



# **Fair Entitlements Guarantee Act 2012**

**No. 159, 2012**

**An Act to provide for financial assistance for workers who have not been fully paid for work done for insolvents or bankrupts, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# Contents

<b>Part 1—Preliminary</b>	2
1 Short title .....	2
2 Commencement .....	2
3 Objects of this Act .....	2
4 Simplified outline of this Act .....	3
5 Definitions .....	4
6 Kinds of employment entitlements .....	8
7 Wages .....	9
8 This Act binds the Crown .....	10
9 Extraterritorial operation .....	10
<b>Part 2—Eligibility for advance</b>	11
<b>Division 1—Conditions of eligibility for advance</b>	11
<b>Subdivision A—Basic conditions of eligibility</b>	11
10 Conditions of eligibility for advance .....	11
<b>Subdivision B—Exclusions from eligibility</b>	12
11 Exclusion for personal connection with employer .....	12
12 Exclusion for being newly employed after working as contractor .....	13
13 Exclusion for employment by certain employers .....	13
<b>Division 2—Claim for eligibility for advance</b>	14
14 Making an effective claim .....	14
15 Secretary must decide effective claim .....	15
<b>Part 3—Amount of advance</b>	16
<b>Division 1—Working out the amount of an advance</b>	16
16 General rule for working out the amount of an advance .....	16
17 Reduction for the person’s debts to the employer .....	17
18 Nil amount if liquidator or bankruptcy trustee can fully pay entitlements soon .....	17
<b>Division 2—Amounts for employment entitlements</b>	18
<b>Subdivision A—Working out amounts for employment             entitlements</b>	18
19 Working out amounts for employment entitlements .....	18
<b>Subdivision B—General rules for basic amounts for employment             entitlements</b>	19
20 Basic amount for annual leave entitlement .....	19

---

21	Basic amount for long service leave entitlement .....	19
22	Basic amount for payment in lieu of notice entitlement .....	19
23	Basic amount for redundancy pay entitlement.....	20
24	Basic amount for wages entitlement.....	20
	<b>Subdivision C—Special rules for basic amounts for employment entitlements</b>	20
25	Disregarding recently agreed changes in terms and conditions .....	20
26	Applying maximum weekly wage rate—entitlements except wages entitlement .....	21
27	Applying maximum weekly wage rate—wages entitlement.....	22
	<b>Part 4—Payment of advance</b>	24
28	Payment to eligible person or intermediary .....	24
	<b>Part 5—Recovery of advance</b>	25
	<b>Division 1—Recovery through winding up or bankruptcy</b>	25
29	Recovery of advance paid to liquidator .....	25
30	Recovery of some amounts of advance paid to bankruptcy trustee .....	26
31	Recovery in other circumstances .....	26
32	Amounts of advance attributable to particular employment entitlements if advance reduced for debts to employer .....	27
33	Recovery of advance for employment for partnership.....	28
	<b>Division 2—Recovery from person eligible for advance</b>	29
34	Recovery from person eligible for advance .....	29
	<b>Part 6—Administration</b>	30
	<b>Division 1—Decision-making about advances</b>	30
35	Presuming accuracy of certain information .....	30
36	Giving notice of decisions made under section 15.....	30
	<b>Division 2—Review of decisions about advances</b>	31
	<b>Subdivision A—Internal review on the Secretary’s own initiative</b>	31
37	Review on the Secretary’s own initiative .....	31
	<b>Subdivision B—Internal review on application</b>	32
38	Application for review by Secretary .....	32
39	Action on application for review .....	33
	<b>Subdivision C—Review by the Administrative Appeals Tribunal</b>	33
40	Application to the Administrative Appeals Tribunal for review .....	33
41	Limit on review of decision on amount of advance .....	34

---

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<b>Division 3—Information management</b>	35
42 Use and disclosure of personal information by the Department for administering this Act .....	35
43 Use and disclosure of personal information by insolvency practitioners and payment intermediaries .....	35
44 Use and disclosure of personal information by persons making payments to former employees .....	36
45 Disclosure of personal information to certain agencies .....	36
<b>Division 4—Arrangements for information and dealing with payments</b>	37
46 Arrangements for information and dealing with payments.....	37
<b>Division 5—Delegation</b>	38
47 Delegation of Secretary’s powers and functions.....	38
48 Delegation of Minister’s powers .....	39
<b>Part 7—Miscellaneous</b>	40
49 Extended operation of this Act in relation to employers in administration under the <i>Corporations Act 2001</i> .....	40
50 Schemes for assistance of workers who were not employees .....	41
51 Appropriation .....	42
52 Recoverable payments.....	42
53 Reports about recoverable payments .....	42
54 Right to financial assistance may be reduced, cancelled etc. without compensation.....	44
55 Regulations.....	44





# **Fair Entitlements Guarantee Act 2012**

**No. 159, 2012**

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**An Act to provide for financial assistance for workers who have not been fully paid for work done for insolvents or bankrupts, and for related purposes**

*[Assented to 28 November 2012]*

The Parliament of Australia enacts:

## Part 1—Preliminary

### 1 Short title

This Act may be cited as the *Fair Entitlements Guarantee Act 2012*.

### 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	28 November 2012
2. Sections 3 to 55	The seventh day after this Act receives the Royal Assent.	5 December 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

### 3 Objects of this Act

The main objects of this Act are:

- (a) to provide for the Commonwealth to pay advances on account of unpaid employment entitlements of former employees of employers in cases where:



- (i) the employers are insolvent or bankrupt; and
  - (ii) the end of the employment of the former employees was connected with that insolvency or bankruptcy; and
  - (iii) the former employees cannot get payment of the entitlements from other sources; and
- (b) to allow the Commonwealth to recover the advances through the winding up or bankruptcy of the employers and from other payments the former employees receive for the entitlements.

