

## EXPLANATORY STATEMENT

### *Social Security (Administration) (Penalty Amount) Determination 2015 (No. 1)*

#### Summary

The *Social Security (Administration) (Penalty Amount) Determination 2015 (No. 1)* (the Determination) is made by the Assistant Minister for Employment (the Minister) under subsection 42T(1) of the *Social Security (Administration) Act 1999* (the Act).

This Determination gives effect to the amendments made by the *Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Act 2014* with regard to the introduction of non-attendance failures and penalty amounts.

Specifically, the Determination:

- aligns the method for the calculation of the new non-attendance failure penalty amount with the existing method for the calculation of the no show no pay and reconnection failures penalty amounts, as per *Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1)* and the *Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1)*;
- sets out the method for working out penalty amounts for no show no pay failures (section 42C), reconnection failures (section 42H) and non-attendance failures (section 42SC) under the Act;
- revokes and replaces the *Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1)* and the *Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1)*.

#### Background

##### *Existing no show no pay failures, reconnection failures*

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

No show no pay failures are incurred when a job seeker fails to attend an activity (e.g. Work for the Dole or training) or a job interview or when they attend but fail to participate appropriately in an activity or job interview. Reconnection failures are incurred when job seekers fail to meet a reconnection requirement, such as failing to attend a rescheduled appointment with an employment services provider.

There are provisions to ensure that a job seeker is not penalised for a failure that was beyond their control. The delegate of the Secretary must always investigate the circumstances surrounding the failure before determining whether or not to apply any penalty. No penalty should be applied if the job seeker had a reasonable excuse for their actions and, where reasonable to do so, they gave prior notice of that reasonable excuse.

### *Non-attendance failures*

Provisions relating to non-attendance failures and the deduction of a penalty amount for a non-attendance failure will be inserted into the Act from 1 July 2015 by the *Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Act 2014* (the Amending Act).

From 1 July 2015, the Secretary may determine that a person commits a non-attendance failure if the Secretary makes a determination under subsection 42SA(1) of the Act to suspend a person's payment because of the person's failure to attend an appointment referred to in paragraph 42SA(1)(b) or (ba). That is, a failure to attend an appointment required by an Employment Pathway Plan or notified to a person under subsection 63(2) of the Act.

The Secretary must not determine a person has committed a non-attendance failure if the Secretary is satisfied that the person has a reasonable excuse for their failure to attend such an appointment (subsection 42SC(2) of the Act).

If the Secretary determines that a person commits a non-attendance failure, then a penalty amount for the non-attendance failure is to be deducted from the person's instalment of a participation payment for the instalment period determined under subsection 42SC(3) of the Act.

### *Instrument required to determine method for working out penalty amounts*

Subsection 42T(1) of the Act provides that the Minister must, by legislative instrument, determine a method for working out a person's penalty amount for a no show no pay failure or a reconnection failure. From 1 July 2015, subsection 42T(1) will provide that the Minister must also determine the method for working out a person's penalty amount for a non-attendance failure under the Act.

Under section 42T, the methods for the calculation of penalty amounts must not provide for a penalty amount that is more than the following:

- the penalty amount for a no show no pay penalty or 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 (subsections 42T(2) and (3));
- from 1 July 2015, subsection 42T(3A) will provide that the penalty for each day of a non-attendance failure penalty period cannot be more than 1.4 times the person's instalment of participation payment that would, apart from subsection 42SA(2), be payable to the person, divided by the number of days in the instalment period;
- additionally, the penalty amount for any of the above penalties cannot affect the person's rent assistance, pharmaceutical allowance or youth disability supplement (if applicable) (subsection 42T(5)).

### *The penalty amounts – a “working day's payment”*

The primary principle underlying the method for working out the penalty amounts for these failures is that a person should lose a 'working day's payment' for each working day they fail to do what is required of them:

- for a no show no pay failure penalty amount, a person should lose a ‘working day’s payment’ for failing to participate in an activity in which they are required to participate on a particular day;
- for a reconnection failure penalty amount, 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);
- for a non-attendance failure penalty amount, a person should lose a ‘working day’s payment’ for each working day that is in a non-attendance failure penalty period (that is, in the period beginning on the day a person is notified of their failure to attend an appointment and ending on the day before the day on which they are required to attend a reconnection appointment).

