

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Social Security Act 1991

Social Security (Waiver of Debts – Legacy Product Conversions) Specification 2025

Purpose

The *Social Security (Waiver of Debts – Legacy Product Conversions) Specification 2025* (the Specification) is made under subsection 1237AB(1) of the *Social Security Act 1991* (the Act), and specifies two classes of social security debts that may be waived by the Secretary of the Department of Social Services (Secretary, the Department). The effect of the Specification is to specify two classes of debts that may be waived in accordance with subsection 1237AB(1) of the Act, and is beneficial in nature.

The first specified class of debts is particular debts arising under section 1223A of the Act in respect of social security recipients who choose to commute a certain asset-test exempt income stream superannuation product. The relevant commutation is enabled by amendments made to the *Retirement Savings Accounts Regulations 1997* (RSA Regulations) and the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) by the *Treasury Laws Amendment (Legacy Retirement Product Commutations and Reserves) Regulations 2024* (Treasury Amendment Regulations).

The second specified class of debts is particular debts arising under section 1223 of the Act in respect of social security recipients whose superannuation product, due to the operation of the Treasury Amendment Regulations, ceased to satisfy statutory requirements to be classified as an asset-test exempt income stream under the Act. This involves instances where the contract or governing rules for the superannuation product were changed to enable the relevant commutation, but where the social security recipient does not commute the product.

Background

The means test regime prescribed in the Act operates to improve payment targeting in the provision of social security payments. This includes by ensuring social security payments are proportionate to the recipient's means and circumstances. As part of the means test regime, rate calculators prescribed in Chapter 3 of the Act require the application of the 'income test' and the 'assets test' as a step in working out the recipient's final rate of social security payment.

The Act provides that certain financial assets, which include superannuation products, are exempt from being considered in the assets test (see paragraph 1118(1)(d)). If a financial asset is exempt, the social security recipient will receive a higher rate of payment where the assets test applies. However, to maintain the exemption, the relevant income stream must remain compliant with classification requirements prescribed in the Act (see for example sections 9A, 9B and 9BA of the Act). For

example, a relevant requirement for asset-test exemption is that the contract or governing rules for the income stream must provide that the income stream cannot be commuted, except in limited circumstances (see paragraphs 9A(2)(h), 9B(2)(h) and 9BA(2)(f) of the Act).

The Treasury Amendment Regulations, which commenced on 7 December 2024, includes amendments to the RSA Regulations and the SIS Regulations. These have the effect of easing commutation restrictions for a range of legacy retirement products for a set period between 7 December 2024 and 6 December 2029, and creating more flexible ongoing pathways for reserve allocations. The measure applies to legacy lifetime, life expectancy and market-linked superannuation income stream products that commenced prior to 20 September 2007, or were commenced as a result of a conversion of an earlier legacy product that commenced prior to that date (legacy products). For lifetime annuities and lifetime pensions, the commutation relaxation only applies where the fund providing the benefit is not a defined benefit fund, or is a self-managed superannuation fund, or was a small APRA fund (within the meaning of the *Corporations Act 2001*) when the benefit payments commenced and at all earlier times.

Debts arising from commutation

Section 1223A of the Act prescribes when a debt will arise in respect of a social security recipient if their asset-test exempt income stream is commuted in a way that is contrary to the contract or governing rules that applied to the income stream when it commenced. As the asset-test exemption is contingent on the product being non-commutable (except in limited circumstances), this provision is intended to prevent people from avoiding the commutation restrictions whilst benefiting from the concessional assets test treatment. Where section 1223A applies, the debt amount is worked out under subsection 1223A(2) as being the difference between the amount paid by way of social security payment when the income stream was asset-test exempt, and the amount that would have been payable had the income stream been asset tested. Subsection 1223A(3) of the Act provides the period of time for the difference in social security payment that is used in calculating the debt amount.

The Department has identified that, while the Treasury Amendment Regulations provide for the commutation of legacy products during a five-year period, the commutation would be contrary to the fund rules which applied to the income streams when they commenced. This means that section 1223A of the Act will apply to the commutations, and social security debts will arise in respect of recipients who commute their legacy products.

The prospect of incurring such a debt would significantly disincentivise people from taking advantage of the commutation measure provided by the Treasury Amendment Regulations. This would undermine the policy intention behind the measure, which is to support retirees by allowing them to exit products that no longer suit their needs. As such, ensuring these debts are able to be waived is critical to the success of the Treasury Amendment Regulations.