#### **4 Simplified outline of this Act**

- (1) This section is a simplified outline of this Act.
- (2) Under Part 2, a person is eligible for financial assistance under this Act (called an advance) if:
  - (a) the person's employment by an employer has ended; and
  - (b) the employer is being wound up or bankrupt; and
  - (c) the end of the employment is connected with the insolvency or bankruptcy of the employer; and
  - (d) the person has not been fully paid his or her entitlements relating to that employment; and
  - (e) the person has made a claim for the advance.
- (3) A person's claim for an advance is decided by the Secretary, who also decides the amount of the advance if the person is eligible for it (see section 15).
- (4) Part 3 explains how to work out the amount of an advance for a person, taking account of the person's unpaid entitlements relating to unused annual leave, unused long service leave, payment in lieu of notice, redundancy pay and wages for a 13-week period. The amount may be reduced because:
  - (a) the person owes debts to his or her employer; or
  - (b) the liquidator or bankruptcy trustee expects to be able to pay those entitlements in full soon.
- (5) Part 4 deals with payment of an advance by the Commonwealth, either:

Section 5

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- (a) directly to the person eligible for the advance; or
  - (b) to the liquidator, the bankruptcy trustee or another intermediary who will pass it on to the person.
- (6) Part 5 lets the Commonwealth recover some or all of the advance, by:
- (a) substituting the Commonwealth for the person eligible for the advance as a creditor in the winding up or bankruptcy of the employer; and
  - (b) requiring the person to pay the Commonwealth if he or she is later paid amounts for the entitlements the advance related to.
- (7) Part 6 deals with administrative matters, including:
- (a) review of decisions made by the Secretary on eligibility for advances and amounts of advances (see Division 2 of Part 6); and
  - (b) use and disclosure of personal information in connection with the administration of the Act (see Division 3 of Part 6).
- (8) Part 7 deals with various matters, including:
- (a) letting the Secretary extend the scheme for advances to persons whose employment has ended and whose employer is in administration under the *Corporations Act 2001*; and
  - (b) allowing regulations to provide for other schemes of financial assistance for persons who worked as contractors (rather than employees) but have not been paid because of the insolvency or bankruptcy of the persons they worked for.

## 5 Definitions

In this Act:

**advance** means financial assistance under this Act on account of employment entitlements.

**annual leave entitlement** has the meaning given by subsection 6(2).

**appointment** of an insolvency practitioner includes a person becoming an insolvency practitioner:

- (a) by taking possession or control of property; or
- (b) by operation of law.

**Bankruptcy Act 1966:** a reference to the *Bankruptcy Act 1966* or a provision of that Act is a reference to that Act or provision:

- (a) applying of its own force; or
- (b) applying, with or without modifications, because of a law of the Commonwealth, a State or a Territory.

**bankruptcy trustee** of a person means the trustee under the *Bankruptcy Act 1966* of the person's estate in bankruptcy.

**Corporations Act 2001:** a reference to the *Corporations Act 2001* or a provision of that Act is a reference to that Act or provision:

- (a) applying of its own force; or
- (b) applying, with or without modifications, because of a law of the Commonwealth, a State or a Territory.

**cost:**

- (a) of the winding up of an employer—means:
  - (i) an expense that relates to the winding up and is described in paragraph 556(1)(a) of the *Corporations Act 2001*; or
  - (ii) an amount described in section 558 of that Act as a cost of the winding up; or
- (b) of the bankruptcy of an employer—means:
  - (i) an expense that relates to the bankruptcy and is described in paragraph 109(1)(a) of the *Bankruptcy Act 1966*; or
  - (ii) an amount described in section 109A of that Act as a cost of the bankruptcy.

Note: Paragraph 556(1)(a) of the *Corporations Act 2001* describes expenses incurred by a liquidator or administrator in carrying on a company's business, among other things. Paragraph 109(1)(a) of the *Bankruptcy Act 1966* describes expenses of the administration of the bankruptcy, among other things.

**employer** includes former employer.

**employment entitlement** means:

Section 5

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- (a) annual leave entitlement; or
- (b) long service leave entitlement; or
- (c) payment in lieu of notice entitlement; or
- (d) redundancy pay entitlement; or
- (e) wages entitlement.

**Finance Minister** means the Minister administering the *Financial Management and Accountability Act 1997*.

**governing instrument** for employment means any of the following that governs the employment:

- (a) a written law of the Commonwealth, a State or a Territory;
- (b) an award, determination or order that is made or recorded in writing;
- (c) a written instrument;
- (d) an agreement (whether a contract or not).

**insolvency event**: an **insolvency event** happens to an employer of a person:

- (a) when a liquidator of the employer is appointed (provisionally or otherwise) under the *Corporations Act 2001*; or
- (b) when the employer becomes a bankrupt under the *Bankruptcy Act 1966*; or
- (c) if the person is or was employed for a partnership by 2 or more of the partners—at the first time an event described in paragraph (a) or (b) happens, or has happened, to all of the partners by whom the person is or was employed.

Example: If a person is employed for a partnership by 2 partners, one of whom becomes bankrupt on 15 October 2013 and the other of whom becomes bankrupt on 1 November 2013, the insolvency event happens on 1 November 2013 (because that is the first time when both the partners have become bankrupt).

**insolvency practitioner** for an employer means:

- (a) a liquidator of the employer; or
- (b) an administrator of the employer appointed under the *Corporations Act 2001*; or
- (c) a person appointed as a receiver of property of the employer; or

- (d) a person who has possession or control of property of the employer for the purpose of enforcing:
  - (i) a charge; or
  - (ii) a mortgage; or
  - (iii) a lien; or
  - (iv) a pledge; or
  - (v) a security interest, within the meaning of the *Personal Property Securities Act 2009*, to which that Act applies, other than a transitional security interest within the meaning of that Act; or
- (e) a bankruptcy trustee of the employer.

**liquidator** means a liquidator appointed (provisionally or otherwise) under the *Corporations Act 2001*.

**long service leave entitlement** has the meaning given by subsection 6(3).

**maximum weekly wage**: the **maximum weekly wage** is:

- (a) \$2,364.00; or
- (b) the result of indexation of the amount in paragraph (a), or of the result of the last application of this paragraph, in accordance with the regulations, by reference to estimates of full-time adult average weekly ordinary time earnings published by the Australian Statistician.

**maximum weekly wage rate** means the rate of the maximum weekly wage a week.

**payment in lieu of notice entitlement** has the meaning given by subsection 6(4).

**redundancy pay entitlement** has the meaning given by subsection 6(5).

**Secretary** means the Secretary of the Department.

**wages** has a meaning affected by section 7.

**wages entitlement** has the meaning given by subsection 6(6).

Section 6

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**wages entitlement period** for a person whose employment by an employer has ended means the 13 weeks ending at the earlier of the following times (or either of those times if they are the same):

- (a) the time the person's employment ended;
- (b) the first time an insolvency practitioner has power (however expressed) to control or manage employment by:
  - (i) the employer; or
  - (ii) if the person was employed for a partnership by 2 or more partners—any of the partners who employed the person.

