

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Employment and Workplace Relations

### **Social Security (Administration) (Penalty Amount) Determination 2025**

#### **AUTHORITY**

The *Social Security (Administration) (Penalty Amount) Determination 2025* (the Determination) is made by the Minister for Employment and Workplace Relations (the Minister) under subsection 42T(1) of the *Social Security (Administration) Act 1999* (the Act). In this explanatory statement all references to legislative provisions are to those in the Act unless otherwise indicated.

#### **PURPOSE AND OPERATION**

##### **Summary**

This Determination replaces the *Social Security (Administration) (Penalty Amount) Determination 2015 (No. 1)* (2015 determination) which sunset on 1 October 2025.

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, a reconnection failure, or a non-attendance failure under the Act.

The Determination is the same as the 2015 determination in all material respects. It maintains the existing 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.

Those provisions form part of the Jobseeker Compliance Framework (JSCF) in Division 3A of Part 3, which applies only to "declared program participants" (see section 42B, and section 28C of the *Social Security Act 1991*).

Due to the *Social Security (Declared Program Participant) Determination 2018* (Declared Program Participant Determination) declared program participants are persons participating in the Community Development Program (CDP). As the Community Development Program will be replaced by the Remote Area Employment Service (RAES) from 1 November 2025 it is intended that the Declared Program Participant Determination will be updated so it refers to participants in RAES.

##### **Background**

RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities. RAES will support people in remote communities to move into meaningful jobs that communities want, with fair pay and conditions.

The JSCF will continue to be the compliance framework for declared program participants through a period of transition to RAES, to ensure continuity and consistency during such a period.

### *Non-attendance failures*

The Secretary may determine that a person commits a non-attendance failure if the Secretary makes a determination under subsection 42SA(1) to suspend a person's payment because of the person's failure to attend an appointment referred to in paragraphs 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).

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)).

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) (section 42SD).

### *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 for no show no pay failures, and section 42L for reconnection failures).

No show no pay failures are incurred when a person fails to attend a job interview or other activity or when they attend but fail to participate appropriately in a job interview or other activity they are required to undertake in their employment pathway plan. Reconnection failures are incurred when a person fails 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 person 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 person had a reasonable excuse for their actions and, where reasonable to do so, they gave prior notice of that reasonable excuse.

### *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, a reconnection failure, or 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));
- 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 (subsection 42T(3A));

- 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 certain failures including, for example, failing to participate in an activity which their employment pathway plan requires them to undertake, or intentionally acting in a manner where it is reasonably foreseeable that acting in that manner could result in an offer of suitable paid work not being made to the person;
- 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 subsection 10(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 subsection 10(3) of the Determination may be the more appropriate.

### *Review rights*

All decisions that a person has committed a failure, resulting in a penalty amount being calculated under the Determination, are potentially subject to review including through internal review within Services Australia, by appeal to the Administrative Review Tribunal (ART) and potentially review by the Federal Court. Both internal review and ART review include merits review. Review by the ART is independent. Both a first and second merits review is available from the ART.

## **REGULATORY IMPACT**

The Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact. The Office of Impact Analysis has determined that detailed analysis is not required under the Australian Government's Policy Impact Analysis Framework.

## **CONSULTATION**

The Department consulted with the National Indigenous Australians Agency and Services Australia in relation to matters dealt with by the Determination.

Extensive consultation has occurred with First Nations people and communities in the establishment of RAES, including on compliance measures. RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities.

The replacement of CDP has been informed by consultation with remote community members, job seekers, peak bodies, First Nations people, CDP providers, CDP participants and other key stakeholders with an interest in remote employment.

Over the past few years, the Government has heard from thousands of people in more than 200 remote communities about the best way to replace the CDP. This was to enable the creation of a jobs program that communities want, supported by employment services that help young people and job seekers get ready for work. Community

consultation and engagement were identified as critical for ensuring job creation efforts align with local priorities and cultural practices.

Broadly, feedback indicated that:

- the new remote employment service should be participant centred with case management to focus on the participant's job readiness pathway.
- the new remote employment service should be planned and led by communities.
- the relationships between providers and participants should be based on reciprocity.

