

EXPLANATORY STATEMENT

Defence (Employer Support Payment Scheme) Determination 2023

This Determination Defence (Employer Support Payment Scheme) Determination 2023 is made under section 58B of the *Defence Act 1903* (Defence Act) and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (AI Act).

Determinations made under section 58B of the Defence Act are disallowable legislative instruments subject to the *Legislation Act 2003* (Legislation Act). These instruments are also subject to the interpretation principles in the AI Act.

This Determination establishes a scheme for providing financial assistance to businesses that employ members of the Reserves who have been absent from their civilian workplace on defence service. The payment also provides an incentive to members of the Reserves who are self-employed to undertake defence service and provide capability to the Australian Defence Force (ADF).

Purpose

The purpose of this Determination is to do the following:

- Implement a new Determination, Defence (Employer Support Payment Scheme) Determination 2023, which sets out the provisions for the Employer Support Payment Scheme.
- Repeal a number of determinations that are replaced by the new Determination.
- Provide a scheme of transitional and savings provisions that will preserve accrued rights and liabilities under the former Principal Determination. The provisions also allow for eligibility that started under the former Principal Determination to continue, where applicable, under this Determination.

Operational details

Details of the operation of the Determination are provided at annex A.

Human rights compatibility

The statement of compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* for this Determination is at annex B.

Review options

A person may seek an internal review of reviewable decisions, as described in the Determination, or apply to the Administrative Appeals Tribunal for review of a decision made under Chapter 7 Part 3 of the Determination in connection with a Chief of Defence Force initiated review. A person may also make a complaint to the Commonwealth Ombudsman regarding the administration of decisions made under the Determination.

Consultation

Before this Determination was made, consultation was undertaken with Navy, Army, Air Force and Headquarters Joint Support Services Division.

The rule maker was satisfied that further consultation was not required.

Approved by:

Matthew James Keogh
Minister for Defence Personnel

Authority:

Section 58B of the
Defence Act 1903

Defence (Employer Support Payment Scheme) Determination, 2023

Operational details

Part 1—Preliminary

Part 1 deals with formal and preliminary matters relating to the operation of this Determination.

Part 1 Division 1—Introduction

Part 1 Division 1 deals with introductory provisions relating to the operation of this Determination.

- Section 1.1.1 of this Determination sets out the manner in which this Determination may be cited.
- Section 1.1.2 provides that this Determination commences on 1 July 2023.
- Section 1.1.3 provides that this instrument has authority under section 58B of the Defence Act.
- Section 1.1.4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Part 1 Division 2—General

Part 1 Division 2 deals with general provisions of the Determination, relating to its purpose, who it applies to, the use of approved forms, and reference to rules in other instruments.

- Section 1.1.5 sets out the purpose of this Determination.
- Section 1.1.6 provides who the Determination applies to.
- Section 1.1.7 provides that an applicant must use an approved form in relation to any application or request made under this Determination.
- Section 1.1.8 provides that this Determination makes reference to rules in other instruments, and the manner in which those rules apply to this Determination.

Part 2—Definitions

Part 2 sets out terms and definitions used in this Determination.

- Section 2.1.1 sets out the purpose of Part 2.
- Section 2.1.2 sets out the common definitions which apply to this Determination.
- Section 2.1.3 defines what a period of continuous defence service is for the purpose of an application for a support payment.
- Section 2.1.4 defines when a member is employed in full-time work, part-time work or as a regular casual employee.
- Section 2.1.5 defines when a member's role and interest in the business employing them is sufficient to consider that the business is related to the member.

Part 3—Support payments

Part 3 provides a procedure about applying for a support payment, whether as an employer applicant or a member applicant.

Part 3 Division 1—General

Part 3 Division 1 section 3.1.1 sets out the purpose of a support payment.

Part 3 Division 2—Applying for support payments

Part 3 Division 2 provides a procedure about how and when to apply for a support payment.