## 6 Kinds of employment entitlements

- (1) This section defines the various kinds of employment entitlements of a person whose employment by an employer has ended, by reference to the person's entitlements under the governing instrument for the employment.

Note: Part 3 may affect the calculation of the person's employment entitlements for the purposes of working out the amount of an advance the person is eligible for.

### *Annual leave entitlement*

- (2) The person's **annual leave entitlement** is the amount the person is entitled to under the governing instrument from the employer for paid annual leave that the person:
- (a) had accrued at the end of the employment; and
  - (b) had not taken by then.

### *Long service leave entitlement*

- (3) The person's **long service leave entitlement** is the amount the person is entitled to under the governing instrument from the employer:
- (a) for long service leave that the person had accrued at the end of the person's employment and had not taken by then; or
  - (b) on account of long service leave that, had the person's employment continued until the person qualified for long service leave, would have been attributable to the period before the actual end of the person's employment.

*Payment in lieu of notice entitlement*

- (4) The person's **payment in lieu of notice entitlement** is the amount the person is entitled to under the governing instrument from the employer for a shortfall in the period of notice of termination of the employment.

*Redundancy pay entitlement*

- (5) The person's **redundancy pay entitlement** is the amount of redundancy pay the person is entitled to under the governing instrument from the employer for termination of the employment.

*Wages entitlement*

- (6) The person's **wages entitlement** is the amount of wages the person is entitled to under the governing instrument from the employer for work done, or paid leave taken, in the wages entitlement period.

*Entitlement unaffected by payment*

- (7) The person's receipt of some or all of an amount he or she was entitled to under the governing instrument does not affect what is the person's annual leave entitlement, long service leave entitlement, payment in lieu of notice entitlement, redundancy pay entitlement or wages entitlement under this section.

Example: If:

- (a) under the governing instrument, the person accrued 8 weeks of annual leave that had not been taken by the end of the person's employment; and
- (b) the employer paid the person for 3 of those weeks;

the person's **annual leave entitlement** is the entitlement to be paid for 8 weeks annual leave.

## **7 Wages**

- (1) **Wages** includes the following:
- (a) allowances;
  - (b) loadings;
  - (c) amounts payable for overtime;
  - (d) amounts payable at penalty rates;

Section 8

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- (e) other amounts that the governing instrument for the relevant employment identifies separately and makes payable regularly.
- (2) However, the following are not *wages*:
  - (a) discretionary payments (such as bonuses);
  - (b) reimbursements;
  - (c) payments of expenses relating to travel or relocation.
- (3) Amounts that are not payable on an ongoing basis are not *wages*, unless they are amounts described in subsection (1).

**8 This Act binds the Crown**

This Act binds the Crown in each of its capacities.

**9 Extraterritorial operation**

This Act extends to the making of payments to, and the recovery of amounts from, persons outside Australia.



## **Part 2—Eligibility for advance**

### **Division 1—Conditions of eligibility for advance**

#### **Subdivision A—Basic conditions of eligibility**

#### **10 Conditions of eligibility for advance**

*General conditions*

- (1) A person is eligible for an advance if the Secretary is satisfied of all of the following:
  - (a) the person's employment by a particular employer has ended;
  - (b) after the commencement of this section, an insolvency event happened to the employer;
  - (c) the end of the employment:
    - (i) was due to the insolvency of the employer; or
    - (ii) occurred less than 6 months before the appointment of an insolvency practitioner for the employer; or
    - (iii) occurred on or after the appointment of an insolvency practitioner for the employer;
  - (d) the person is (or would, apart from the discharge of the bankruptcy of the employer, be) owed one or more debts wholly or partly attributable to all or part of one or more employment entitlements;
  - (e) the person has taken steps, so far as reasonable, to prove those debts in the winding up or bankruptcy of the employer;
  - (f) if the person was owed any of those debts before the insolvency event happened, the person took reasonable steps before that event to be paid those debts;
  - (g) when the employment ended, the person was an Australian citizen or, under the *Migration Act 1958*, the holder of a permanent visa or a special category visa;
  - (h) an effective claim (see section 14) that the person is eligible for the advance has been made to the Secretary by or on behalf of the person.

**Part 2** Eligibility for advance

**Division 1** Conditions of eligibility for advance

**Section 11**

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Note: Subdivision B excludes certain persons from eligibility.

*If person was employed for a partnership by partners*

- (2) If the person was employed for a partnership by 2 or more of the partners, paragraphs (1)(c), (d) and (e) apply as if each reference in those paragraphs to the employer were a reference to each of the partners who employed the person.

**Subdivision B—Exclusions from eligibility**

**11 Exclusion for personal connection with employer**

- (1) A person is not eligible for an advance for the person's employment by an employer if:
- (a) section 556 of the *Corporations Act 2001* applies to the winding up of the employer; and
  - (b) the person is an excluded employee under that section in relation to the employer.
- (2) A person is not eligible for an advance for the person's employment by an employer who is or was a bankrupt under the *Bankruptcy Act 1966* if:
- (a) the person is a relative (as defined in the *Corporations Act 2001*) of the employer; or
  - (b) the person was a spouse or de facto partner (within the meaning of the *Acts Interpretation Act 1901*) of the employer at any time within the 12 months ending on the date of the bankruptcy (as defined in the *Bankruptcy Act 1966*) of the employer.
- (3) A person who was employed for a partnership by 2 or more of the partners is not eligible for an advance for that employment if the conditions in subsection (1), or any of the conditions in subsection (2), exist in relation to any of the partners who employed the person.
- (4) This section has effect despite section 10.

## **12 Exclusion for being newly employed after working as contractor**

- (1) A person is not eligible for an advance for the person's employment by an employer that has ended if the Secretary is satisfied that all the following apply:
  - (a) the person started to be employed by the employer in the 6 months ending at the earlier of the following events:
    - (i) the end of the employment;
    - (ii) the appointment of an insolvency practitioner for the employer;
  - (b) the person was engaged by the employer, but not as an employee of the employer, before the start of the employment;
  - (c) it was reasonable to expect at the start of that employment that the employer would not be able to meet the employer's obligations under the terms and conditions of that employment for the actual duration and end of that employment.
- (2) If the person was employed for a partnership by 2 or more of the partners, subsection (1) applies as if each reference in paragraphs (1)(a), (b) and (c) to the employer were a reference to each of the partners who employed the person.
- (3) This section has effect despite section 10.

