EXPLANATORY STATEMENT

Issued by the authority of the Secretary of the Department of Social Services

Social Security Act 1991

Social Security (Exempt Lump Sum - Certain Commonwealth Discretionary Payments) Determination 2025

Purpose

The *Social Security (Exempt Lump Sum - Certain Commonwealth Discretionary Payments) Determination 2025* (the Determination) ensures that an amount of certain discretionary payments made by the Commonwealth to a social security recipient is an exempt lump sum under paragraph 8(11)(d) of the *Social Security Act 1991* (the Act).

The Determination applies to payments made under the Compensation for Detriment Caused by Defective Administration scheme and act of grace payments made by the Commonwealth in lieu of an amount paid under the social security law, the family assistance law, the *Student Assistance Act 1973*, the ABSTUDY Scheme, the Assistance for Isolated Children Scheme or the *Paid Parental Leave Act 2010*, or to reimburse expenses incurred by a person due to the administration of this legislation or schemes.

By determining that these discretionary payments are exempt lump sums under the Act, the amount of such a payment will not be assessed as income for the purposes of the recipient's social security payment.

Background

Exempt lump sums

An income amount earned, derived or received for a person's own use or benefit is generally assessed as income under the social security law. However, paragraph 8(11)(d) of the Act allows the Secretary of the Department of Social Services, or their delegate, to determine that an amount, or class of amounts, received by a person is an exempt lump sum for the purposes of the Act.

An exempt lump sum is excluded from the definition of "ordinary income" in subsection 8(1) of the Act. This means the amount is not taken into account under the social security income test, and will not have any effect on the person's social security payment.

The exemption of a lump sum payment from the income test does not affect the assessment of any ongoing income generated by the lump sum, nor any assessable asset produced from the lump sum. These will be counted under the social security income and assets tests respectively. This is consistent with the treatment of other amounts as exempt lump sums under paragraph 8(11)(d) of the Act.

Certain Commonwealth discretionary payments

The Determination exempts Commonwealth discretionary payments made under the Compensation for Detriment Caused by Defective Administration (CDDA) scheme, and act of grace payments made under section 65 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

The CDDA scheme is a discretionary payment scheme which provides compensation to people who have experienced detriment as a result of defective administration by a non-corporate Commonwealth entity. This may include circumstances where the entity did not comply with existing administrative procedures, or gave incorrect advice in the circumstances.

Act of grace payments are made under section 65 of the PGPA Act, and are also discretionary. An act of grace payment may be made where a decision-maker considers it is appropriate in the special circumstances of the case.

Determination

This Determination repeals the current determination, the *Social Security Exempt Lump Sum (Certain Commonwealth Discretionary Payments) Determination 2015* (2015 Determination), which is due to sunset on 1 October 2025. The Determination remakes the 2015 Determination in broader but similar terms.

In relation to the two types of discretionary payments above, the Determination applies to exempt such payments (referred to in the Determination as "compensation payments") from the social security income test, in two particular situations, which both relate to the social security law, the family assistance law, the *Student Assistance Act 1973*, the ABSTUDY Scheme, the Assistance for Isolated Children Scheme or the *Paid Parental Leave Act 2010*.

These two circumstances are specified in section 6 of the Determination. The order of the two circumstances has been reversed from the 2015 Determination, and the requirements relating to payments in lieu have largely been retained.

However, the Determination removes the reference to payments under section 23 of the PGPA Act from the definition of "compensation payment". While section 23 may be relevant in making CDDA payments and certain act of grace payments, it is intended that only CDDA payments and act of grace payments are exempt lump sums under the Determination. That is, any other Commonwealth payments made in accordance with section 23 (for example, under a contract or agreement) are not intended to be included.

The Determination also removes the reference to payments in lieu of an amount paid under the *Business Services Wage Assessment Tool Payment Scheme Act 2015*, as payments are no longer made under this Act.

The Determination also includes references to the *Student Assistance Act 1973*, the ABSTUDY Scheme and the Assistance for Isolated Children Scheme, which are not contained in the 2015 Determination. This is to ensure that compensation payments made in lieu of payments in accordance with the *Student Assistance Act 1973*, the ABSTUDY Scheme or the Assistance for Isolated Children Scheme, or to reimburse expenses incurred due to the administration of that Act or schemes, are also clearly disregarded as income for social security purposes, similar to the treatment of other income support payments.

The terms "ABSTUDY Scheme" and "Assistance for Isolated Children Scheme" are used in the *Student Assistance Act 1973*, and these schemes are largely administered in accordance with the ABSTUDY Policy Manual and the Assistance for Isolated Children Scheme Guidelines respectively. These policy guidelines are available on the Department of Social Services' website at https://guides.dss.gov.au.

