

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment and Workplace Relations

Social Security (Administration) (Persistent Non-compliance) Determination 2025

AUTHORITY

The *Social Security (Administration) (Persistent Non-compliance) Determination 2025* (the Determination) is made by the Minister for Employment and Workplace Relations (the Minister) under subsection 42M(4) of the *Social Security (Administration) Act 1999* (the Act). In this explanatory statement all references to legislative provisions are to those in the Act unless otherwise indicated.

PURPOSE AND OPERATION

Summary

The Determination replaces the *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No. 1)* (2015 determination) which sunset on 1 October 2025. The Determination is the same as the 2015 determination in all material respects.

Under subsection 42M(4), the Minister is required to determine, by legislative instrument, the matters that the Secretary must consider in deciding whether they are satisfied that a person has been persistently non-compliant with their obligations in relation to a participation payment. Subsection 42M(5) makes clear that in deciding whether a person committed persistent non-compliance, the Secretary must consider the matters specified in that instrument.

If the Secretary is satisfied that a person has committed persistent non-compliance, the Secretary has a further decision to make, namely whether to determine that the person has committed a serious failure. As outlined below, there is potential for compliance action where it is determined that a person has committed a serious failure. However, the Secretary could decide not to determine that a person has committed a serious failure, even if persistent non-compliance has been established, if there is good reason not to make such a determination.

Subsection 42M(6) makes clear that the Determination does not limit the matters that the Secretary may consider in deciding whether the person failed to comply with their obligations.

Section 42M forms part of the Jobseeker Compliance Framework (JSCF) in Division 3A of Part 3, which applies only to “declared program participants” (see section 42B, and section 28C of the *Social Security Act 1991*).

Due to the *Social Security (Declared Program Participant) Determination 2018* (Declared Program Participant Determination) declared program participants are

persons participating in the Community Development Program. As the Community Development Program will be replaced by the Remote Area Employment Service (RAES) from 1 November 2025 it is intended that the Declared Program Participant Determination will be updated so it refers to participants in RAES.

Background

RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities. RAES will support people in remote communities to move into meaningful jobs that communities want, with fair pay and conditions.

The JSCF will continue to be the compliance framework for declared program participants through a period of transition to RAES, to ensure continuity and consistency during such a period.

Section 42M of the Act sets out the basis upon which the Secretary may determine that a person commits a *serious failure* for persistent non-compliance. Under subsection 42M(1) the Secretary may only determine that a person commits a *serious failure* as a result of persistent non-compliance if the person:

- has persistently failed to comply with their obligations in relation to a participation payment; and
- receives an instalment of a participation payment in the instalment period in which the determination is made.

Subsection 42M(2) states that in determining whether a person commits a serious failure the Secretary must not consider failures that were outside the person's control and must only consider failures that occurred intentionally, recklessly or negligently.

Subsection 42M(3) prevents the Secretary from determining that a person commits a serious failure under section 42M if the person is already in a serious failure period due to a determination under subsection 42M(1) or is a new apprentice.

Subsection 42NA(1) provides that before the Secretary determines that a person has committed a serious failure there must be a comprehensive compliance assessment (CCA) regarding the person. Subsection 42NA(2) provides that a CCA must assess the reason for any failures under the JSCF, the reasons for any failures to meet other social security law requirements, whether the person has any barriers to employment, and whether their participation requirements are appropriate.

If satisfied that a person has committed persistent non-compliance, the Secretary may determine that the person has committed a serious failure. If a person is found to have committed a serious failure, it is then necessary to determine whether section 42NC applies.

Section 42NC provides that if the Secretary determines that a person commits a serious failure, the Secretary must also determine that section 42NC applies unless the Secretary is satisfied of two things. These are that the person does not have the capacity to undertake any serious failure requirement and that serving the serious failure period would cause the person to be in severe financial hardship.

If the Secretary determines that section 42NC applies, then the person's payment is not payable to them during a non-payment period known as a serious failure period: section 42P. The person may also be required to comply with a serious failure requirement: subsection 42P(3). The serious failure period is worked out in accordance with subsection 42P(2) and can continue for up to eight weeks after it begins.

The serious failure period may end earlier if the person begins to comply with a serious failure requirement, or the Secretary determines that the person does not have the capacity to undertake any serious failure requirement and serving the serious failure period would cause the person to be in severe financial hardship (section 42Q) or if the person informs the Secretary that they intend to comply with a serious failure requirement imposed upon them (section 42R).