- Section 3.2.1 sets out the process for how to apply for a support payment.
- Section 3.2.2 provides that an application for support payments must be made within 12 months of the period of absence on defence service. A later period may be considered if the decision-maker is satisfied that exceptional circumstances justify doing so.
- Section 3.2.3 provides that when a member is employed by more than one business that is related to them, only one of the businesses may submit an application for support payment.

Part 3 Division 3—When can a support payment be made to an employer applicant

Part 3 Division 3 provides a procedure about applying for a support payment as an employer applicant.

- Section 3.3.1 sets out when a support payment can be made to an employer applicant.
- Section 3.3.2 sets out the information that must be provided by an employer applicant when applying for a support payment in a new financial year.

Part 3 Division 4—When can a support payment be made to a member applicant

Part 3 Division 4 provides a procedure about applying for a support payment as a member applicant.

Part 3 Division 4 Subdivision 1—General

Part 3 Division 4 Subdivision 1 provides the general rules about applying for a support payment.

- Section 3.4.1 sets out when a support payment can be made to a member applicant.
- Section 3.4.2 sets out how a member's principal source of income from a member applicant's business is established.
- Section 3.4.3 sets out how a member's principal source of employment from a member applicant's business is established.
- Section 3.4.4 sets out the information that must be provided by a member applicant when applying for a support payment.

Part 3 Division 4 Subdivision 2—Working out the income a member applicant receives from a business

Part 3 Division 4 Subdivision 2 sets out the rules relating to working out the income a member applicant receives from a business.

- Section 3.4.5 sets out what amounts that a member receives may be counted as income for the purposes of working out the income a member receives from a business. This is particularly important in the case of applicants who claim that their business provides the member's principal source of income.
- Section 3.4.6 sets out the circumstances in which an amount may be taken to have been earned as income. There are a range of situations set out to clarify when the income from a business would be able to count as income for a member and so assist in establishing eligibility as a member applicant for the purpose of a payment under this Determination. The situations generally count only amounts that are treated as a member's income.

Part 3 Division 5—Which absences can be counted when determining the amount of payment

Part 3 Division 5 sets out the rules relating to which days of absence can be counted, or not counted, when determining the amount of support payment related to a period of continuous defence service.

- Section 3.5.1 sets out the days that can be counted for the purpose of determining the support payment payable to an applicant.

- Section 3.5.2 sets out a range of absences that are not counted for the purpose of determining the amount of support payment payable to an applicant.

Part 3 Division 6—Working out the amount of support payment

Part 3 Division 6 sets out the method for calculating an amount of support payment, whether a member is employed by one or more employers, and the maximum support payments payable. It also sets out rules relating to payment when a member has worked less than 3 months in the applicant's business, and payments relating to medical officers when civil practice support allowance is payable.

- Section 3.6.1 sets out the method for calculating an amount of payment in relation to a period of absence from employment where a member is employed by one employer. The amount is based on the weekly payment amount relevant to the employee's working arrangements.
- Section 3.6.2 sets out the method for calculating an amount of payment in relation to a period of absence from part-time employment where the member works for more than one employer. The amount is based on a proportion of the weekly payment amount relevant to the member's working arrangements with the claiming employer.
- Section 3.6.3 provides claim limits on amounts payable for absences on defence service, including in relation to continuous-full-time service and defence service when force assigned to ADF operations. In certain circumstances, a claim limit may be increased if the Chief of the Defence Force (CDF) is satisfied that the support payment would facilitate the provision of a capability required by the ADF, involving a specified member, class or classes of members.
- Section 3.6.4 provides a limit on the period of employment for a member who has performed a substantial amount of continuous full-time service. The member must have had a break of at least 3 months between periods of continuous full-time service, in order for a future application to rest on their absence from employment. If the employee is regularly away on continuous full-time service and has never been in the workplace for a substantial period of time, then it is reasonable to expect other arrangements to be made to manage the regular absences.
- Section 3.6.5 provides a limit to reduce any eligibility for an amount of support payment for a period by the amount of civil practice support allowance payable in relation to a member's service for the same period. Civil practice support allowance is intended to assist a Reserve medical practitioner to obtain a locum to help in their business, it is not intended as a supplement to support payments. Because of the potential for overlap between these payments, the section provides a formal control to clarify that a member who claims both amounts does not receive a 'windfall'.

