

EXPLANATORY STATEMENT

Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Amendment Determination 2017

Summary

The *Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Amendment Determination 2017* (the Amendment Determination) is made under paragraph 8(11)(d) of the *Social Security Act 1991* (the Act). The Amendment Determination allows the Secretary of the Department of Social Services (DSS) to determine that an amount or class of amounts received by a person is an exempt lump sum for the purposes of the Act.

The Amendment Determination amends the *Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Determination 2017* (the 2017 Determination) which applies to a number of different classes of non-economic loss lump sum payments that are compensatory in nature covering a variety of circumstances. The 2017 Determination provides coverage to certain lump sum payments that are not ‘compensation’ as defined in section 17 of the Act. The specified classes of non-economic loss payments are an exempt lump sum for the purpose of paragraph 8(11)(d) of the Act.

The Amendment Determination inserts a new section 8A, which provides that certain payments made under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* are an exempt lump sum for the purpose of paragraph 8(11)(d) of the Act.

The payments included in new section 8A, that were made prior to 12 October 2017, were made under the *Safety, Rehabilitation and Compensation Act 1988* but are now taken to have been made under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*. Those lump sum payments were previously exempt from the operation of the social security income test under section 8 of the *Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Determination 2017*.

Background

Under social security law, an income test is used to determine a person’s eligibility for a social security payment and, if they are eligible, the rate of a social security payment that is payable. An income amount earned, derived or received for a person’s own use or benefit is generally assessable as income. However, some amounts that would otherwise be income are specifically exempted.

Paragraph 8(11)(d) of the Act allows the DSS Secretary to determine that an amount, or class of amounts, is an ‘exempt lump sum’ for the purposes of the Act. An exempt lump sum is excluded from the definition of ‘ordinary income’ under subsection 8(1) of the Act, meaning the lump sum amount is not to be taken into account under the social security income test.

The Amendment Determination extends the application of the exemption under paragraph 8(11)(d) of the Act to recipients of certain payments made under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*, which takes effect from 12 October 2017. The Amendment Determination creates a new class of non-economic loss payments, which are exempt lump sums for the purpose of paragraph 8(11)(d) of the Act.

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The effect of the Amendment Determination is that a person who receives a non-economic loss lump sum payment specified in the Amendment Determination, and who also receives a social security payment, will not have their social security payments reduced as these lump sum payments will not be regarded as income for the purposes of the social security income test.

The exemption of these payments from the income test on receipt does not alter the fact that any ongoing income generated by the lump sum is counted under the income test, and any assessable asset produced from the lump sum is counted under the social security assets test. This is consistent with the treatment of other lump sum payments exempted under paragraph 8(11)(d) of the Act.

This Amendment Determination does not change the operation of the compensation recovery provisions at Part 3.14 of the Act. These provisions will continue to apply to lump sums associated with personal injury that include an element of compensation for economic loss.

The purpose of the payments included in the Amendment Determination is to provide monetary compensation to a person in respect of death, funeral expenses, permanent impairment, interim payments of compensation and non-economic loss under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

The Amendment Determination ensures that a person's social security payment will not be affected if the person receives a specified compensation related payment. If an income test exemption was not provided for the specified compensation related payments, income support recipients who receive a payment could have their income support payments reduced or cancelled, and would therefore not receive the full benefit of the compensation.

Further, there may be health and other costs associated with the event that resulted in the receipt of compensation that will likely be met from the compensation amount received. Accordingly, it would be an unequitable outcome if a person's income support payment was reduced due to the receipt of a compensation payment for non-economic loss.

Explanation of Provisions

Section 1 of the Determination states the name of the Amendment Determination.

Section 2 provides that the Amendment Determination commences on 12 October 2017. This Determination has retrospective effect, but it is beneficial in nature so does not adversely impact on any individual.

Section 3 provides that the 2017 Determination is amended as set out in Schedule 1 of the Amendment Determination.

Schedule 1 of the Amendment Determination

Item 1 adds section 8A to the 2017 Determination. Section 8A provides for payments made under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* for the purposes of section 5 of the 2017 Determination. These payments provide monetary compensation to a person in respect of death, funeral expenses, permanent impairment,

interim payments of compensation and non-economic loss under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*.

Consultation

The Department of Veterans' Affairs and the Department of Agriculture and Water Resources have been consulted about relevant parts of this determination.

Regulatory Impact Analysis

The Determination does not require a Regulatory Impact Statement. The Determination will operate in a beneficial manner. It is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.

Statement of Compatibility with Human Rights

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

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The effect of the Amendment Determination is to amend the *Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Determination 2017* which applies to a number of different classes of non-economic loss lump sum payments that are compensatory in nature covering a variety of circumstances. The Amendment Determination inserts a new section 8A, which provides that certain payments in respect of death, funeral expenses, permanent impairment, interim payments of compensation and non-economic loss under the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* are an exempt lump sum for the purpose of paragraph 8(11)(d) of the Act and therefore will not be assessed as income under the social security law. The payments included in the new section 8A, that were made prior to 12 October 2017, were made under the *Safety, Rehabilitation and Compensation Act 1988*. Those lump sum payments were previously exempt from the operation of the social security income test under section 8 of the *Social Security (Exempt Lump Sums – Payments Compensatory in Nature for Non-Economic Loss) Determination 2017*.

Human rights implications

The Amendment Determination engages the right to social security under Article 9 of the International Covenant on Economic, Social and Cultural Rights (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.

The changes made by the Amendment Determination will operate beneficially as certain compensatory payments will not be taken into account when assessing a person's eligibility or rate of social security entitlements under the social security income test. If the compensatory payment is not exempted, a person in receipt of the compensatory payment may not be eligible for a social security payment or, if they are eligible, their rate of payment might be reduced.

The exemption of these payments from the income test on receipt does not alter the fact that any ongoing income generated by the lump sum is counted under the income test, and any assessable asset produced from the lump sum is counted under the social security assets test. This is consistent with the treatment of other lump sum payments exempted under paragraph 8(11)(d) of the Act.

The exemption provided by the Amendment Determination will ensure that receipt of a relevant compensatory payment will not be taken into account when assessing a person's eligibility or rate of social security entitlements under the social security income test and is therefore consistent with the promotion of the right to social security.

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Conclusion

This Amendment Determination supports a person's human right to social security.

**Anita Davis, Branch Manager, Payability and Integrity Branch, as a delegate of the
Secretary of the Department of Social Services.**