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.

*Penalty amount does not affect certain allowances*

Despite these penalty amounts, subsection 42T(5) of the Act provides that a person will still be entitled to the full amount of certain allowances or supplements to which they are entitled. The following payments are excluded when calculating 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.

*Formulae*

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 penalty amount produced using the formula in section 9(2) 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 such cases, the penalty

amount produced using the formula in section 9(3) of the Determination may be the more appropriate (the explanation of section 9 below provides an example).

## **Explanation of Provisions**

### **Section 1 – Name of instrument**

Section 1 provides the name of the Determination is the *Social Security (Administration) (Penalty Amount) Determination 2015 (No. 1)*.

### **Section 2 – Commencement information**

Section 2 provides that the Determination will commence on 1 July 2015. This coincides with the commencement of Schedule 2 of the Amending Act.

### **Section 3 – Authority**

Section 3 specifies the authority for the Determination, which is subsection 42T(1) of the Act.

Subsections 4(1) and 4(2) of the *Acts Interpretation Act 1901* relevantly provide that if an Act is enacted and at a time (the ‘start time’) after its enactment it will confer a power to make an instrument of a legislative character because it will be amended by another Act that has been enacted and that commences at the start time, the power may be exercised before the start time as if the relevant commencement had occurred.

Section 4 of the *Acts Interpretation Act 1901* applies to the Act. The Minister relies upon the specific authority conferred by subsection 4(2) to determine a method for working out a person’s penalty amount for a non-attendance failure under s 42T(1).

### **Section 4 – Revocation**

Subsection 4(1) of the Determination revokes the previous determinations, namely, the *Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1)* and the *Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1)*. The FaHCSIA (now Department of Social Services (DSS)) instrument will be revoked as DSS no longer has administrative responsibility under section 42T of the Act to make such a 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.

Subsection 4(2) of the Determination provides that, despite the revocation in subsection (1), the previous determinations continue in relation to no show no pay failures and reconnection failures that were committed before 1 July 2015. This has the practical effect of ensuring that penalties relating to failures committed before 1 July 2015 are not waived inadvertently, which would necessitate the recalculation of

the penalty amount for the remainder of the penalty period under the new instrument, even though the penalty calculation method would be precisely the same.

For example, if a person commits a reconnection failure on 29 June 2015 and does not comply with a reconnection failure requirement until 3 July 2015, the 2012 determination will continue to apply for the reconnection failure period. The Secretary (or delegate) will also determine the instalment period for the penalty amount to be applied, for example, a period commencing on 6 July 2015.

## **Section 5 – Definitions**

Section 5 contains definitions for the Determination.

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

## **Section 6 – Method for calculating reconnection failure penalty amounts**

Section 6 sets out the method for calculating reconnection failure penalty amounts for reconnection failures. A person's reconnection failure penalty amount is the sum of the daily penalty rates for each weekday in the reconnection failure period, calculated in accordance with section 9 of the Determination.

## **Section 7 – Method for calculating no show no pay failure penalty amounts**

Section 7 sets out the method for calculating no show no pay failure penalty amounts. A person's no show no pay failure penalty amount for a particular day is the daily penalty rate, calculated in accordance with section 9 of the Determination.

## **Section 8 - Method for calculating non-attendance failure penalty amounts**

Section 8 sets out the method for calculating non-attendance failure penalty amounts. A person's non-attendance failure penalty amount is the sum of the daily penalty rates for each weekday in the non-attendance failure penalty period, calculated in accordance with section 9 of the Determination.

## **Section 9 – Penalty amount calculations**

Section 9 provides for two penalty amount calculations. A person's *daily penalty rate* for a reconnection failure or non-attendance 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 9(3) sets out what a person's penalty-affected rate is. A *penalty-affected rate* is essentially the amount of participation payment the person receives in the instalment period in which the reconnection, non-attendance 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*, provided at subsection 9(2), 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 Act to calculate the maximum penalty amount that can apply for a day.