Given that the above consultation occurred and that RAES is designed to ensure that requirements are suitable and to minimise non-compliance, and given that there is some flexibility in decision-making leading to whether relevant compliance action occurs at all, it was not considered necessary to undertake further consultation specifically on the Determination, which is the same in all material respects as the 2015 Determination.

## **Social Security (Administration) (Penalty Amount) Determination 2025**

### **EXPLANATION OF PROVISIONS**

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

Section 1 provides the name of the Determination is the *Social Security (Administration) (Penalty Amount) Determination 2025*.

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

Section 2 provides that the Determination will commence on 1 October 2025

#### **Section 3 – Authority**

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

#### **Section 4 – Schedule**

Section 4 relates to the Schedule, which repeals the 2015 determination.

#### **Section 5 – Definitions**

Section 5 contains definitions of terms used in the Determination.

#### **Section 6 – Transitional arrangements**

Section 6 provides that the Determination applies in relation to decisions made on or after 1 October 2025 whether a relevant no show no pay failure, non-attendance failure, or reconnection failure occurred before that date or not.

This makes clear that it is the Determination, not the 2015 determination, which applies in connection with decisions or calculations which rely on the Determination made on or after 1 October 2025, i.e. after the Determination is in effect. In any event, the content of the two instruments is substantively the same. Calculations about a penalty amount must relate to failures which have occurred in the past. There is no retrospective operation for the purpose of section 12 of the *Legislation Act 2003*.

#### **Section 7 – Method for calculating reconnection failure penalty amounts**

Section 7 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, calculated in accordance with section 10 of the Determination, for each weekday in the reconnection failure period.

#### **Section 8 – Method for calculating no show no pay failure penalty amounts**

Section 8 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 10 of the Determination.

## **Section 9 - Method for calculating non-attendance failure penalty amounts**

Section 9 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, calculated in accordance with section 10 of the Determination, for each weekday in the non-attendance failure penalty period.

## **Section 10 – Penalty amount calculations**

Section 10 provides for two penalty amount calculations. A person's *daily penalty rate* for a reconnection failure or non-attendance failure, which is also a person's penalty amount for a day on which they commit a no show no pay failure, is the lesser of the two amounts calculated.

Both calculations in this section use a person's *penalty-affected rate* as their basis for determining a person's penalty amount. Subsection 10(4) sets out how to work out a person's penalty-affected rate. 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 10(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 weekdays 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 10(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 person leaves payment before the end of their instalment period). The formulae in section 42T the Act can result in inequitable outcomes that do not reflect a working day's payment when applied to a person in such circumstances and can potentially result in penalty amounts greater than the total instalment.

For example, under the formulae in section 42T, 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.

## **Schedule 1 – Repeals**

Schedule 1 to the Determination repeals the 2015 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.



## 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 2025

The *Social Security (Administration) (Penalty Amount) Determination 2025* (the 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)**

This Determination replaces the *Social Security (Administration) (Penalty Amount) Determination 2015 (No. 1)* (2015 determination) which sunset on 1 October 2025.

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, a reconnection failure, or a non-attendance failure under the Act.

The Determination is the same as the 2015 determination in all material respects. It maintains the existing 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.

Those provisions form part of the Jobseeker Compliance Framework (JSCF) in Division 3A of Part 3, which applies only to "declared program participants" (see section 42B, and section 28C of the *Social Security Act 1991*).

Due to the *Social Security (Declared Program Participant) Determination 2018* (Declared Program Participant Determination) declared program participants are persons participating in the Community Development Program (CDP). As the Community Development Program will be replaced by the Remote Area Employment Service (RAES) from 1 November 2025 it is intended that the Declared Program Participant Determination will be updated so it refers to participants in RAES.

### **Background**

RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities. RAES will support people in remote communities to move into meaningful jobs that communities want, with fair pay and conditions.

The JSCF will continue to be the compliance framework for declared program participants through a period of transition to RAES, to ensure continuity and consistency during such a period.