Having a compliance measure for persistent non-compliance provides further incentive for persons to fulfil their mutual obligation requirements, or to inform their provider if there are any issues preventing them from doing so.

All failures that contribute to a determination of persistent non-compliance, as well as the determination that a person has committed a serious failure for persistent non-compliance itself, are potentially subject to review including through internal review within Services Australia, by appeal to the Administrative Review Tribunal (ART) and potentially review by the Federal Court. Both internal review and ART review include merits review. Review by the ART is independent. Both a first and second merits review is available from the ART.

REGULATORY IMPACT

The Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact. The Office of Impact Analysis has determined that detailed analysis is not required under the Australian Government's Policy Impact Analysis Framework.

CONSULTATION

The Department consulted with the National Indigenous Australians Agency and Services Australia in relation to matters dealt with by the Determination.

Extensive consultation has occurred with First Nations people and communities in the establishment of RAES, including on compliance measures. RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities.

The replacement of CDP has been informed by consultation with remote community members, job seekers, peak bodies, First Nations people, CDP providers, CDP participants and other key stakeholders with an interest in remote employment.

Over the past few years, the Government has heard from thousands of people in more than 200 remote communities about the best way to replace the CDP. This was to enable the creation of a jobs program that communities want, supported by employment

services that help young people and job seekers get ready for work. Community consultation and engagement were identified as critical for ensuring job creation efforts align with local priorities and cultural practices.

Broadly, feedback indicated that:

- the new remote employment service should be participant centred with case management to focus on the participant's job readiness pathway.
- the new remote employment service should be planned and led by communities.
- the relationships between providers and participants should be based on reciprocity.

Given that the above consultation occurred and that RAES is designed to ensure that requirements are suitable and to minimise non-compliance, and given that there is some flexibility in decision-making leading to whether relevant compliance action occurs at all, it was not considered necessary to undertake further consultation specifically on the Determination, which is the same in all material respects as the 2015 Determination.

Social Security (Administration) (Persistent Non-compliance) Determination 2025

EXPLANATION OF PROVISIONS

Section 1 – Name of instrument

Section 1 states the name of the Determination.

Section 2 – Commencement information

Section 2 states that the Determination commences on 1 October 2025.

Section 3 – Authority

Section 3 indicates that the Determination is made under subsection 42M(4).

Section 4 – Schedule

Section 4 relates to the Schedule to the Determination, which repeals the 2015 determination.

Section 5 – Definitions

Section 5 contains interpretation provisions. In particular, the term *failure* is defined for the purposes of determining whether a person's failure to comply with participation-related obligations would be regarded as persistent non-compliance under subsection 42M(1).

Section 6 – Matters to be taken into account in determining persistent non-compliance

Section 6 sets out matters that the Secretary must consider in deciding whether a person has persistently failed to comply with their obligations in relation to a 'participation payment'. The term "participation payment" is defined in Schedule 1 to the Act.

Under section 42NA, the Secretary must conduct a CCA in relation to a person before the Secretary can determine that the person has committed a serious failure for persistent non-compliance.

Under paragraph 6(1)(a), the Secretary is required to look at a person's recent compliance history by considering their most recent CCA, to determine whether the person has persistently failed to comply with their participation-related obligations.

Paragraph 6(1)(b) provides that the Secretary must consider whether, in the relevant assessment period, the person has committed three or more failures. In looking at a person's recent compliance history, the Secretary is to take into account the number of failures the person has committed in the six months prior to the start of the person's current CCA, unless, during that six months, the person has already incurred a serious failure under subsection 42M(1) for persistent non-compliance, in which case the

Secretary is only to take into account the failures since the end of the serious failure period applied for that failure.

The intention is that once a person incurs a serious failure, the prior failures which resulted in that serious failure should not be taken into account in determining another serious failure. If the assessment of persistent non-compliance was made simply by taking into account the number of failures incurred in the previous six months, a person who had incurred one serious failure could continue to incur serious failures for each single failure committed thereafter, until they had managed to incur no failures for a full six-month period. It is not intended that persons should incur “rolling” or cumulative eight-week penalties in this way.

Paragraph 6(1)(c) provides that if a person has committed three or more failures in the assessment period the Secretary must consider the number of failures, and whether the failures demonstrate a pattern of non-compliance or should be viewed as a single instance of non-compliance.

