**EXPLANATORY STATEMENT**

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

**Summary**

Paragraph 8(11)(d) of the *Social Security Act 1991* (the Act) 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 effect of this Determination is that a non-economic loss lump sum payment that is compensatory in nature is an exempt lump sum under paragraph 8(11)(d) of the Act.

**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.

This Determination applies to a number of different classes of non-economic loss lump sum payments that are compensatory in nature and which are made in a variety of circumstances. The 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 effect of this Determination is that a person who receives a non-economic loss lump sum payment specified in the 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 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.

**Purpose**

The purpose of the payments included in this Determination is to provide monetary compensation to a person in respect of:

* a criminal injury;
* the death of a close relative;
* discrimination, harassment, breach of human rights or breach of privacy;
* non-economic loss under the Fair Work Act 2009, other than where compensation was paid to a person for being unfairly dismissed;
* loss as a result of negligent provision of professional services;
* a personal injury, disease or condition;
* death benefits;
* insurance in respect of specified medical trauma or event; and
* death and permanent impairment under the Safety, Rehabilitation and Compensation Act 1988 or the Military Rehabilitation and Compensation Act 2004.

This 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 these 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 Determination.

**Section 2** provides that the Determination commences on the day after it is registered.

**Section 3** provides that the authority for making this Determination is paragraph 8(11)(d) of the Act.

**Section 4** provides definitions of certain terms used in the Determination.

Close relative is defined as a person who is a partner; a parent, including a step-parent, foster parent or adoptive parent; a child, including a step-child foster child or adopted child; or a sibling, including a foster- brother or foster-sister.

Misconduct means any conduct that constitutes fraud, negligence, default, breach of trust, breach of duty or any other misconduct in the course of duty.

**Section 5** sets out the type of compensation payments that are exempt for the purposes of paragraph 8(11)(d) of the Act.

Under paragraph 5(1)(a), the gross amount of a payment covered by subsection 5(3) or sections 6 to 10 of the Determination is an exempt lump sum. Some one-off lump sum payments that are compensatory in nature may consist of components that cover both economic and non‑economic loss. For the purposes of this Determination, only the non-economic loss component of these types of one-off lump sum payments will be exempt from the social security income test.

Under paragraph 5(1)(b), unless paragraph 5(1)(c) applies, the gross amount of the lump sum payment that is exempt does not include:

1. any component of the compensation payment that relates to lost earnings or a lost capacity to earn; or
2. a lump sum payment that is received instead of periodic payments for a set period (that is, a lump sum payment calculated at a set weekly, fortnightly or monthly rate over a specific period). In these cases the lump sum payment is treated as if periodic payments were being made throughout the relevant period.

Paragraph 5(1)(c) provides that the gross amount of the lump sum payment that is exempt is to be reduced by 50% where:

1. the lump sum payment is made (either with or without admission of liability) in settlement of a claim relating wholly or partly to economic loss, by consent judgment or otherwise; and
2. the component of the lump sum payment that is made in respect of lost earnings or capacity to earn is not identified; and
3. the settlement does not represent a lump sum that is paid instead of periodic payments (as such lump sums should be captured by paragraph 5(1)(b)(ii)).

Subsection 5(2) provides that payments covered by section 7 (payments made under the Military Rehabilitation and Compensation Act 2004) are to be exempt in full, and not reduced under paragraphs 5(1)(b) or (c).

For the purposes of subsection 5(1), subsection 5(3) covers the following payments:

1. a payment made under a Commonwealth, State or Territory law to certain victims of crime to assist in their recovery and in recognition of a personal injury suffered, or a disease or condition contracted, as a result of the commission of an offence. This may include payments made to a family member of a person who was injured or killed.
2. a payment made under a Commonwealth, State or Territory law or in accordance with an international agreement to which Australia is a party that applies to air travel to a person on the death of a close relative for pain and suffering, or expenses related to the relative’s medical treatment or funeral;
3. a payment made under a Commonwealth, State or Territory law for discrimination or harassment, breaches of human rights and breaches of privacy. This may include, but is not limited to, issues of race, age, disability, sex and religion;
4. a payment of compensation made under the Fair Work Act 2009 in respect of non-economic loss, other than compensation paid to a person for being unfairly dismissed (within the meaning of the Fair Work Act 2009);
5. any of the following payments in respect of loss (not including personal injury) as a result of misconduct in the provision of professional services:
	1. a payment of compensation; or
	2. a payment under an insurance scheme that applies to particular professional services; or
	3. the settlement of a claim for damages (whether or not accompanied by an admission of liability).

Subsection 5(4) provides that a payment mentioned in paragraph 5(3)(b) includes a one-off payment which could be more than that prescribed or calculated under the relevant law or in accordance with the relevant international agreement.

**Section 6** sets out that, for the purposes of section 5, the following payments are covered:

1. a payment made under a contract of insurance:
	1. on the death of a person insured under the contract if a minimum benefit determined under the contract is payable; or
	2. in respect of a medical trauma or medical event specified in the contract;

as specified in the insured person’s policy.

1. a payment made by a superannuation fund of a death benefit on the death of a fund member to a person nominated or entitled to receive the benefit.

**Section 7** provides for payments made under the Military Rehabilitation and Compensation Act 2004 for the purposes of section 5. These payments relate to lump sum payments for death and permanent impairment, as specified in this section, which are paid by the Department of Veterans’ Affairs.

**Section 8** provides for payments made under the Safety, Rehabilitation and Compensation Act 1988 for the purposes of section 5. These payments relate to lump sum payments for death and permanent impairment, as specified in this section, which are paid by the Department of Veterans’ Affairs.

**Section 9** provides for payments made under the Defence Determination 2016/19, Conditions of service for the purposes of section 5. These payments relate to lump sum payments for additional death benefit and severe injury adjustment, as specified in this section, which are paid by the Department of Veterans’ Affairs. References in this section to the Defence Determination 2016/19, Conditions of service are intended to be a reference to that instrument as in force from time to time.

**Section 10** provides for payments relating to personal injuries, etc. Subsection 10(1) provides that subject to subsection 10(2) and for the purposes of subsection 5, section 10 applies to a payment made in Australia that relates to a personal injury, disease, condition or medical procedure that constitutes:

1. a payment of damages; or
2. a payment under an insurance or compensation scheme made under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or
3. a payment made (either with or without admission of liability) in settlement of a claim for damages;
4. a payment in the nature of compensation or damages.

At paragraph 10(1)(a)(i), “personal injury” is intended to include harm (whether physical or psychological) caused by physical or sexual abuse.

Subsection 10(2) specifies that:

1. an income protection payment;
2. a total and permanent disability or incapacity payment;
3. a total and temporary disability payment;
4. a permanent and partial disability payment;

that is paid as a lump sum under:

1. a sickness or accident insurance policy; or
2. a group insurance policy arranged by the trustees of a superannuation fund;

is not covered under subsection 10(1) (no matter how it is described in a relevant policy document).

**Consultation**

The Department of Veterans’ Affairs, the Department of Agriculture and Water Resources and the Department of Human Services 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*

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

The effect of the Determination is that a person who receives a Payment Compensatory in Nature for Non-Economic Loss (Compensatory Payment) will not have that Compensatory Payment assessed as income under the social security law.

*Human rights implications*

The 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 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 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.

*Conclusion*

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

**Anita Davis, Acting Branch Manager, International and Means Test Policy Branch, as a delegate of the Secretary of the Department of Social Services.**