### *Non-attendance failures*

The Secretary may determine that a person commits a nonattendance failure if the Secretary makes a determination under subsection 42SA(1) to suspend a person's

payment because of the person's failure to attend an appointment referred to in paragraphs 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).

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

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) (section 42SD).

#### *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 for no show no pay failures, and section 42L for reconnection failures).

No show no pay failures are incurred when a person fails to attend a job interview or other activity or when they attend but fail to participate appropriately in a job interview or other activity they are required to undertake in their employment pathway plan. Reconnection failures are incurred when a person fails 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 person 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 person had a reasonable excuse for their actions and, where reasonable to do so, they gave prior notice of that reasonable excuse.

#### *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, a reconnection failure, or 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));
- 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 (subsection 42T(3A));
- 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 certain failures including, for example, failing to participate in an activity which their employment pathway plan requires them to undertake, or intentionally acting in a manner where it is reasonably foreseeable that acting in that manner could result in an offer of suitable paid work not being made to the person;
- 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 subsection 10(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 subsection 10(3) of the Determination may be the more appropriate.

### *Review rights*

All decisions that a person has committed a failure, resulting in a penalty amount being calculated under the Determination, are potentially subject to review including through internal review within Services Australia, by appeal to the Administrative Review Tribunal (ART) and potentially review by the Federal Court. Both internal review and ART review include merits review. Review by the ART is independent. Both a first and second merits review is available from the ART.

## **EXPLANATION OF PROVISIONS**

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

Section 1 provides the name of the Determination is the *Social Security (Administration) (Penalty Amount) Determination 2025*.

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

Section 2 provides that the Determination will commence on 1 October 2025

### **Section 3 – Authority**

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

### **Section 4 – Schedule**

Section 4 relates to the Schedule, which repeals the 2015 determination.

### **Section 5 – Definitions**

Section 5 contains definitions of terms used in the Determination.

### **Section 6 – Transitional arrangements**

Section 6 provides that the Determination applies in relation to decisions made on or after 1 October 2025 whether a relevant no show no pay failure, non-attendance failure, or reconnection failure occurred before that date or not.

## **Section 7 – Method for calculating reconnection failure penalty amounts**

Section 7 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, calculated in accordance with section 10 of the Determination, for each weekday in the reconnection failure period.

## **Section 8 – Method for calculating no show no pay failure penalty amounts**

Section 8 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 10 of the Determination.

## **Section 9 - Method for calculating non-attendance failure penalty amounts**

Section 9 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, calculated in accordance with section 10 of the Determination, for each weekday in the non-attendance failure penalty period.

## **Section 10 – Penalty amount calculations**

Section 10 provides for two penalty amount calculations. A person's *daily penalty rate* for a reconnection failure or non-attendance failure, which is also a person's penalty amount for a day on which they commit a no show no pay failure, is the lesser of the two amounts calculated.

Both calculations in this section use a person's *penalty-affected rate* as their basis for determining a person's penalty amount. Subsection 10(4) sets out how to work out a person's penalty-affected rate. 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 10(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 weekdays 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 10(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 person leaves payment before the end of their instalment period). The formulae in section 42T the Act can result in inequitable outcomes that do not reflect a working day's payment when applied to a person in such

circumstances and can potentially result in penalty amounts greater than the total instalment.

For example, under the formulae in section 42T, 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.

### **Schedule 1 – Repeals**

Schedule 1 to the Determination repeals the 2015 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.

## Human rights implications

The Determination engages the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right of everyone to an adequate standard of living including adequate food, water and housing, and to the continuous improvement of living conditions in Article 11 of the ICESCR;
- the provision 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’ as set out in Article 4 of the ICESCR;
- the right of the child to benefit from social security in Article 26 of the Convention on the Rights of the Child (CRC) and the obligation to provide protection and assistance to the family in Article 10 of the ICESCR;
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 27 of the CRC.

*Right to social security and right to an adequate standard of living, and the obligation to provide protection and assistance to the family*

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.

Article 26 of the CRC recognises the right of every child to benefit from social security, taking into account the resources and circumstances of both the child and the person responsible for the child.

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 persons who comply with their participation obligations.