The intention is that the Secretary would only be satisfied that a person has committed persistent non-compliance if that conclusion is warranted having regard to the number of failures, the existence or otherwise of a pattern, and other relevant matters whether mentioned in the Determination or not.

The JSCF was inserted by the *Social Security Legislation Amendment (Employment Services Reform) Act 2009*. The explanatory memorandum for that Act says in relation to section 42M that:

The term persistent is used in its ordinary meaning. The non-compliance does not need to be total: a job seeker may be persistently non-compliant over a period despite complying with some or even most of their obligations during that period. The intention of the provision is to deter certain patterns of behaviour. It is therefore intended that a decision maker under paragraph 42M(1)(a) will look at a job seeker’s recent compliance history to determine whether the job seeker has been persistently non-compliant.

Paragraph 6(1)(d) requires the Secretary to consider the extent to which the person has otherwise complied with their obligations in relation to a participation payment during the assessment period. This requires the Secretary to consider the person’s compliance history holistically.

For example, while persistent non-compliance does not mean total non-compliance, a person who committed three no show no pay failures by missing three consecutive days of an activity several months ago but has met their requirements or committed a small number of failures since then would not necessarily be viewed as persistently non-compliant.

The fact that a person has committed three failures, or any other number of failures, does not in itself mean the Secretary could be satisfied that a person has committed persistent non-compliance. Even if a person has committed three or more failures, the Secretary might not be satisfied that they have committed persistent non-compliance.

Further, the only failures that the Secretary can consider for these purposes are those that satisfy subsection 42M(2) of the Act; that is, failures that are not outside the person's control and that occurred intentionally, recklessly or negligently.

Under subsection 6(2), the Secretary is only required to consider a matter that is relevant to determining persistent non-compliance in relation to a participation payment. Subsection 6(2) makes clear that the Secretary is not required to take into account a matter set out in that subsection if it is not relevant to whether a person persistently failed to comply with his or her participation-related obligations.

Section 7 – Transitional arrangements

Section 7 provides that the Determination applies in relation to decisions made on or after 1 October 2025 whether a relevant failure occurred before that date or not. This makes clear that it is the Determination, not the 2015 determination, which applies in connection with decisions made on or after 1 October 2025, i.e. after the Determination is in effect, about whether a person has committed persistent non-compliance. In any event, the content of the two instruments is substantively the same.

This does not amount to retrospective operation for the purpose of section 12 of the *Legislation Act 2003*. In determining whether persistent non-compliance has occurred, it is necessary to look at a person's compliance history before that decision is made. Section 6 of the Determination makes that clear. The 2015 determination included the same provision.

Schedule 1 – Repeals

Schedule 1 to the Determination repeals the 2015 determination.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to 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 such instrument. Subsection 33(3) of the *Acts Interpretation Act 1901* applies to the Act.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2025

The *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2025* (the 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*.

Overview of the Determination under the *Social Security (Administration) Act 1999* (the Act)

The Determination replaces the *Social Security (Administration) (Persistent Non-compliance) (Employment) Determination 2015 (No. 1)* (2015 determination) which sunset on 1 October 2025. The Determination is the same as the 2015 determination in all material respects.

Under subsection 42M(4), the Minister is required to determine, by legislative instrument, the matters that the Secretary must consider in considering whether they are satisfied that a person has been persistently non-compliant with their obligations in relation to a participation payment. Subsection 42M(5) makes clear that in deciding whether a person committed persistent non-compliance, the Secretary must consider the matters specified in that instrument.

If the Secretary is satisfied that a person has committed persistent non-compliance, the Secretary has a further decision to make, namely whether to determine that the person has committed a serious failure. As outlined below, there is potential for compliance action where it is determined that a person has committed a serious failure. However, the Secretary could decide not to determine that a person has committed a serious failure, even if persistent non-compliance has been established, if there is good reason not to make such a determination.

Subsection 42M(6) makes clear that the Determination does not limit the matters that the Secretary may consider in deciding whether the person failed to comply with their obligations.

Section 42M forms part of the Jobseeker Compliance Framework (JSCF) in Division 3A of Part 3, which applies only to “declared program participants” (see section 42B, and section 28C of the *Social Security Act 1991*).

Due to the *Social Security (Declared Program Participant) Determination 2018* (Declared Program Participant Determination) declared program participants are persons participating in the Community Development Program. As the Community Development Program will be replaced by the Remote Area Employment Service (RAES) from 1 November 2025 it is intended that the Declared Program Participant Determination will be updated so it refers to participants in the RAES.

