EXPLANATORY STATEMENT

Social Security (Administration) (Penalty Amount) (DEEWR) Determination 2009 (No. 1)

Summary

The Social Security (Administration) (Penalty Amount (DEEWR) Determination 2009 (No. 1) (the Determination) is made by the Minister for Employment Participation (the Minister).

The purpose of the Determination is to determine the methods for working out penalty amounts for no show no pay failures and reconnection failures under the Social Security (Administration) Act 1999 (the Act). These methods are used by the Secretary to determine how much of a person’s participation payment should be deducted for a reconnection failure or a no show no pay failure under 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));
- a reconnection penalty cannot be more than the total of the daily rates of the person’s participation payment payable to the person during the reconnection failure period (subsection (3));
- the penalty amount cannot affect the person’s rent assistance, pharmaceutical allowance, or youth disability supplement (if applicable) (subsection (5)).

Reconnection failure penalty amounts

The primary principle underlying reconnection failure penalty amounts is that a person should not receive a participation payment on a day that is in a reconnection failure period (that is, in a period during which they have failed to comply with a reconnection requirement). However, a person will still be entitled to any of the following allowances or supplements on a day in a reconnection failure period:

- 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.

No show no pay penalty amounts

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 they are required to participate in. 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 business days in that instalment period. As for reconnection failures, a person will still be entitled to any of the following allowances or supplements on a day on which they commit a no show no pay failure:

- 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.

However, the actual calculations of no show no pay penalties endeavour to avoid unintended consequences arising from shortened instalment periods (i.e. those less than 14 days) including weekends, and the effect of reconnection failure periods occurring in instalment periods in which no show no pay failures also occur.

Explanation of Provisions

Section 1 states the name of the Determination.

Section 2 states that the Determination commences on 1 July 2009. This corresponds with the commencement date of the amendment to the Act under which the Determination is made. This amendment is made by the Social Security Legislation Amendment (Employment Services Reform) Act 2009.

Section 3 contains definitions for the Determination.

The term business day is used in the calculation of no show no pay penalties, and does not exclude public holidays. If public holidays were excluded, no show no pay penalties in periods including public holidays would be larger than if they were not excluded from the definition.

The term maximum penalty amount refers back to the limitations on penalties set by subsection 42T(2) and (3) of the Act. The calculations of reconnection and no show no pay penalty amounts ensure that this amounts set in the Act – that is, the maximum penalty amounts – are not exceeded.

Section 4 sets out the method for calculating reconnection penalty amounts. A person’s reconnection penalty amount is simply the sum of the daily penalty amounts
for the days in the person’s reconnection failure period (subject to this not exceeding the relevant maximum penalty amount).

Subsection (2) sets out how a person’s daily penalty amount is calculated – it is the person’s daily rate of participation payment less the amount of specified allowances and supplements payable to the person on that day.

Section 5 sets out the method for calculating no show no pay penalty amounts. A person’s no show no pay penalty amount for a day is the person’s penalty amount for the day (subject to this not exceeding the relevant maximum penalty amount). However, if a person commits a no show no pay failure on a day in a reconnection failure period, their penalty for the no show no pay failure is nil. This ensures that a person will not lose two penalty amounts on the same day, one for a reconnection failure and the other for a no show no pay failure.

A person’s penalty amount for a day is calculated in accordance with section 6. Section 6 provides for two penalty amount calculations, and a person’s daily penalty amount is the lower of these two.

Both calculations in section use a person’s penalty-affected rate as their basis for determining a person’s penalty amount. Subsection 6 (3) sets out what a person’s penalty-affected rate is – the person’s amount of participation payment in the instalment period in which the no show no pay penalty occurs, less specified allowances and supplements payable to the person during that instalment period, as well as any reconnection failure penalty amounts deducted for that period.

The first penalty amount calculation (subsection 6 (1)) divides the person’s penalty-affected rate by the number of business days during which the person is expected to be participating in activities – that is, the number of actual business days in the instalment period less the number of business days in reconnection failure periods during that instalment period.

The second penalty amount calculation (subsection 6 (2)) divides the person’s penalty-affected rate by the number of (calendar) days in the instalment period less the number of (calendar) days in reconnection failure periods 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.

The purpose of having two penalty amount calculations is to address the consequences of:

- shortened instalment periods with an atypical proportion of weekends (such as a 4-day instalment period from Friday to Monday, or a 9-day instalment period from Saturday to the Sunday of the following week); and
- instalment periods in which a large number of days are taken up in reconnection failure periods.

Examples of penalty calculations

The following table sets out a hypothetical 14-day period over which a person (Albert) receives a participation payment, including the daily rate of payment for each
day in that period. Albert does not receive any excluded supplements or allowances during this period. He receives a lower rate of payment from day 5 onwards because he declares some income for this period.