## **13 Exclusion for employment by certain employers**

- (1) A person is not eligible for an advance for the person's employment by an employer if the employer was within the scope of the scheme known as the Special Employee Entitlements Scheme for Ansett Group Employees.
- (2) This section has effect despite section 10.

## Division 2—Claim for eligibility for advance

### 14 Making an effective claim

- (1) To be effective for the purposes of this Act, a claim that a person is eligible for an advance for the person's employment by an employer must:
  - (a) be in a form approved by the Secretary; and
  - (b) be accompanied by any documents required by the Secretary; and
  - (c) be made in accordance with subsection (2), and with subsection (3) if it applies.
- (2) The claim must be made before the end of 12 months after the later of the following events:
  - (a) an insolvency event happens to the employer;
  - (b) the person's employment by the employer ends.
- (3) However, if the employer is or was a bankrupt, the claim must be or have been made before the discharge of the employer's bankruptcy.
- (4) Despite subsection (1), the claim is not effective for the purposes of this Act if it is made after a claim (the *earlier claim*) was made for a payment, under the scheme known as the General Employee Entitlements and Redundancy Scheme, connected with the person's employment by the employer.
- (5) Subsection (4) does not apply if the earlier claim was rejected because an insolvency event had not happened to the employer before the commencement of this section.

#### *Statutory declaration*

- (6) A claim form approved by the Secretary may provide for verification by statutory declaration of statements in the claim.

## **15 Secretary must decide effective claim**

- (1) If an effective claim that a person is eligible for an advance is made to the Secretary, the Secretary must decide whether the person is eligible for the advance.
- (2) If it is decided that a person is eligible for an advance, the Secretary must decide the amount of the advance in accordance with Part 3.

Note 1: Subsection (2) applies whether the decision that a person is eligible for an advance is made under subsection (1) or on review under Part 6.

Note 2: Division 1 of Part 6 contains provisions relevant to making and notifying decisions on eligibility for an advance and the amount of an advance.

## **Part 3—Amount of advance**

### **Division 1—Working out the amount of an advance**

#### **16 General rule for working out the amount of an advance**

- (1) If a person is eligible for an advance for the person's employment by an employer, the amount of the advance is the total of the amount worked out under Division 2 for each of the person's employment entitlements for the employment.

*Excluding some basic amounts if person is offered similar work*

- (2) However, do not include in the total the amount worked out under Division 2 for the person's payment in lieu of notice entitlement or redundancy pay entitlement if:
  - (a) the business in which the employer employed the person is transferred to someone else (the *transferee*) other than the bankruptcy trustee of the employer; and
  - (b) within 14 days of the end of the person's employment by the employer, the transferee offers to employ the person:
    - (i) to do work that is the same, or substantially the same, as the work the person did for the employer; and
    - (ii) on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the person's terms and conditions of employment with the employer immediately before the end of that employment.
- (3) Subsection (2) is taken never to have applied if the transferee employs the person (whether as a result of the offer described in paragraph (2)(b) or not) and either:
  - (a) the transferee terminates that employment because the transferee no longer requires the job done by the person to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

- (b) an insolvency event happens to the transferee, the person's employment by the transferee ends and one or more of the following applies:
- (i) the end was due to the insolvency of the transferee;
  - (ii) the end occurred less than 6 months before the appointment of an insolvency practitioner for the transferee;
  - (iii) the end occurred on or after the appointment of an insolvency practitioner for the transferee.

Note: If the amount of an advance is decided, relying on subsection (2), and the events described in subsection (3) happen later (so that subsection (2) is taken never to have applied), the decision can be reviewed under Division 2 of Part 6.

- (4) Subsection (2) does not apply for the purposes of working out the amount of an advance the person is eligible for because of an insolvency event that happened to the employer on or after 1 July 2014.

### **17 Reduction for the person's debts to the employer**

The Secretary may reduce the amount of an advance worked out under section 16 for a person's employment by an employer by an amount not exceeding the sum of the person's debts to the employer.

### **18 Nil amount if liquidator or bankruptcy trustee can fully pay entitlements soon**

The Secretary may reduce to nil the amount of an advance worked out under this Division for a person's employment by an employer if the Secretary is satisfied that the liquidator or bankruptcy trustee of the employer expects to have in the next 112 days enough money (apart from this Act) to pay the person what the amount of the advance would be apart from this section.

## **Division 2—Amounts for employment entitlements**

### **Subdivision A—Working out amounts for employment entitlements**

#### **19 Working out amounts for employment entitlements**

- (1) Work out the amount for each of a person's employment entitlements to be taken into account under section 16 by:
  - (a) working out the basic amount for the entitlement under Subdivisions B and C; and
  - (b) reducing the basic amount (but not below nil) by the sum of the amounts described in subsections (2) and (3) for the entitlement.
- (2) One amount of the reduction of the basic amount for a particular employment entitlement of a person for his or her employment by an employer is the total of amounts that:
  - (a) are attributable to the entitlement; and
  - (b) have been paid by anyone:
    - (i) to the person; or
    - (ii) to someone else for the person's benefit or in accordance with the person's direction; and
  - (c) are not costs of the winding up or bankruptcy of the employer.
- (3) The other amount of the reduction of the basic amount for a particular employment entitlement of a person for his or her employment by an employer is the total of amounts that:
  - (a) are attributable to the entitlement; and
  - (b) are payable (and have not been paid) by anyone:
    - (i) to the person; or
    - (ii) to someone else for the person's benefit or in accordance with the person's direction; and
  - (c) are not payable:



- (i) under the *Corporations Act 2001* in the winding up of the person's employer; or
- (ii) under the *Bankruptcy Act 1966* from the proceeds of the property of the bankrupt employer of the person; or
- (iii) under this Act.

### **Subdivision B—General rules for basic amounts for employment entitlements**

#### **20 Basic amount for annual leave entitlement**

The basic amount for a person's annual leave entitlement for his or her employment by an employer is so much of the entitlement as is not a cost of the winding up or bankruptcy of the employer.

Note: Sections 25 and 26 may affect the basic amount.

#### **21 Basic amount for long service leave entitlement**

The basic amount for a person's long service leave entitlement for his or her employment by an employer is so much of the entitlement as is not a cost of the winding up or bankruptcy of the employer.

Note: Sections 25 and 26 may affect the basic amount.