The *second method*, provided at subsection 9(3), divides the person's penalty-affected rate by the number of weekdays 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 calculation methods 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 Act can result in inequitable outcomes that do not reflect a working day's payment when applied to job seekers in such circumstances, and can potentially result in penalty amounts greater than the total instalment. For example, under the formula in the Act, a person with a 12 day instalment period, including one weekend, who was in a reconnection failure period or non-attendance failure penalty 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 or non-attendance failure penalty 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**

Consultation was undertaken with the Department of Social Services in relation to the revocation of the *Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1)*.

No further consultation was undertaken in relation to the Determination because the Determination is of a minor or machinery nature and does not substantially alter existing arrangements. Although the Determination revokes and replaces the previous determinations, it does not alter the method of working out no show no pay failure and reconnection failure penalty amounts. The method of working out the new non-attendance failure penalty amount is the same as the method used to work out the other penalty amounts.

## **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. 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 calculation for the penalties may be incurred by the Department of Human Services, which is solely responsible for the calculation and deduction of penalty amounts. 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 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*

### ***Social Security (Administration) (Penalty Amount) Determination 2015 (No. 1) (the Determination)***

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 under the *Social Security (Administration) Act 1999 (the Act)***

The purpose of the Determination is to:

- align the method for the calculation of the new non-attendance failure penalty amount with the existing method for the calculation of the no show no pay and reconnection failures penalty amounts, as per *Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1)* and the *Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1)*;
- set out the method for working out penalty amounts for no show no pay failures (section 42C), reconnection failures (section 42H) and non-attendance failures (section 42SC) under the Act;
- revoke and replace the *Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2012 (No. 1)* and the *Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1)*.

#### *Non-attendance failures*

Currently, the Secretary has the discretion to suspend a person's payment because of certain participation failures. Once the period of suspension ends, the person then receives back pay, subject to meeting usual eligibility requirements, in respect of that period.

This incentive is not sufficient for job seekers to avoid missing appointments. In 2013-14, over 280,000 job seekers (or more than one in five who receive a participation payment each year) had a participation failure applied by the Department of Human Services for missing a regular appointment or a reconnection appointment with their provider. The possibility of having payment deducted for the days of non-attendance provides a greater incentive to job seekers to attend scheduled appointments in the first place and reduces the financial impact on employment providers from failures to attend. Attendance at appointments is important to ensure job seekers are receiving support to maximise their chance of finding employment. Job seekers who give prior notice (where possible) of a reasonable excuse for missing appointments are not subject to financial penalties.



As a result, the Act was amended by the *Social Security Legislation Amendment (Strengthening the Job Seeker Compliance Framework) Act 2014* (the Amending Act) to introduce non-attendance failures and penalty amounts from 1 July 2015.

The amendments will enable a penalty amount to be deducted from a person's payment for a failure to attend certain appointments (that is, an appointment required by an Employment Pathway Plan or notified to a person under subsection 63(2) of the Act) without reasonable excuse. In practice, this would be equivalent to not providing the person with back pay or reduced back pay. The amount of the penalty will be calculated by this Determination made under subsection 42T(1) of the Act.

#### *No show no pay and reconnection failure penalties*

No show no pay failures are incurred when job seekers fail to attend an activity (for example, Work for the Dole) or a job interview, on a particular day. Reconnection failures apply after a job seeker fails to meet a reconnection requirement (e.g. attend a reconnection appointment after missing an initial appointment) and act as a continuing incentive for job seekers to reengage with employment services. These penalties are not applied if the job seeker has a reasonable excuse for their failure and where, if reasonable, the job seeker gives prior notice of their reasonable excuse. The intention is that job seekers are only penalised for failures that are deliberate and within the job seeker's control.

The amount of a no show no pay failure is calculated to represent a 'working day's payment' i.e. one tenth of a job seeker's total payment for a typical fortnight, with adjustments for shorter instalment periods. Similarly, the penalty for a reconnection failure is calculated to represent a 'working day's payment' for each day within the penalty period.

The imposition of penalties for no show no pay, reconnection and non-attendance failures does not affect a person's entitlement to various supplements and allowances. Consultation was undertaken with the Department of Social Services (DSS) in relation to the revocation of the *Social Security (Administration) (Penalty Amount) (FaHCSIA) Determination 2012 (No. 1)*. No further consultation was undertaken in relation to the Determination because the Determination is of a minor or machinery nature.