Debts arising from change of contract or governing rules

Section 1223 of the Act further prescribes when a debt will arise against a person for receiving a social security payment for which they were not entitled under the Act. For example, this applies to social security recipients who receive a higher rate of a social security payment than is provided for under the Act.

The Department has further identified that the changes made to the contract or governing rules for the legacy products, to enable the relevant commutations, have caused the legacy products to no longer be asset-test exempt income streams for the purposes of the Act. This is because those changes, which could have taken effect from as early as the commencement of the Treasury Amendment Regulations (7 December 2024), prevent the Secretary from continuing to be satisfied that the legacy products meet certain requirements for asset-test exemption on an ongoing basis, which is a requirement for asset-test exemption under paragraphs 9A(1)(c), 9B(1A)(c) or subparagraph 9BA(1)(a)(v) of the Act (see also paragraphs 9A(2)(h), 9B(2)(h) and 9BA(2)(f)).

This means that, where a relevant social security recipient has elected not to commute their legacy product in accordance with the Treasury Amendment Regulations, or has not yet done so, the income stream product ceased to be asset-test exempt from the time the relevant commutation was made available.

Despite the Treasury Amendment Regulations commencing on 7 December 2024, non-commuted legacy products have continued to be assessed as exempt from the assets test, resulting in the recipient receiving a higher rate of payment than they were entitled to under the Act. This means a debt arises under section 1223 of the Act in relation to the overpayment.

The loss of asset-test exemption in this instance is an unintended ramification of the Treasury Amendment Regulations on the social security system. It is an inappropriate policy outcome for the affected social security recipients, who do not commute their legacy product, to lose asset-test exemption for the product and consequentially incur a debt by operation of section 1223 of the Act.

Specified classes of debts

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 in a class of debts specified by the Minister by legislative instrument. The Specification provides two classes of social security debts that may be waived by the Secretary.

The first specified class of social security debts are those debts incurred by persons who commute legacy asset-test exempt income streams which, prior to commutation, complied with the requirements of either section 9A, 9B or 9BA of the Act. Importantly, a debt may only be in the specified class if it arose because the whole of the income stream was commuted in accordance with specific provisions inserted into the RSA Regulations and the SIS Regulations by the Treasury Amendment Regulations.

The second specified class of social security debts are those debts incurred by persons under section 1223 of the Act, whose non-commuted legacy product ceased

to satisfy statutory requirements for asset-test exemption under the Act due to the operation of the Treasury Amendment Regulations. This class of debts may arise from 7 December 2024 until such a time as the legacy products are reclassified as being asset-test exempt, including by the Secretary making a determination under subsections 9A(5), 9B(4) or 9BA(11) of the Act.

A decision made under subsection 1237AB(1) to waive a debt, as informed by this instrument, is reviewable both internally and externally under Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

Commencement

The Specification commences on the day after the end of the relevant disallowance period with reference to section 42 of the *Legislation Act 2003*. Subsection 1237AB(3) of the Act provides that an instrument made under subsection 1237AB(1) has 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.

However, the provisions do not commence at all if the instrument, or a provision of the instrument, is disallowed or taken to have been disallowed during the disallowance period.

From commencement, the Secretary will be able to consider waiving debts in the classes of debts referred to in the Specification, under subsection 1237AB(1) of the Act. These debts may arise under section 1223 or section 1223A of the Act either before or after the Specification commences.

Consultation

The Department consulted with Services Australia, the Department of Veterans' Affairs and the Department of the Treasury on the text of the Specification. These agencies supported the Specification being made.

It was not necessary to consult with the social security recipients likely to be affected by the Specification given it is purely beneficial in nature.

Impact Analysis

An Impact Analysis is not required, as the Specification is not regulatory in nature, will not impact business activity and will have no, or minimal, compliance costs or competition impact (OIA24-08240).

Explanation of the provisions

Section 1 states that the name of the Specification is the *Social Security (Waiver of Debts – Legacy Product Conversions) Specification 2025*.

Section 2 provides that the instrument will commence on the day after the end of the relevant disallowance period with reference to section 42 of the *Legislation Act 2003*. However, the provisions do not commence at all if the instrument, or a provision of the instrument, is disallowed or taken to have been disallowed during the disallowance period.

Section 3 provides that the Specification is made under subsection 1237AB(1) of the Act.

Section 4 prescribes a list of definitions used in the Specification.

Section 5 specifies the classes of debts that may be waived by the Secretary under subsection 1237AB(1) of the Act.