#### **22 Basic amount for payment in lieu of notice entitlement**

The basic amount for a person's payment in lieu of notice entitlement for his or her employment by an employer is so much of the entitlement as:

- (a) is not a cost of the winding up or bankruptcy of the employer; and
- (b) does not exceed 5 weeks' pay at the rate relevant to working out that entitlement.

Note: Sections 25 and 26 may affect the basic amount.

Section 23

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**23 Basic amount for redundancy pay entitlement**

The basic amount for a person's redundancy pay entitlement for his or her employment by an employer is so much of the entitlement as:

- (a) is not a cost of the winding up or bankruptcy of the employer; and
- (b) does not exceed the total of:
  - (i) 4 weeks' pay (at the rate relevant to working out that entitlement) for each full year of the person's service with the employer for which the employer was required to pay redundancy pay by the governing instrument for that employment; and
  - (ii) if that instrument requires payment of redundancy pay for a proportion of a year (less than a full year) of the person's service with the employer—that proportion of 4 weeks' pay (at the rate relevant to working out that entitlement).

Note: Sections 25 and 26 may affect the basic amount.

**24 Basic amount for wages entitlement**

The basic amount for a person's wages entitlement is the wages entitlement less any amount required to be withheld under Part 2-5 (Pay as you go (PAYG) withholding) in Schedule 1 to the *Taxation Administration Act 1953* from the wages covered by the entitlement.

Note: Sections 25 and 27 may affect the basic amount.

**Subdivision C—Special rules for basic amounts for employment entitlements**

**25 Disregarding recently agreed changes in terms and conditions**

- (1) This section affects a basic amount for a person's employment entitlement for his or her employment by an employer if:
  - (a) less than 6 months before the end of the employment or the appointment of an insolvency practitioner for the employer, the employer agreed to a change in the terms and conditions

of the person's employment in favour of the person (whether or not the change also affected anyone else's terms and conditions of employment); and

- (b) the Secretary is satisfied that, at the time of the change, it was not reasonable to expect that the employer would be able to meet the employer's obligations under those more favourable terms and conditions for the actual duration and end of the person's employment; and
  - (c) the Secretary is satisfied that it is appropriate that this section apply.
- (2) Work out the basic amount as if the governing instrument for the employment had not been changed.

Note: This affects the basic amount by affecting the amount of the employment entitlement. It may also affect the basic amount by affecting limits on the basic amount such as those in paragraphs 22(b) and 23(b).

- (3) If the person was employed for a partnership by 2 or more of the partners, subsection (1) applies as if:
- (a) the first reference in paragraph (1)(a) to the employer were a reference to any of the partners who employed the person; and
  - (b) the second reference in paragraph (1)(a), and the reference in paragraph (1)(b), to the employer were a reference to all the partners who employed the person.

## **26 Applying maximum weekly wage rate—entitlements except wages entitlement**

- (1) This section affects a basic amount for a person's employment entitlement for his or her employment if the governing instrument for the employment provided for a rate of pay relevant to working out the basic amount that, when expressed as a weekly rate, exceeded the maximum weekly wage rate at the end of the employment.
- (2) Work out the basic amount as if the governing instrument had provided for the relevant wage rate to be the maximum weekly wage rate at the end of the employment.

**Part 3** Amount of advance

**Division 2** Amounts for employment entitlements

**Section 27**

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Note: This affects the basic amount by affecting the amount of the employment entitlement. It may also affect the basic amount by affecting limits on the basic amount such as those in paragraphs 22(b) and 23(b).

- (3) This section does not affect the basic amount for the person's wages entitlement.

**27 Applying maximum weekly wage rate—wages entitlement**

- (1) This section affects the basic amount for a person's wages entitlement for his or her employment by an employer if subsection (2), (3) or (4) applies.

*When this section affects the basic amount*

- (2) This subsection applies if:
- (a) the governing instrument for the employment provided for a rate of pay at the end of the wages entitlement period for work that the instrument envisaged that the person would do regularly; and
  - (b) that rate, when expressed as a weekly rate, exceeded the maximum weekly wage rate at the end of that period.
- (3) This subsection applies if:
- (a) the governing instrument for the employment did not provide for a rate of pay at the end of the wages entitlement period for work that the instrument envisaged that the person would do regularly; and
  - (b) the person's average weekly wage for that period (see subsection (5)) is greater than the maximum weekly wage at the end of that period.

Note: The condition in paragraph (3)(a) may be met because the governing instrument:

- (a) did not provide for a rate described in that paragraph; or
- (b) did not envisage that the person would do any particular work regularly.

- (4) This subsection applies if:
- (a) the Secretary is satisfied that, over the weeks for which the person was employed in the wages entitlement period, there is not a regular pattern of one or both of the following:
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- (i) hours worked by the person;
  - (ii) wages to which the person was entitled for work done or leave taken within those weeks; and
  - (b) the person's average weekly wage for that period (see subsection (5)) is greater than the maximum weekly wage at the end of that period.
- (5) For the purposes of paragraphs (3)(b) and (4)(b), the person's average weekly wage for the wages entitlement period is the result of dividing the person's wages entitlement by the number of weeks for which he or she was employed by the employer in that period. That number need not be a whole number.

*Effect on basic amount*

- (6) Work out the basic amount as if the governing instrument for the employment had entitled the person, for each of the weeks for which the employer employed the person in the wages entitlement period, to wages at the maximum weekly wage rate at the end of that period.

## Part 4—Payment of advance

### 28 Payment to eligible person or intermediary

- (1) On behalf of the Commonwealth, the Secretary must pay an advance a person is eligible for in relation to his or her employment by an employer:
  - (a) to the person; or
  - (b) to the liquidator or bankruptcy trustee of the employer, for the liquidator or trustee to pass on to the person, subject to the liquidator or trustee withholding or deducting an amount as required by law; or
  - (c) to another person (the *payee*) for the payee to pass on to the person in accordance with a contract between the payee and the Commonwealth, subject to the payee withholding or deducting an amount as required by law.

#### *Payment in instalments*

- (2) The Secretary may pay the advance in instalments if the Secretary is satisfied that doing so will result in the person receiving an instalment of the advance sooner than the person would have received the advance in full if the advance were not paid in instalments.
- (3) The Minister may direct the Secretary:
  - (a) to pay the advance that a specified person is eligible for in instalments of amounts, and at times, determined by the Secretary; or
  - (b) to pay the advances that persons who were employed by a specified employer are eligible for in instalments of amounts, and at times, determined by the Secretary.
- (4) The Secretary must comply with the direction.
- (5) If the direction is made in writing, the direction is not a legislative instrument.

