

EXPLANATORY STATEMENT

Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1)

Summary

The *Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1)* (the Determination) is made by the Minister for Employment Participation (the Minister).

The purpose of the Determination is to determine the method for working out penalty amounts for reconnection failures under the *Social Security (Administration) Act 1999* (the Act).

Background

When a person commits a no show no pay failure or a reconnection failure under the Act, the Secretary must deduct a penalty amount from the person's participation payment (see section 42D for no show no pay failures and section 42L for reconnection failures).

The penalty amount is determined in accordance with an instrument made by the Minister under section 42T of the Act – that is, the Determination. Section 42T provides for certain limitations on the methods by which a penalty amount for a person is calculated:

- a no show no pay penalty cannot be more than 1.4 times the person's instalment of participation payment divided by the number of days in the instalment period (subsection (2));
- the penalty for each day of a reconnection failure period cannot be more than 1.4 times the person's instalment of participation payment divided by the number of days in the instalment period (subsection (3));
- the penalty amount for either penalty cannot affect the person's rent assistance, pharmaceutical allowance or youth disability supplement (if applicable) (subsection (5)).

Penalty amounts

The primary principle underlying reconnection failure penalty amounts is that a person should lose a "working day's payment" for each working day that is in a reconnection failure period (that is, in a period during which they have failed to comply with a reconnection requirement). The primary principle underlying no show no pay failure amounts is that a person should lose a "working day's payment" for failing to participate in an activity in which they are required to participate. To represent a "working day's payment", a person loses an amount of payment equal to the amount of their participation payment for an instalment period divided by the number of weekdays in that instalment period.

A person will still be entitled to any of the following allowances or supplements on a day in a reconnection failure period or for a day in respect of which a no show no pay penalty is applied. These payments are accordingly excluded from the person's penalty affected rate of payment:

- pharmaceutical allowance;
- pension supplement;
- rent assistance;
- remote area allowance;
- youth disability supplement;
- any allowance or supplement that is not part of the person's participation payment (i.e. is a separate social security payment), for example, mobility allowance, pensioner education supplement, telephone allowance etc.

For a fourteen day instalment period, which applies to the majority of payment recipients, the formula included in the Act is used. To avoid unintended consequences arising from shortened instalment periods (i.e. those less than fourteen days), the calculation uses two formulae to arrive at two penalty amounts and the lesser penalty amount is applied (as the formula in the Act is intended to provide for a maximum penalty amount).

This recognises that, in a shorter instalment period, the formula in the Act may result in a penalty amount that is not proportional to the person's actual daily payment amount. That is, a person's daily payment amount represents one fourteenth of the fortnightly payment amount (based on fourteen calendar days in a standard instalment), whereas the penalty amount represents one tenth of the fortnightly payment amount (based on ten business days in a standard instalment). Where a person's instalment period is less than fourteen calendar days and the penalty period includes at least one weekend, the reconnection penalty amount produced using the formula in Section 7(1) of the Determination (that is, the maximum penalty amount provided for by the Act) may exceed the amount payable for the same number of days or may result in an otherwise disproportionate penalty amount. In this case the penalty amount produced using the formula in Section 7(2) of the Determination may be the more appropriate. (See the explanation of Section 7 below for an example.)

Explanation of Provisions

Section 1 states the name of the Determination.

Section 2 states that the Determination commences on 1 July 2012. This is the commencement date of the amendment to the Act under which the penalty calculation is made. This amendment is made by the *Social Security and Other Legislation Amendment (Income Support and Other Measures) Act 2012*.

Section 3 revokes the previous determination, namely, the *Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2009 (No. 1)*

Section 4 contains definitions for the Determination.

The term *weekday* is used in the calculation of both no show no pay and reconnection penalties, and does not exclude public holidays.

Section 5 sets out the method for calculating reconnection penalty amounts for reconnection failure periods. A person's reconnection penalty amount is the sum of the daily penalty rates for each weekday in the reconnection failure period calculated in accordance with Section 7.

Section 6 sets out the method for calculating no show no pay penalty amounts. A person's no show no pay penalty amount for a particular day is the lesser of the daily penalty rates calculated in accordance with section 7.