Paragraphs 5(1)(a) and 5(1)(b) provide that a debt is in the first specified class if it is owed to the Commonwealth by a person under section 1223A of the Act, and did not arise because the person knowingly made a false or misleading statement, or knowingly provided false information to the Commonwealth.

The first specified class of debts must also meet the requirements of paragraph 5(1)(c), which provides that a debt is only in the specified class if it arose because the whole of the income stream was commuted in accordance with those provisions inserted into the RSA Regulations and the SIS Regulations by the Treasury Amendment Regulations, specifically:

- regulation 1.08AA of the *Retirement Savings Accounts Regulations 1997*; or
- regulation 1.05AA of the *Superannuation Industry (Supervision) Regulations 1994*; or
- regulation 1.06C of the *Superannuation Industry (Supervision) Regulations 1994*.

Paragraphs 5(2)(a) and 5(2)(b) provide that a debt is in the second specified class if it is owed to the Commonwealth by a person under section 1223 of the Act, and did not arise because the person knowingly made a false or misleading statement, or knowingly provided false information to the Commonwealth.

The second specified class of debts must also meet the requirements of paragraphs 5(2)(c) and 5(2)(d).

Paragraph 5(2)(c) prescribes a debt may only be in the specified class if it arose because paragraph 9A(1)(c), paragraph 9B(1A)(c) or subparagraph 9BA(1)(a)(v) of the Act is no longer satisfied in relation to the income stream. These provisions stipulate that an income stream ceases to be an asset-test exempt income stream in instances where the Secretary cannot be satisfied that the relevant requirements under subsections 9A(2), 9B(2) or 9BA(2) continue to be met in relation to the income stream. As noted above, subsections 9A(2), 9B(2) and 9BA(2) prescribe requirements for an income stream to be asset-test exempt, including that the contract or governing rules provide that the income stream cannot be commuted, except in limited circumstances (paragraphs 9A(2)(h), 9B(2)(h) and 9BA(2)(f) of the Act).

Paragraph 5(2)(d) prescribes that the relevant debt may only be in the second class of debts if the sole reason why paragraphs 9A(2)(h), 9B(2)(h) and 9BA(2)(f) of the Act ceased to be satisfied is because the contract or governing rules of the income stream were changed to enable the income stream to be commuted in accordance with the provisions inserted into the RSA Regulations and the SIS Regulations by the Treasury Amendment Regulations, specifically:

- regulation 1.08AA of the *Retirement Savings Accounts Regulations 1997*; or
- regulation 1.05AA of the *Superannuation Industry (Supervision) Regulations 1994*; or
- regulation 1.06C of the *Superannuation Industry (Supervision) Regulations 1994*.

Statement of Compatibility with Human Rights

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

Social Security Act 1991

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The *Social Security (Waiver of Debts – Legacy Product Conversions) Specification 2025* (the Specification) 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 Specification is made under subsection 1237AB(1) of the *Social Security Act 1991* (the Act). 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 in a class of debts specified by the Minister by legislative instrument.

The effect of the Specification is to specify two classes of debts that may be waived in accordance with subsection 1237AB(1) of the Act, and is beneficial in nature.

The first specified class of debts is particular debts arising under section 1223A of the Act in respect of social security recipients who choose to commute a certain asset-test exempt income stream superannuation product. The relevant commutation is enabled by amendments made to the *Retirement Savings Accounts Regulations 1997* (RSA Regulations) and the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations) by the *Treasury Laws Amendment (Legacy Retirement Product Commutations and Reserves) Regulations 2024*.

The second specified class of debts is particular debts arising under section 1223 of the Act in respect of social security recipients whose superannuation product, due to the operation of the Treasury Amendment Regulations, ceased to satisfy statutory requirements to be classified as an asset-test exempt income stream under the Act. This involves instances where the contract or governing rules for the superannuation product were changed to enable the relevant commutation, but where the social security recipient does not commute the product.

Human rights implications

The Specification engages the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to an adequate standard of living in Article 11 of the ICESCR.

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.

Article 11 of the ICESCR recognises the right to an adequate standard of living. This recognises the right of everyone to an adequate standard of living for all individuals and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The Specification is compatible with Australia's obligations in relation to the right to social security and the right to an adequate standard of living. The Specification does not restrict a person's eligibility to receive a social security payment or reduce the payments to which a person may be entitled.

This Specification is entirely beneficial, as it specifies two classes of debts that may be waived by the Secretary.

Conclusion

The Specification is compatible with human rights as it promotes and supports the right to social security and the right to an adequate standard of living.

The Hon Amanda Rishworth MP, Minister for Social Services