most basic forms of education.

The Determination will operate beneficially as certain payments under the Scheme will not be taken into account when assessing a person's eligibility or rate of social security entitlements under the social security income test. If certain payments under the Scheme are not exempted, a person in receipt of that payment may not be eligible for a social security payment or, if they are eligible, their rate of payment might be reduced. The Determination is therefore consistent with the promotion of the right to social security.

The exemption of certain payments under the Scheme from the income test on receipt does not alter the fact that any ongoing income generated by the lump sum is not exempt from the income test, and any assessable asset produced from the lump sum is counted under the social security assets test. This is consistent with the treatment of other lump sum payments under paragraph 8(11)(d) of the *Social Security Act 1991*.

Conclusion

The Determination is compatible with human rights as it supports a person's right to social security.

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