## **Part 5—Recovery of advance**

### **Division 1—Recovery through winding up or bankruptcy**

#### **29 Recovery of advance paid to liquidator**

For the purposes of section 560 of the *Corporations Act 2001*, a payment of an advance for a person's employment by an employer that is made to the liquidator of the employer under section 28 of this Act is to be treated as follows:

- (a) so much of the advance as is for the person's wages entitlement is taken to be an advance (within the meaning of section 560 of the *Corporations Act 2001*) of money by the Commonwealth for the purpose of making a payment on account of wages;
- (b) so much of the advance as is for the person's annual leave entitlement or long service leave entitlement is taken to be an advance (within the meaning of that section) of money by the Commonwealth for the purpose of making a payment in respect of leave of absence;
- (c) so much of the advance as is for the person's payment in lieu of notice entitlement or redundancy pay entitlement is taken to be an advance (within the meaning of that section) of money by the Commonwealth for the purpose of making a payment in respect of termination of employment.

Note 1: If, because of the advance, the person receives an amount on account of wages, in respect of leave of absence or in respect of termination, section 560 of the *Corporations Act 2001* effectively gives the Commonwealth the same rights in the winding up as the person would have had for that amount if he or she had not received it.

Note 2: Section 32 explains how to work out what amounts of the advance are for particular entitlements if the amount of the advance has been reduced under section 17 because of the person's debts to the employer.

### **30 Recovery of some amounts of advance paid to bankruptcy trustee**

For the purposes of subsections 109(2) and (3) of the *Bankruptcy Act 1966*, a payment of an advance for a person's employment by an employer that is made to the bankruptcy trustee of the employer under section 28 of this Act is to be treated as follows:

- (a) so much of the advance as is for the person's wages entitlement is taken to be moneys advanced by the Commonwealth for the purpose of enabling a payment described in paragraph 109(1)(e) of the *Bankruptcy Act 1966*;
- (b) so much of the advance as is for the person's annual leave entitlement or long service leave entitlement is taken to be moneys advanced by the Commonwealth for the purpose of enabling a payment described in paragraph 109(1)(g) of the *Bankruptcy Act 1966*.

Note 1: If, because of the advance, the person receives an amount on account of services rendered to the employer before the date of the bankruptcy or in respect of leave, subsections 109(2) and (3) of the *Bankruptcy Act 1966* effectively give the Commonwealth the same rights in the bankruptcy as the person would have had for that amount if he or she had not received it.

Note 2: Section 32 explains how to work out what amounts of the advance are for particular entitlements if the amount of the advance has been reduced under section 17 because of the person's debts to the employer.

Note 3: Section 31 applies to so much of the advance as is for the person's payment in lieu of notice entitlement or redundancy pay entitlement.

### **31 Recovery in other circumstances**

- (1) When an advance is paid under section 28 for a person's employment by an employer, then, to the extent of the amount of the advance paid:
  - (a) the employer's liability to the person is discharged; and
  - (b) the rights the person had immediately before that discharge in relation to that liability in the winding up or bankruptcy of the employer become rights of the Commonwealth.
- (2) So far as the advance is for a particular employment entitlement, the Commonwealth has the same priority as the person had for that entitlement.



- (3) Subsections (1) and (2) do not apply to an amount of the advance that:
- (a) was paid to the liquidator or bankruptcy trustee of the employer; and
  - (b) is, because of section 29 or 30 of this Act, taken for the purposes of section 560 of the *Corporations Act 2001* or subsections 109(2) and (3) of the *Bankruptcy Act 1966* to have been advanced.

### **32 Amounts of advance attributable to particular employment entitlements if advance reduced for debts to employer**

- (1) This section applies for the purposes of working out for the purposes of this Part how much of an advance for a person's employment by an employer is for a particular employment entitlement if the amount of the advance is reduced under section 17 for the person's debts to the employer.
- (2) So far as the amount of the debt applied in the reduction relates to a thing described in column 1 of an item of the following table, the reduction is taken to be of the amount of the advance for the person's employment entitlement described in column 2 of the item.

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#### **Effect of applying debts relating to particular things**

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<b>Item</b>	<b>Thing to which debt relates</b>	<b>Relevant employment entitlement</b>
1	Annual leave	Annual leave entitlement
2	Long service leave	Long service leave entitlement
3	Payment in lieu of notice	Payment in lieu of notice entitlement
4	Redundancy pay	Redundancy pay entitlement
5	Wages (except for annual leave or long service leave)	Wages entitlement

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- (3) So far as the amount of the debt applied in the reduction does not relate to a thing described in column 1 of the table in subsection (2), the reduction is taken to have applied proportionally to what would (apart from the reduction for that amount) have been

**Part 5** Recovery of advance

**Division 1** Recovery through winding up or bankruptcy

**Section 33**

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the amounts of the advance that would have been for particular employment entitlements.

**33 Recovery of advance for employment for partnership**

If an advance is for a person's employment for a partnership by 2 or more of the partners:

- (a) sections 29, 30 and 31 apply in relation to each of the partners who employed the person; and
- (b) the Commonwealth cannot recover through the winding up or bankruptcy of all of those partners one or more amounts totalling more than the amount of the advance.

## **Division 2—Recovery from person eligible for advance**

### **34 Recovery from person eligible for advance**

- (1) This section applies if:
  - (a) the Commonwealth pays someone (the *payee*) an advance for a person's employment by an employer; and
  - (b) an amount (the *later amount*) for an employment entitlement of the person for which an amount was included in the advance is later paid by someone (the *later payer*) to the person or for the benefit of the person or in accordance with the person's directions; and
  - (c) the later payer is not:
    - (i) the Commonwealth; or
    - (ii) the liquidator or bankruptcy trustee of the employer; or
    - (iii) the payee.
- (2) There is a debt due by the person to the Commonwealth of the lesser of the following (or either of them if they are equal):
  - (a) the later amount;
  - (b) the difference between the advance and the sum of:
    - (i) the amounts paid to the Commonwealth in the winding up or bankruptcy of the employer because of Division 1; and
    - (ii) the debts (if any) created by previous operations of this section in relation to the person.
- (3) A debt under this section may be recovered by the Secretary, on behalf of the Commonwealth, in a court of competent jurisdiction.