The Determination expands the exemption relating to the reimbursement of expenses, by removing the requirement that the expenses must have been incurred due to an administrative error made by the Human Services Department (which is Services Australia). Instead, the compensation payment for the reimbursement of expenses must be due to the administration of the social security law, the family assistance law, the *Student Assistance Act 1973*, the ABSTUDY Scheme, the Assistance for Isolated Children Scheme or the *Paid Parental Leave Act 2010*.

That is, while a compensation payment for the reimbursement of expenses may be due to an administrative error, this is no longer required for the payment to be an exempt lump sum under the Determination. The reference to administration of the relevant legislation or schemes in paragraph 6(b) of the Determination is intended to include, but apply more broadly than, situations where an administrative error or defective administration occurs. This may involve circumstances where the legislation or scheme is correctly administered, for example, a social security arrears payment is made, a family assistance debt is waived or a claim for parental leave pay is correctly rejected, in accordance with the legislation. However, this administration may warrant a CDDA or act of grace payment to reimburse expenses where it involves, for example, failure to comply with administrative procedures relating to timeliness, or an unintended or anomalous impact of legislation or policy.

Further, the Determination applies to compensation payments relating to any relevant Commonwealth agency administering the legislation above, and not just Services Australia. For example, the Department of Social Services and the Department of Employment and Workplace Relations currently have responsibility for administering certain aspects of the social security law, and may make CDDA payments in respect of their defective administration, for example, which satisfies the requirements to be an exempt lump sum under the Determination. This ensures that the social security income test exemption applies to additional but similar types of compensation payments.

Authority

The Determination is made under paragraph 8(11)(d) of the Act, which provides that the Secretary may determine an amount, or class of amounts, to be an exempt lump sum for the purposes of the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to revoke such instrument. In repealing the 2015 Determination, the Secretary is relying on this provision in conjunction with the power in paragraph 8(11)(d) of the Act.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003* and is subject to disallowance.

Commencement

The Determination commences on the day after it is registered on the Federal Register of Legislation.

Consultation

The Department of Social Services consulted the Department of Employment and Workplace Relations and Services Australia on the text of the Determination because compensation payments made by these agencies are included in the Determination. These agencies supported the Determination.

The Department of Social Services also consulted the following agencies on the intention to make this Determination:

- the Department of Agriculture, Fisheries and Forestry because paragraph 8(11)(d) determinations apply automatically under the *Farm Household Support Act 2014*; and

- the Department of Veterans' Affairs because paragraph 8(11)(d) determinations apply automatically under the *Veterans' Entitlements Act 1986*.

The above agencies supported the Determination.

The Department of Social Services did not consult with income support recipients likely to be affected by the Determination, given it is beneficial in nature. The Determination is a revised version of the 2015 Determination and will apply more broadly, but serves the same purpose as the

2015 Determination in terms of providing an income test exemption for relevant compensation payments.

Availability of independent review

A decision made under the social security law, as informed by the Determination, is subject to internal and external review under Parts 4 and 4A of the *Social Security (Administration) Act 1999*.

<u>Explanation of the provisions</u>

Details of the *Social Security (Exempt Lump Sum - Certain Commonwealth Discretionary Payments) Determination 2025*

Part 1 - Preliminary

Section 1 – Name

Section 1 states how the Determination is to be cited, that is, as the *Social Security (Exempt Lump Sum - Certain Commonwealth Discretionary Payments) Determination 2025*.

Section 2 - Commencement

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

Section 3 – Authority

Section 3 provides that the Determination is made under paragraph 8(11)(d) of the *Social Security Act 1991.*

Section 4 – Definitions

Section 4 contains definitions of certain terms used in the Determination.

The terms “Act”, “family assistance law” and “social security law” are defined in section 4.

The term “compensation payment” is defined in section 4 as a payment under:

(a) the Compensation for Detriment Caused by Defective Administration scheme (CDDA Scheme); or
(b) section 65 of the *Public Governance, Performance and Accountability Act 2013*.

Section 5 – Schedules

Section 5 provides that each instrument that is specified in a Schedule to the Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Determination has effect according to its terms.

Section 6 – Exempt lump sum

Section 6 specifies the amounts determined by the Secretary to be exempt lump sums, in accordance with paragraph 8(11)(d) of the Act.