<table>
<thead>
<tr>
<th>No.</th>
<th>Day</th>
<th>Daily Rate ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Friday</td>
<td>40</td>
</tr>
<tr>
<td>2</td>
<td>Saturday</td>
<td>40</td>
</tr>
<tr>
<td>3</td>
<td>Sunday</td>
<td>40</td>
</tr>
<tr>
<td>4</td>
<td>Monday</td>
<td>40</td>
</tr>
<tr>
<td>5</td>
<td>Tuesday</td>
<td>30</td>
</tr>
<tr>
<td>6</td>
<td>Wednesday</td>
<td>30</td>
</tr>
<tr>
<td>7</td>
<td>Thursday</td>
<td>30</td>
</tr>
<tr>
<td>8</td>
<td>Friday</td>
<td>30</td>
</tr>
<tr>
<td>9</td>
<td>Saturday</td>
<td>30</td>
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<tr>
<td>10</td>
<td>Sunday</td>
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<tr>
<td>11</td>
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<tr>
<td>12</td>
<td>Tuesday</td>
<td>30</td>
</tr>
<tr>
<td>13</td>
<td>Wednesday</td>
<td>30</td>
</tr>
<tr>
<td>14</td>
<td>Thursday</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>460</strong></td>
</tr>
</tbody>
</table>

**Example 1**
Albert commits a reconnection failure and his reconnection failure period is from day 4 to day 5.

Albert’s reconnection penalty amount is the lower of:
- the sum of his daily penalty amounts for days 4 and 5 ($40 + $30 = $70); and
- the sum of his daily rates for days 4 and 5 ($40 + $30 = $70).

Since Albert has no excluded allowances and supplements, his daily penalty amounts will equal his daily rates.

**Example 2**
Albert commits a reconnection failure and his reconnection failure period is from day 1 to day 4 (i.e. 2 business days and 2 non-business days).

He also commits a no show no pay penalty on day 4.

Albert’s reconnection penalty amount is $40 + $40 + $40 + $30 = $150.

Albert’s no show no pay penalty for day 4 is $0, as day 4 is in a reconnection failure period (subsection 5 (2) of the Determination).

**Example 3**
Albert commits a reconnection failure and his reconnection failure period is from day 1 to day 4 (i.e. 2 business days and 2 non-business days).

He also commits a no show no pay penalty on day 7.

Albert’s reconnection penalty amount is $40 + $40 + $40 + $30 = $150.

Albert’s no show no pay penalty for day 7 is the lowest of:
- $1.4 \times 460 / 14 = $46 (subsection 42T (2) of the Act);
- (460 – 150) / (10 – 2) = $38.75 (subsection 6 (1) of the Determination); and
- $1.4 \times (460 – 150) / (14 – 4) = $43.40 (subsection 6 (2) of the Determination).

**Example 4**
Albert commits a reconnection failure and his reconnection failure period is from day 1 to day 10 (i.e. 8 business days and 2 non-business days).
He also commits a no show no pay penalty on day 13.

Albert’s reconnection penalty amount is \(4 \times 40 + 6 \times 30 = 340\).

Albert’s no show no pay penalty for day 13 is the lowest of:

- \(1.4 \times \frac{460}{14} = 46\) (subsection 42T (2) of the Act);
- \(\frac{460 - 340}{10 - 6} = 30\) (subsection 6 (1) of the Determination); and
- \(1.4 \times \frac{460 - 340}{14 - 10} = 42\) (subsection 6 (2) of the Determination).

**Example 5**

Albert commits two reconnection failures and his reconnection failure periods are from day 4 to day 8 (i.e. 5 business days) and days 11 and 12 (i.e. 2 business days).

He also commits a no show no pay failure on day 1.

Albert’s reconnection penalty amount is \(40 + 6 \times 30 = 220\).

Albert’s no show no pay penalty for day 1 is the lowest of:

- \(1.4 \times \frac{460}{14} = 46\) (subsection 42T (2) of the Act);
- \(\frac{460 - 220}{10 - 7} = 80\) (subsection 6 (1) of the Determination); and
- \(1.4 \times \frac{460 - 220}{14 - 7} = 48\) (subsection 6 (2) of the Determination).

Note that the reconnection failure penalty is calculated first, even though the no show no pay failure occurred first. This is so that Albert’s penalty-affected rate for the purposes of calculating his no show no pay penalty can be determined. As penalties will be deducted at least one instalment period after the period in which failures occur (see subsections 42C (5) and 42H (5) of the Act), it will be possible to determine reconnection failure penalties and no show no pay penalties in an instalment period sequentially even if the relevant failures occur the other way around.

**Consultation**

Consultations were undertaken with the following organisations.

- Homelessness Australia (HA);
- Catholic Social Services Australia;
- Mission Australia;
- National Employment Services Association;
- National Welfare Rights Network
- Australian Council of Social Service;
- Commonwealth Ombudsman’s office; and
- Centrelink

The organisations consulted were provided with a draft of the Determination and were invited to provide comments at a forum held on 12 March 2009.

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. This Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.