However, the possible calculation of a penalty under the Determination for a person 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 is 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.

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.

#### *Necessary and proportionate*

Any limitation is reasonable and proportionate. Extensive consultation has occurred with First Nations people and communities in the establishment of RAES, including on compliance measures. RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities.

This will help ensure that those who participate in RAES are less likely to fail to meet requirements – because it will help ensure that requirements are tailored to their circumstances, needs, interests and capacity to comply



To receive a participation payment a person generally needs to enter and comply with an employment pathway plan, also known as a Job Plan. A Job Plan is a collaborative agreement between an employment service provider and the person. It outlines a personalised journey that builds on the person's strengths, interests, and aspirations. In developing a Job Plan, the provider and person will be required to identify meaningful activities and opportunities that support the person's growth, enhance their skills, and guide them toward achieving their training and development goals on the pathway to find and keep suitable paid work.

Tailored and respectful case management will support RAES participants in achieving meaningful goals, including paid work or community engagement. Case management is about walking alongside the person as they work toward their goals. This includes supporting them to meet their mutual obligation requirements in ways that reflect their strengths, aspirations, and circumstances. Providers must help RAES participants to gain the skills, qualifications, and experiences needed support them along the pathway to finding and keeping suitable paid work. This includes identifying opportunities that align with their interests and local community needs.

There will also be a range of circumstances in which RAES participants, in common with recipients of participation payments generally, may be exempt from requirements.

For example, subsection 40L(2) provides a broad discretion for the Secretary to grant exemptions if satisfied that circumstances beyond the person's control exist and these make it unreasonable to expect the person to comply with employment pathway plan requirements.

Subsection 40L(3) enables the Secretary to exempt a person from employment pathway plan requirements if satisfied in all the circumstances that the person should not be expected to meet those requirements – whether the circumstances are beyond the person's control or not.

There are other exemptions from employment pathway plan requirements in addition to section 40L exemptions and do not limit the scope of section 40L. These include exemptions due to domestic violence (section 40N), caring responsibilities (section 40P) and pre-natal and post-natal circumstances (section 40Q).

One of the aims of the RAES program, as with other employment programs, is therefore to maximise compliance with requirements and to minimise compliance action by ensuring requirements are suitable and only apply where a person could be expected to meet them.

Even if no exemption provision applied, a person might still have a reasonable excuse for not meeting a requirement, in which case there also would be no compliance action.

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 a person 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 work force.

The limitation is also proportionate because it establishes a direct and equitable connection between the daily penalty amount and a person'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 person leaves payment before the end of their instalment period). The formula in the primary legislation can result in inequitable outcomes when applied to persons in such circumstances, and can result in penalty amounts greater than the person'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 person 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 person failed to comply with a reconnection requirement to the day they do comply with the requirement. For example, a person who has 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 person failed to attend a job interview or 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.

### *The right to equality and non-discrimination*

The rights of equality and non-discrimination are provided for in a number of the 7 core international human rights treaties to which Australia is a party, most relevantly the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (the CERD). In particular, article 5 of the CERD requires parties '*to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race,*

*colour or national or ethnic origin, to equality before the law’, notably in the enjoyment of ‘the right to...social security and social services’ (article 5(e)(iv)).*

RAES has been designed in partnership with remote communities through consultations, lessons learnt from job trials and testing new ways to create jobs in specific remote communities.

It will support people in remote communities to move into meaningful jobs that communities want, with fair pay and conditions. More broadly, this promotes the right to equality and non-discrimination. This Determination will help to ensure continuity while RAES is developed and implemented.

### *Right to self determination*

Article 1 of the ICESCR states that ‘*all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*’.

This Determination does not limit or interfere with the right to self-determination or a person’s right to freely pursue their economic, social or cultural development. Individuals subject to this Determination can continue to receive their payments (however so limited) in a way that is proportionate and fair to others in similar situations.

Whilst this does limit a person’s payment in certain situations, it does not impact on their right to freely pursue their economic, social or cultural development.

### **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.

**The Hon. Amanda Rishworth, Minister for Employment and Workplace Relations**