Section 6 requires that an exempt lump sum is a compensation payment made under the CDDA Scheme, or an act of grace payment made under section 65 of the PGPA Act, in circumstances where:

(a) the compensation payment is made to a person in lieu of an amount under the social security law, the family assistance law, the *Student Assistance Act 1973*, the ABSTUDY Scheme, the Assistance for Isolated Children Scheme or the *Paid Parental Leave Act 2010.*

This is the case where a payment has not been made to the person under any of these laws or schemes, as applicable, but a compensation payment is made to the person instead that is equivalent to the amount the person has not received under the relevant law or scheme. For example, this may be the case where the relevant law does not enable an amount to be paid to the person in the circumstances.

An example of this situation is where Services Australia has inadvertently failed to action information which would have increased a person's social security payment at a particular time, and it is not now possible to pay arrears back to that time due to the limitations imposed by the date of effect provisions in the *Social Security (Administration) Act 1999*. In this situation a CDDA payment may be made instead of an arrears payment under the social security law, to compensate the person for the detriment they have incurred; or

(b) to reimburse expenses incurred by a person as a result of the administration of the social security law, the family assistance law, the *Student Assistance Act 1973*, the ABSTUDY Scheme, the Assistance for Isolated Children Scheme or the *Paid Parental Leave Act 2010.*

This requires that, whether the above legislation or schemes are administered correctly or incorrectly, there must be something involved in the administration of the legislation or schemes that causes the person to incur expenses for which a compensation payment is warranted. This may be any of the circumstances for which a CDDA or act of grace payment may be made, for example, where Services Australia has given incorrect or ambiguous advice in relation to the legislation or scheme, or their actions in applying the legislation or scheme has caused an unintended and inequitable result for the person.

The administration of the legislation or scheme may be in relation to the person who incurred the expenses, or to another person, such as their partner, but the compensation payment must be paid to the person who incurred the expenses for the payment to be an exempt lump sum in respect of assessing that person's social security entitlements. It is possible that the person may also receive a compensation payment specified in paragraph 6(a) of the Determination relating to the same circumstances.

In relation to the example at (a) above, the CDDA payment made in lieu of an arrears payment under the social security law, due to Services Australia's defective administration, may also include an amount to reimburse the person for expenses incurred as a result of that same defective administration. That is (applying the same example), in administering the social security law, Services Australia inadvertently failed to action relevant information and the person received a lower rate of social security payment than they should have, and have incurred expenses as a result.

Examples of expenses that may be reimbursed by a compensation payment include late payment fees incurred on bills, and interest incurred on payday loans.

Schedule 1 - Repeals

Item 1 of Schedule 1 repeals the *Social Security Exempt Lump Sum (Certain Commonwealth Discretionary Payments) Determination 2015*. This instrument is due to sunset on 1 October 2025.

The Determination is intended to remake the 2015 Determination in broader but similar terms. The Determination serves the same purpose as the repealed instrument in terms of providing an income test exemption for relevant compensation payments.

Statement of Compatibility with Human Rights

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

Social Security (Exempt Lump Sum - Certain Commonwealth Discretionary Payments) Determination 2025

The *Social Security (Exempt Lump Sum – Certain Commonwealth Discretionary Payments) Determination 2025* (the Determination) is compatible with the 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 legislative instrument

The Determination ensures that an amount of certain discretionary payments made by the Commonwealth to a social security recipient is an exempt lump sum under paragraph 8(11)(d) of the *Social Security Act 1991* (the Act).

The Determination applies to payments made under the Compensation for Detriment Caused by Defective Administration scheme and act of grace payments made by the Commonwealth in lieu of an amount paid under the social security law, the family assistance law, the *Student Assistance Act 1973*, the ABSTUDY Scheme, the Assistance for Isolated Children Scheme or the *Paid Parental Leave Act 2010*, or to reimburse expenses incurred by a person due to the administration of this legislation or schemes.

By determining that these discretionary payments are exempt lump sums under the Act, the amount of such a payment will not be assessed as income for the purposes of the recipient’s social security payment.

Human rights implications

The Determination engages the right to social security and the right to an adequate standard of living.

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right to social security and requires a social security scheme to be established under domestic law 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 to an adequate standard of living, which provides that everyone is entitled to adequate food, clothing and housing and to the continuous improvement of living conditions.

Under the Act, social security payments are subject to a means test which assess the person's income and assets to determine their eligibility for the payment, and their rate of payment. The Determination operates beneficially as a discretionary 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. This exemption also flows through to means tested payments under the *Veterans' Entitlements Act 1986* and the *Farm Household Support Act 2014*.

If the discretionary payments are not exempted, a person in receipt of such a payment may not be eligible for an income support payment or, if they are eligible, their rate of payment might be reduced.

Conclusion

This Determination is compatible with human rights as it promotes and supports a person's right to social security and the right to an adequate standard of living.

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