Part 3 Division 7—When support payments are made for specified capabilities

Part 3 Division 7 sets out when a support payment may be determined under specified conditions which would facilitate the provision (by a member, class or classes of members) of a capability required by the ADF.

- Section 3.7.1 sets out the purpose of Part 3 Division 7
- Section 3.7.2 provides that a support payment be calculated at a specified rate on a recommendation from a Service Chief or the Head of Joint Support Services Division to the CDF, in relation to the provision of a capability required by the ADF.
- Section 3.7.3 provides that a support payment should be payable in modified circumstances, on a recommendation from a Service Chief or the Head of Joint Support Services Division to the CDF, whether at a standard payment rate or a specified capability payment rate, in relation to the provision of a capability required by the ADF.
- Section 3.7.4 provides that, on a recommendation from a Service Chief or the Head of Joint Support Services Division to the CDF, the limits that have been placed on a support payment related to an approval decision under section 3.7.2 or 3.7.3 be varied or revoked.

Part 3 Division 8—Finalising applications

Part 3 Division 8 sets out the procedure for finalising an application made under Part 3 of this Determination.

- Section 3.8.1 sets out what happens after considering an application for a support payment or before a payment has been made if an applicant ceases to operate or trade.
- Section 3.8.2 provides that an applicant must be given written notice of any decision made on their application.
- Section 3.8.3 sets out when a support payment is paid following the approval of an application.

Part 4—Extended support payments

Part 4 provides a procedure about applying for an extended support payment, relating to an injury or illness resulting from the member's defence service, or in circumstances when a member dies on defence service.

Part 4 Division 1—General

Part 4 Division 1 section 4.1.1 provides an overview of Part 4 of this Determination and sets out the circumstances when extended support payments under the Part are payable.

Part 4 Division 2—Applying for extended support payment

Part 4 Division 2 section 4.2.1 sets out how and when an applicant can apply for an extended support payment.

Part 4 Division 3—Illness or injury of member

Part 4 Division 3 provides for the payment of an extended support payment when a member is unable to perform the full duties of their employment due to an injury or illness resulting from their defence service.

- Section 4.3.1 sets out when an applicant is eligible to be paid an extended support payment if a member has suffered an injury or illness resulting from their defence service.
- Section 4.3.2 sets out that an employer applicant may be approved an extended support payment until the earliest of a specified event occurring.
- Section 4.3.3 sets out that a member applicant may be approved an extended support payment until the earliest of a specified event occurring.
- Section 4.3.4 provides how the amount of the extended support payment is worked out, and the limits of payment eligibility if the extended support payment does not cease under section 4.3.2 or section 4.3.3.

Part 4 Division 4—Death of member

Part 4 Division 4 section 4.4.1 sets out when an applicant may apply for an extended support payment, and the period of payment eligibility if a member dies on defence service. This is intended to assist continuity of the business in the period immediately following the death of the member.

Part 4 Division 5—Finalising applications

Part 4 Division 5 sets out the procedure for finalising an application made under Part 4 of this Determination.

- Section 4.5.1 sets out what the CDF must do after a decision has been made on an application for an extended support payment.
- Section 4.5.2 provides that the CDF must provide the applicant with written notice of any decision made.
- Section 4.5.3 sets out the timeframe for the payment of an extended support payment.

Part 5—Additional support payments

Part 5 provides a procedure about applying for an additional support payment if an applicant's business incurred a substantial financial loss due to the member's absence on defence service, or due to an absence from employment in the business due to injury or illness resulting from their defence service.

Part 5 Division 1—General

Part 5 Division 1 section 5.1.1 provides an overview of the purpose of Part 5 and sets out the circumstances when an additional support payment is payable.

Part 5 Division 2—Applying for additional support payment

Part 5 Division 2 section 5.2.1 sets out the manner in which an applicant applies for an additional support payment.