### **Human rights implications**

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

Article 9 of the International Covenant on Economic, Social and Cultural Rights (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 imposing penalties for reconnection failures, no show no pay failures and non-attendance failures engages the right to social security and the right to an adequate standard of living.

The calculation of a penalty under the Determination will not impact job seekers who comply with their participation obligations.

However, the possible calculation of a penalty under the Determination for a job seeker who fails to comply with reasonable activities designed to assist them into employment may individually affect a person’s amount of social security payment 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, reasonable, necessary and proportionate, as outlined below.

*Legitimate objective and reasonableness*

The Determination permissibly limits the right to social security and the right to an adequate standard of living in order to achieve the legitimate objective of encouraging persons receiving social security payments to participate in activities or programs designed to improve their employment prospects, where those persons otherwise might deliberately fail to participate in such 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 or undertaking activities to improve their employment prospects.

The limitation is also reasonable because those persons who comply or genuinely cannot comply with the participation requirements to attend appointments or participate in activities, will not be adversely affected by this Determination.

For example, a person will not commit a no show no pay failure, reconnection failure or non-attendance failure (and therefore will not have to pay a penalty amount) if they have a reasonable excuse for any relevant non-compliance and, where reasonable, they give prior notice of the reasonable excuse. A reasonable excuse may include (but it not limited to) whether the person or a close family member has suffered a serious illness or whether the person lacked access to contact their provider that they could not attend an appointment. 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. The matters a decision maker must take into account when making a determination that a person had a reasonable excuse are

outlined in the *Social Security (Reasonable Excuse - Participation Payment Obligations) (DEEWR) Determination 2009 (No. 1)*.

Further, the imposition of such a penalty will not affect a person's entitlement to a range of supplements and allowances, which are not part of their participation payment.

All penalties are potentially subject to review, both within the Department of Human Services and by appeal to the Administrative Appeals Tribunal.

To the extent that the Determination limits a person's right to social security and an adequate standard of living, the limitation is reasonable because those persons who genuinely cannot comply with their obligations will not be given a penalty for failing to attend an appointment.

*Necessary and proportionate*

The limitation on the right to social security and an adequate standard of living is necessary because, without the possibility of a penalty, there is less incentive for a person to attend those activities or programs, which are designed to facilitate participation in the workforce. An ineffective compliance framework has a detrimental impact on job seekers as they are not given a sufficient incentive to take active steps to attend their appointments, and therefore increase their chances of moving off income support and experiencing the benefits of participation in the workforce.

The limitation is also proportionate because it establishes a direct and equitable connection between the daily penalty amount and a job seeker's fortnightly income support payment. Additionally, the Determination includes another formula to arrive at another penalty amount and the lesser penalty is applied. Specifically, it is recognised that in a short instalment period, the formula in the Act may result in a penalty that is not proportional to a person's actual daily payment amount. The Determination provides for two penalty amount calculation methods. This 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, and can result in penalty amounts greater than the job seeker's total instalment

For example, under the formula in the Act, a person with a 12 day instalment period, including one weekend, who was in a reconnection failure period or non-attendance failure penalty 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 or non-attendance failure penalty 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.

In relation to non-attendance failures, a penalty amount will only be able to be deducted in respect of the period from when the notification was given to the job seeker that their payment was first suspended to the day before the person complied, or failed to comply, with the first reconnection requirement, i.e. the first appointment with their employment provider subsequent to the failure which led to the suspension.

This will help ensure that any penalty amounts are relatively small, and therefore proportionate.

Reconnection failures will continue to apply only for the period from when the job seeker failed to comply with a reconnection requirement to the day they do comply with the requirement. For example, job seekers who have a reconnection requirement of attending a reconnection appointment will only be penalised from the day they fail to attend that appointment to the day they do attend a reconnection appointment.

No show no pay failures will continue to apply only for the day in which the job seeker failed to attend an activity.

For those people subject to a no show no pay failure, reconnection failure, or non-attendance failure penalties, the limitation is proportionate as the penalties are connected to a person's actual daily payment amount, and directly targeted at their period of non-compliance.

### **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 to achieving that objective.