Section 7 provides for two penalty amount calculations, and a person's *daily penalty rate* for a reconnection failure or their penalty amount for a day on which they commit a no show no pay failure is the lesser of the two.

Both calculations in this section use a person's *penalty-affected rate* as their basis for determining a person's penalty amount. Subsection 7(3) sets out what a person's penalty-affected rate is. It is essentially the amount of participation payment the person receives in the instalment period in which the reconnection or no show no pay failure occurs, including any participation-related allowances and supplements payable to the person during that instalment period (for example, an approved program of work supplement) but not including specified allowances and supplements that do not relate directly to the person's participation (for example, rent assistance).

The *first method* (subsection 7(1)) divides the person's penalty-affected rate by the number of calendar days in the instalment period and multiplies the result by 1.4, to notionally represent the proportion of days to business days in the usual 14 day instalment period. This is the formula included in the primary legislation to calculate the maximum penalty amount that can apply for a day.

The *second method* (subsection 7(2)) divides the person's penalty-affected rate by the number of business days in the instalment period - that is, the number of days during which the person is expected to be available to participate in activities.

The purpose of having two penalty amount calculations is to address the consequences of shortened instalment periods with an atypical proportion of weekends. (Instalment periods can be shortened when a job seeker leaves payment before the end of their instalment period.) The formula in the primary legislation can result in inequitable outcomes when applied to job seekers in such circumstances. For example, under the legislated formula, a person with a 12 day instalment period, including one weekend, who was in a reconnection failure period for eight weekdays would lose 93 per cent of their payment, whereas a person in a 14 day instalment period, which includes two weekends, who was also in a reconnection failure period for eight weekdays, would lose 80 per cent of their payment. Applying the alternative formula would mean that the person on the shortened instalment period would also lose 80 per cent of their payment.

Consultation

The Department of Families, Housing, Community Services and Indigenous Affairs was consulted during the preparation of this determination. This was done to ensure a co-ordinated and consistent approach for all social security payments under the Act.

Regulatory Impact Statement

This Determination does not require a Regulatory Impact Statement (RIS) nor a Business Cost Calculator Figure.

The Determination does not affect the financial or other interests of business or the not-for-profit sector in any direct or substantive way. In addition the Determination is likely to be both minor and machinery in nature.

The Determination does not substantially alter the existing regulatory arrangements currently in place for the imposition of penalties. Any compliance costs that arise from the Determination will be minimal. Limited costs associated with implementing the new calculation for the penalties may be incurred, however once this change has been carried out there will be no additional ongoing compliance costs.

To the extent that the Determination varies existing regulatory arrangements, those changes are consequential changes required as a result of an amendment to the *Social Security (Administration) Act 1999* (the Act).

The Determination will not have any impact on competition.

Statement of Compatibility with Human Rights

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

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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*.

Overview of the Determination

The Determination sets out the methods for working out penalty amounts for reconnection failures and no show no pay failures under the *Social Security (Administration) Act 1999* (the Act). The Act provides the basis for the imposition of penalties, while the Determination provides the method by which the penalty is to be worked out.

Human rights implications

The statutory scheme for imposing penalties for reconnection failures and no show no pay failures engages the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). That article recognises the right of everyone to social security.

The calculation of a penalty under the Determination may be seen to negatively affect that right. However, to the extent that the Determination itself limits the right to social security, there is no incompatibility with human rights because the limitation is both legitimate and reasonable, necessary and proportionate.

The limitation is legitimate because it supports a return to work for those on social security benefits by providing a financial disincentive for people who fail to participate in activities or programs designed to improve employment prospects.

The limitation is reasonable because those persons who comply or genuinely cannot comply with the participation requirements to attend appointments or participate in activities, are not adversely affected.

The limitation is necessary because without the penalties there is less incentive to attend those activities or programs.

The limitation is proportionate because it establishes a direct and equitable connection between the daily penalty amount and a job seeker's fortnightly income support payment.

Conclusion

The Determination is compatible with human rights because, to the extent that it may have an impact on human rights, that impact is legitimate, reasonable, necessary and proportionate.