Part 5 Division 3—When can an additional support payment be made

Part 5 Division 3 provides for the payment of an additional support payment.

- Section 5.3.1 provides a definition of a relevant financial loss, and the circumstances which form the basis for claiming an additional support payment.
- Section 5.3.2 sets out when an application for an additional support payment can be made when specified criteria are met.
- Section 5.3.3 provides that a payment of an additional support payment cannot be made to an applicant if a legal officer sessional fee was paid or is payable for the same period of defence service.

Part 5 Division 4—Finalising applications

Part 5 Division 4 sets out the procedure for finalising an application for additional support payment.

- Section 5.4.1 sets out what the CDF must do after a decision has been made on an application for an additional support payment.
- Section 5.4.2 provides when an additional support payment must be made if an application has been approved.

Part 6—Changes in circumstances

Part 6 sets out an applicant's obligation to keep the decision-maker informed of certain changes in circumstances that are relevant to their eligibility for a support payment. This notification is intended to prevent or minimise any overpayments. The CDF is able to reassess eligibility on the basis of the notification and inform the applicant of any changes to eligibility

- Section 6.1.1 provides the purpose of Part 6.
- Section 6.1.2 sets out the applicants that Part 6 applies to.
- Section 6.1.3 provides that an applicant must notify the CDF when there is a change in any of the specified circumstances that affect their eligibility for a support payment.
- Section 6.1.4 sets out when a support payment may be increased because of a change in the applicant's circumstances.
- Section 6.1.5 sets out when a support payment may be decreased and a repayment made because of a change in the applicant's circumstances.

Part 7—Review of decisions

Part 7 sets out a procedure for an applicant who is dissatisfied with certain decisions to request the review of those decisions and the application to which they relate. Part 7 also sets out a procedure for the CDF to initiate a review of a reviewable decision.

Part 7 Division 1—General

Part 7 Division 1 deals with the general provisions relating to the review of decisions.

- Section 7.1.1 provides the purpose of Part 7.
- Section 7.1.2 provides a definition of what a reviewable decision is for the purpose of Part 7 and what decisions are not reviewable.

Part 7 Division 2—Applicant may request a review

Part 7 Division 2 provides how an applicant may request the review of a reviewable decision.

- Section 7.2.1 sets out the basis for an applicant to request the review of a reviewable decision.
- Section 7.2.2 sets out the manner and time limit a request for a review must be made.
- Section 7.2.3 sets out what the CDF must do after a decision has been made on the review of a decision.
- Section 7.2.4 provides that the CDF must provide the applicant with written notice of any decision made and a statement that the person may apply to the Ombudsman for an investigation into the administration of the decision that was reviewed.
- Section 7.2.5 sets out what happens with a decision that is under review during the review and after a decision has been made in regards to the review.

Part 7 Division 3—CDF-initiated review

Part 7 Division 3 provides how a decision-maker can initiate a review of a reviewable decision.

- Section 7.3.1 sets out the basis for the CDF to initiate a review of a reviewable decision.
- Section 7.3.2 provides a time limit on a review initiated under Division 3.
- Section 7.3.3 provides that the CDF must provide the applicant with written notice that a review of a decision is being made and provides the applicant to make a submission about the review.
- Section 7.3.4 provides that the CDF may request further information from an applicant, in relation to the review of a reviewable decision.
- Section 7.3.5 sets out what the CDF must do after a decision has been made on the review of a decision.
- Section 7.3.6 provides that the CDF must provide the applicant with written notice of any decision made and a statement that the applicant may apply for a review of the decision either by the Administrative Appeals Tribunal or under Division 2 of this Chapter.
- Section 7.3.7 sets out what happens with a decision that is under review during the review and after a decision has been made in regards to the review.

Part 7 Division 4—Administrative Appeals Tribunal right to review

Part 7 Division 4 confers on the Administrative Appeals Tribunal authority to review a decision made under section 7.3.6 of the determination if an applicant has applied for a review. The Administrative Appeals Tribunal cannot review a decision that is being reviewed, or has been reviewed under Division 2 of this Chapter or a decision that has been referred to the Ombudsman for investigation, including a decision of the Ombudsman not to investigate the decision.