Background

RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities. RAES will support people in remote communities to move into meaningful jobs that communities want, with fair pay and conditions.

The JSCF will continue to be the compliance framework for declared program participants through a period of transition to RAES, to ensure continuity and consistency during such a period.

Section 42M of the Act sets out the basis upon which the Secretary may determine that a person commits a *serious failure* for persistent non-compliance. Under subsection 42M(1) the Secretary may only determine that a person commits a *serious failure* as a result of persistent non-compliance if the person:

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Subsection 42M(2) states that in determining whether a person commits a serious failure the Secretary must not consider failures that were outside the person's control and must only consider failures that occurred intentionally, recklessly or negligently.

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Section 42NC provides that if the Secretary determines that a person commits a serious failure, the Secretary must also determine that section 42NC applies unless the Secretary is satisfied of two things. These are that the person does not have the capacity to undertake any serious failure requirement and that serving the serious failure period would cause the person to be in severe financial hardship.

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Human rights implications

The Determination engages the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions in Article 11 of the ICESCR;
- the provision that countries may subject economic social and cultural rights only to such limitations ‘as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’ as set out in Article 4 of the ICESCR;
- the right of the child to benefit from social security in Article 26 of the Convention on the Rights of the Child (CRC) and the obligation to provide protection and assistance to the family in Article 10 of the ICESCR;
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 27 of the CRC;
- the rights of equality and non-discrimination in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the Convention on the Rights of the Child (CRC), and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Right to social security and right to an adequate standard of living

Article 9 of the ICESCR recognises the right of everyone to social security. The right to social security requires parties to establish a social security system and, within their maximum available resources, ensure access to a social security scheme that provides 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 of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions.

Article 4 of ICESCR provides that countries may subject economic social and cultural rights only to such limitations ‘as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. The Committee on Economic, Social and Cultural Rights has stated that such limitations must be proportional and the least restrictive alternative where several types of limitations are available, and even where such limitations are permitted, they should be of limited duration and subject to review.

The statutory scheme for determining a serious failure engages the right to social security and the right to an adequate standard of living.

A determination of persistent non-compliance or a determination of a serious failure will not impact on persons who comply with their participation obligations. The matters

set out in the Determination assist in ensuring that those who are impacted are only those where there has been a pattern of non-compliance within a person's control and there are no extenuating circumstances which mean that compliance action is not an appropriate measure.

The possible determination of a serious failure for a person who persistently fails to comply with reasonable activities designed to assist them into employment may individually affect a person's amount of social security payment and their ability to provide an adequate standard of living, depending on the extent of the non-compliance. To the extent that the imposition of penalties under the Determination will limit the right to social security and an adequate standard of living, this limitation is compatible with these human rights because the limitation is for a legitimate objective and is reasonable, necessary and proportionate, as outlined below.

Necessary to achieve a legitimate objective

The Determination is aimed at achieving the legitimate objective of encouraging persons receiving social security payments to attend appointments and undertake activities designed to improve their employment prospects, where those persons otherwise might deliberately fail to attend appointments and undertake activities.

It is expected that a person who is able to work and is receiving social security payments should demonstrate that they are actively looking for work and taking other steps to improve their employment prospects.

The limitation is also reasonable because those persons who comply or genuinely cannot comply with their participation requirements will not be adversely affected by the framework, which includes this Determination.

The limitation is necessary because, without the possibility of a significant penalty for persistent non-compliance, there is less incentive for a person to meet their mutual obligation requirements, which are designed to facilitate participation in the workforce. An effective compliance framework provides sufficient incentive for a person to take active steps to meet their requirements and therefore work towards the goal of participating in the workforce.

Reasonable and proportionate

The limitation is reasonable and proportionate. Extensive consultation has occurred with First Nations people and communities in the establishment of RAES, including on compliance measures. RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities.

This will help ensure that those who participate in RAES are less likely to fail to meet requirements – because it will help ensure that requirements are tailored to their circumstances, needs, interests and capacity to comply.

To receive a participation payment a person generally needs to enter and comply with an employment pathway plan, also known as a Job Plan. A Job Plan is a collaborative

agreement between an employment service provider and the person. It outlines a personalised journey that builds on the person's strengths, interests, and aspirations. In developing a Job Plan, the provider and person will be required to identify meaningful activities and opportunities that support the person's growth, enhance their skills, and guide them toward achieving their training and development goals on the pathway to finding and keeping suitable paid work.