## **Part 6—Administration**

### **Division 1—Decision-making about advances**

#### **35 Presuming accuracy of certain information**

For the purposes of deciding:

- (a) whether a person is eligible for an advance for the employment of the person by an employer; and
- (b) the amount of such an advance;

the Secretary may presume that information relating to the person that is given to the Secretary by an insolvency practitioner for the employer is accurate.

#### **36 Giving notice of decisions made under section 15**

- (1) The Secretary must give a person written notice of each of the following decisions:
  - (a) a decision under subsection 15(1) whether the person is eligible for an advance;
  - (b) a decision under subsection 15(2) on the amount of an advance the person is eligible for.
- (2) The notice must set out:
  - (a) the terms of the decision; and
  - (b) written reasons for the decision; and
  - (c) the person's rights to have the decision reviewed.

## **Division 2—Review of decisions about advances**

### **Subdivision A—Internal review on the Secretary’s own initiative**

#### **37 Review on the Secretary’s own initiative**

- (1) If the Secretary is satisfied that there is sufficient reason, the Secretary may review:
  - (a) a decision whether a person is eligible for an advance; or
  - (b) a decision on the amount of an advance a person is eligible for.
- (2) The Secretary may review a decision under subsection (1) even if an application has been made to the Administrative Appeals Tribunal for a review of the decision (as affirmed or varied under Subdivision B or substituted under that Subdivision for an earlier decision).
- (3) The Secretary must not review a decision under subsection (1) while a review of the decision is taking place under Subdivision B.
- (4) After reviewing the decision under subsection (1), the Secretary may make a decision (the *review decision*):
  - (a) affirming the decision that was reviewed; or
  - (b) varying the decision that was reviewed; or
  - (c) setting aside the decision that was reviewed and substituting a new decision.

#### *Notifying the person of the review decision*

- (5) The Secretary must give the person written notice of the review decision, setting out:
  - (a) the terms of the review decision; and
  - (b) written reasons for the review decision.
- (6) Failure to comply with subsection (5) does not affect the validity of the review decision.

**Section 38**

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*Notifying the Administrative Appeals Tribunal of the review decision*

- (7) The Secretary must give the Registrar of the Administrative Appeals Tribunal written notice of the review decision if:
- (a) the review decision varied, or substituted a new decision for, the decision that was reviewed under subsection (1); and
  - (b) before the review decision was made, the person had applied to the Tribunal for review of the decision (as affirmed or varied under Subdivision B, or substituted for an earlier decision under that Subdivision) that was reviewed under subsection (1).

**Subdivision B—Internal review on application**

**38 Application for review by Secretary**

*Making an application*

- (1) A person may apply to the Secretary for review of:
- (a) a decision whether the person is eligible for an advance; or
  - (b) a decision on the amount of an advance the person is eligible for.
- (2) The application must be made within 28 days after the date of the notice of the decision, or such longer time as the Secretary allows.
- (3) The application must:
- (a) state the reasons why the application is being made; and
  - (b) set out, or be accompanied by, any information or documents relating to those reasons, other than information or documents referred to in the notice of the decision.

*Withdrawing an application*

- (4) The person may withdraw the application at any time before the review is completed.
- (5) The application may be withdrawn orally, in writing or in another manner approved by the Secretary.

- (6) If the application is withdrawn, it is taken never to have been made.

### **39 Action on application for review**

- (1) If a person applies under section 38 for review of a decision, the Secretary must review the decision and:
- (a) affirm the decision; or
  - (b) vary the decision; or
  - (c) set the decision aside and substitute a new decision.
- (2) The Secretary must give the person written notice of the decision made as a result of the review.
- (3) The notice must set out:
- (a) the terms of the decision made as a result of the review; and
  - (b) written reasons for that decision; and
  - (c) the person's rights to have that decision reviewed.

### **Subdivision C—Review by the Administrative Appeals Tribunal**

#### **40 Application to the Administrative Appeals Tribunal for review**

- (1) An application may be made to the Administrative Appeals Tribunal by a person for review of:
- (a) a decision by the Secretary whether the person is eligible for an advance that has been affirmed under Subdivision B or has been substituted under that Subdivision for an earlier decision; or
  - (b) a decision by the Secretary on the amount of an advance the person is eligible for that has been affirmed or varied under Subdivision B or substituted under that Subdivision for an earlier decision.
- (2) Subsection (1) has effect despite subsection 27(1) of the *Administrative Appeals Tribunal Act 1975*.

Section 41

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*If Secretary has reviewed decision after application is made*

- (3) If, after the person has applied to the Administrative Appeals Tribunal for review of the decision, the Secretary varies the decision, or substitutes a new decision for it, under Subdivision A, the application is taken to be for review of the decision as varied or the new decision.

**41 Limit on review of decision on amount of advance**

- (1) This section applies to a review by the Administrative Appeals Tribunal of a decision on the amount of an advance a person is eligible for if the decision involved the exercise of the power under section 17 to reduce that amount (because of a debt the person owed an employer).
- (2) The Tribunal cannot review the exercise of that power to reduce that amount.
- (3) The Tribunal cannot exercise that power.
- (4) This section has effect despite subsection 43(1) of the *Administrative Appeals Tribunal Act 1975*.



## **Division 3—Information management**

### **42 Use and disclosure of personal information by the Department for administering this Act**

For the purposes of administering this Act, the Department may:

- (a) use personal information about an employer or a current or former employee of an employer; and
- (b) disclose to any of the following persons personal information about an employer or a current or former employee of an employer:
  - (i) an insolvency practitioner for the employer;
  - (ii) a person with whom the Commonwealth has a contract to pass on to a former employee of the employer payments made under this Act;
  - (iii) a person who is making, proposes to make or has made a payment to a former employee of the employer associated with an amount owing or owed to the former employee in connection with his or her employment.

### **43 Use and disclosure of personal information by insolvency practitioners and payment intermediaries**

- (1) For the purposes of facilitating the administration of this Act, an insolvency practitioner for an employer may:
  - (a) use personal information about the employer or a current or former employee of the employer; and
  - (b) disclose to the Department personal information about the employer or a current or former employee of the employer.
- (2) For the purposes of facilitating the administration of this Act, a person with whom the Commonwealth has a contract to pass on to a former employee of an employer payments made under this Act may:
  - (a) use personal information about the former employee or the employer; and

Section 44

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- (b) disclose to the Department personal information about the former employee or employer.