Part 8—Miscellaneous

Part 8 deals with miscellaneous matters.

- Section 8.1.1 provides the purpose of Part 8.

- Section 8.1.2 sets out an applicant's obligation to provide accurate information in, or in connection with, an application or any request for a review.
- Section 8.1.3 provides the reasons why the Department of Defence is authorised to collect, use and disclose personal information and sensitive information necessary or required for the administration of payments under this Determination.
- Section 8.1.4 provides that the CDF may authorise persons to exercise decision-making powers or functions under this Determination.

Schedule 1—Repeals

Item 1 repeals Defence Determination 2002 (Employer Support Payments) which was superseded by Defence Determination 2012/68, Reserve employer support payments and no longer has any effect.

Item 2 repeals Defence Determination 2002 (Employer Support Payments) Amendment Determination 2003 (No. 1) which no longer has any effect.

Item 3 repeals Defence Determination 2012/68, Reserve employer support payments which has been superseded by this Determination.

Schedule 2—Savings and transitional Provisions

Clause 1 provides definitions for terms used in Schedule 2 and includes definitions of “former Determination” and “new Determination”.

Clause 2 provides that the new Determination only applies to applications made on or after 1 July 2023, unless provided for under Schedule 2.

Clause 3 provides that the former Determination continues to apply for the review of any decision made under the former determination before 1 July 2023.

Clause 4 provides that the former Determination continues to apply for applications made under the former determination which had not been determined before 1 July 2023. The former Determination also continues to apply for those applications in relation to the review of any decision made on or after 1 July 2023.

Clause 5 provides that the former Determination continues to apply for an application that relates to a period of defence service that was completed before 1 July 2023.

Clause 6 provides which Determination applies to an application when a period of defence service commences before 1 July 2023 but is not completed until after that date. The former Determination applies to the period of defence service that commenced before 1 July 2023 and the new Determination applies for the defence service that was performed from 1 July 2023.

Clause 7 provides that the establishment of a member's principal source of income or principal source of employment which has been established under the former determination satisfies paragraph 3.4.1.e and paragraph 3.4.3.3 of the new Determination, if the specified 2 year period has not ended.

Clause 8 provides that section 3.6.4 of the new Determination extends to continuous full-time service that occurred before 1 July 2023.

Defence (Employer Support Payment Scheme) Determination 2023

Statement of Compatibility with Human Rights

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

The purpose of this Determination is to do the following:

- Implement a new Determination, Defence (Employer Support Payment Scheme) Determination 2023, which sets out the provisions for the Employer Support Payment Scheme.
- Repeal a number of determinations that are replaced by the new Determination.
- Provide a scheme of transitional and savings provisions that will preserve accrued rights and liabilities under the former Principal Determination. The provisions also allow for eligibility that started under the former Principal Determination to continue, where applicable, under the new Determination.

Human rights implications

Right to the enjoyment of just and favourable conditions of work

The protection of a person's right to remuneration engages Article 7 of the International Covenant on Economic, Social and Cultural Rights. Article 7 guarantees just and favourable conditions of work, including remuneration, safe and healthy conditions, equal opportunity and reasonable limitations.

Assessment of compatibility

This Determination promotes the right to the enjoyment of just and favourable conditions of work. It provides a benefit that may facilitate the achievement of the objectives of Article 7 by assisting employers who are unable to rely on an employee during a period when the employee is absent on defence service as a member of the Reserves. It may also facilitate the achievement of the objectives of Article 7 by promoting opportunity for employees to provide voluntary service as a member of the Reserves.

The employer support payment assists a business to maintain continuity when an employee is absent on defence service. The payment provided may be used by an employer to procure a locum or contract service during an employee's absence or to make other arrangements that assist in keeping the business running. An additional benefit may also be paid if there is a significant cost due to the absence that cannot be prevented or mitigated.

Conclusion

This Determination is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.