Tailored and respectful case management will support RAES participants in achieving meaningful goals, including paid work or community engagement. Case management is about walking alongside the person as they work toward their goals. This includes supporting them to meet their mutual obligation requirements in ways that reflect their strengths, aspirations, and circumstances. Providers must help RAES participants to gain the skills, qualifications, and experiences needed support them along the pathway to finding and keeping suitable paid work. This includes identifying opportunities that align with their interests and local community needs.

There will also be a range of circumstances in which RAES participants, in common with recipients of participation payments generally, may be exempt from requirements.

For example, subsection 40L(2) provides a broad discretion for the Secretary to grant exemptions if satisfied that circumstances beyond the person's control exist and these make it unreasonable to expect the person to comply with employment pathway plan requirements.

Subsection 40L(3) enables the Secretary to exempt a person from employment pathway plan requirements if satisfied in all the circumstances that the person should not be expected to meet those requirements – whether the circumstances are beyond the person's control or not.

There are other exemptions from employment pathway plan requirements in addition to section 40L exemptions and do not limit the scope of section 40L. These include exemptions due to domestic violence (section 40N), caring responsibilities (section 40P) and pre-natal and post-natal circumstances (section 40Q).

One of the aims of the RAES program, as with other employment programs, is therefore to maximise compliance with requirements and to minimise compliance action by ensuring requirements are suitable and only apply where a person could be expected to meet them.

Even if no exemption provision applied, a person might still have a reasonable excuse for not meeting a requirement, in which case there also would be no compliance action.

Serious failures for persistent non-compliance can only be applied in select circumstances. Only failures that are committed intentionally, recklessly or negligently will contribute to a determination of persistent non-compliance. Even in these cases there is discretion as to whether to determine that a serious failure has occurred.

Further, even if it is determined that a serious failure has occurred, compliance action does not necessarily follow: see sections 42NC and 42P.

In addition, those persons who comply or genuinely cannot comply with their participation requirements will not be adversely affected by the Determination.

For example, a person will not commit a participation failure that contributes to a determination of persistent non-compliance if they have a reasonable excuse for any relevant non-compliance and, where applicable and reasonable, they give prior notice of the reasonable excuse. A reasonable excuse may include but is not limited to whether the person or a close family member has suffered a serious illness or whether the person lacked the capacity to advise their provider that they could not attend an appointment.

There are a wide range of circumstances which may amount to a reasonable excuse. When making a decision that a person had a reasonable excuse, the decision maker must take into account a range of factors, including but not limited to whether the person has access to safe housing, their literacy and language skills, unforeseen caring responsibilities, whether the person was affected by an illness, impairment or condition that impeded their ability to meet their requirements.

Persons who incur a serious failure penalty due to persistent non-compliance may also have the financial penalty waived if they agree to undertake an additional compliance activity or if they are unable to do so and are likely to face financial hardship as a result of the penalty.

Accordingly, to the extent that the Determination limits a person's right to social security and an adequate standard of living, the limitation is reasonable and proportionate to achieving the legitimate objective of improving the employment prospects of persons receiving social security payments through encouraging attendance at appointments and participation in activities.

The right to equality and non-discrimination

The rights of equality and non-discrimination are provided for in a number of the international human rights treaties to which Australia is a party, most relevantly the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (the CERD). In particular, article 5 of the CERD requires parties '*to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law*', notably in the enjoyment of '*the right to...social security and social services*' (article 5(e)(iv)).

RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities.

RAES will support people in remote communities to move into meaningful jobs that communities want, with fair pay and conditions. This promotes the right to equality and non-discrimination.

Extensive consultation has occurred with First Nations people and communities in the establishment of RAES, including on compliance measures.

Right to self determination

Article 1 of the ICESCR states that ‘*all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*’.

This Determination does not limit or interfere with the right to self-determination or a person’s right to freely pursue their economic, social or cultural development. Individuals subject to this Determination can continue to receive their payments (however so limited) in a way that is proportionate and fair to others in similar situations.

While the effect of the Determination when considered with the primary legislation limits a person’s payment in certain situations, it does not prevent them from freely pursuing their economic, social or cultural development.

Conclusion

The Determination is compatible with human rights because, to the extent that it may limit human rights, the impact is for a legitimate objective, and is reasonable, necessary and proportionate.

The Hon. Amanda Rishworth, Minister for Employment and Workplace Relations