**44 Use and disclosure of personal information by persons making payments to former employees**

For the purposes of facilitating the administration of this Act, a person, who is making, proposes to make or has made a payment to a former employee of an employer associated with an amount owing or owed to the former employee in connection with his or her employment, may:

- (a) use personal information about the former employee or the employer; and
- (b) disclose to the Department personal information about the former employee or employer.

**45 Disclosure of personal information to certain agencies**

For the purposes of facilitating the exercise of powers, or performance of functions, that an agency (as defined in the *Privacy Act 1988*) has in relation to the *Corporations Act 2001*, the *Bankruptcy Act 1966* or entitlements of current or former employees, the Department may disclose to the agency personal information that:

- (a) the Department has in connection with the administration of this Act; and
- (b) is about:
  - (i) an employer; or
  - (ii) an officer (as defined in the *Corporations Act 2001*) of an employer; or
  - (iii) an insolvency practitioner for an employer; or
  - (iv) a current or former employee of an employer.

## **Division 4—Arrangements for information and dealing with payments**

### **46 Arrangements for information and dealing with payments**

- (1) On behalf of the Commonwealth, the Secretary may make, vary, administer and otherwise give effect to an arrangement, agreement or contract for:
  - (a) the provision to or by the Department of information about a person that is relevant to determining either or both of the following:
    - (i) deciding whether a person is eligible for an advance;
    - (ii) deciding the amount of an advance a person is eligible for; or
  - (b) dealing with amounts of an advance that it has been decided a person is eligible for.
- (2) This section does not limit the executive powers of the Commonwealth.

## Division 5—Delegation

### 47 Delegation of Secretary's powers and functions

#### *To APS employees in the Department*

- (1) The Secretary may delegate in writing to an APS employee in the Department any or all of the Secretary's functions or powers under this Act, except the following provisions:
  - (a) section 25 (about disregarding recently agreed changes in terms and conditions);
  - (b) subsection 28(2) (about paying advances in instalments);
  - (c) subsection 38(5) (about approving the manner of withdrawing an application for internal review).

#### *To SES employees and acting SES employees in the Department*

- (2) The Secretary may delegate in writing to an SES employee, or acting SES employee, in the Department any or all of the Secretary's functions or powers under the following provisions:
  - (a) section 25;
  - (b) subsection 38(5).

Note: *SES employee* and *acting SES employee* are defined in section 2B of the *Acts Interpretation Act 1901*.

#### *To SES and Executive Level 2 APS employees in the Department*

- (3) The Secretary may delegate in writing the Secretary's power under subsection 28(2) to:
  - (a) an SES employee, or an acting SES employee, in the Department; or
  - (b) an APS employee who holds, or is acting in, an Executive Level 2 position, or an equivalent position, in the Department.

*Delegates to comply with directions*

- (4) In exercising powers or performing functions under a delegation under this section, the delegate must comply with any directions of the Secretary.

**48 Delegation of Minister's powers**

- (1) The Minister may delegate in writing the Minister's powers under section 49 to the Secretary or an SES employee in the Department who is at or acting at Band 3 level.
- (2) In exercising powers under a delegation under this section, the delegate must comply with any directions of the Minister.

## Part 7—Miscellaneous

### 49 Extended operation of this Act in relation to employers in administration under the *Corporations Act 2001*

#### *Making a declaration*

- (1) The Minister may by legislative instrument declare that this Act applies in relation to persons who were employed, but are no longer employed, by a specified employer that is under administration under Part 5.3A of the *Corporations Act 2001* (whether or not the employer was under administration while any of the persons were employed).
- (2) The Minister may make the declaration only if he or she is satisfied that:
  - (a) the employer's creditors are expected to resolve at a meeting convened under section 439A of the *Corporations Act 2001* that the employer be wound up; and
  - (b) if the declaration is made, it will be practicable to administer this Act as it will apply because of the declaration in relation to the employer.

#### *Effect of declaration*

- (3) While the declaration is in force, this Act applies in relation to the persons and the employer as if:
  - (a) the administrator of the employer under Part 5.3A of the *Corporations Act 2001* were a liquidator appointed when the administrator was appointed; and
  - (b) paragraph 14(2)(a) of this Act referred to the declaration being made (instead of an insolvency event happening to the employer).

*Revoking a declaration*

- (4) The Minister may by legislative instrument revoke a declaration made under subsection (1).

**50 Schemes for assistance of workers who were not employees**

- (1) A regulation may provide for a scheme for:
- (a) providing, directly or indirectly to individuals who are owed amounts for work they did for a specified person (except as employees of the person) who is insolvent or is reasonably expected to be insolvent, financial assistance relating to those amounts; and
  - (b) recovering amounts of that financial assistance.
- (2) A regulation providing for such a scheme may also provide for the following:
- (a) the determination of which individuals are eligible for financial assistance under the scheme (which determination may be made by, or depend on the opinion of, a person specified by the regulation);
  - (b) the determination of how much financial assistance individuals are eligible for under the scheme, which determination may:
    - (i) be made by, or depend on the opinion of, a person specified by the regulation; and
    - (ii) be of different amounts for different individuals;
  - (c) matters relating to the administration of the scheme, including:
    - (i) the making of claims and giving of notices; and
    - (ii) use and disclosure of personal information; and
    - (iii) review of decisions relating to the administration of the scheme (including applications to the Administrative Appeals Tribunal for review); and
    - (iv) the making, varying, administering and giving effect to of arrangements, contracts, agreements and deeds; and
    - (v) delegation of powers and functions relating to the administration of the scheme.

## Section 51

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- (3) A regulation made for the purposes of this section does not take effect before the end of the period in which it could be disallowed in either House of the Parliament.

### 51 Appropriation

The Consolidated Revenue Fund is appropriated for the purposes of payments under this Act or a regulation made for the purposes of section 50.

### 52 Recoverable payments

- (1) If, apart from this subsection, the Commonwealth does not have power under this Act or a regulation made for the purposes of section 50 to pay an amount (the *relevant amount*) to a person (the *recipient*) purportedly as an advance or as financial assistance under such a regulation, then the Commonwealth may pay the relevant amount to the recipient.
- (2) If a payment is made under subsection (1) to the recipient, the relevant amount:
- (a) is a debt due to the Commonwealth by the recipient; and
  - (b) may be recovered by the Secretary, on behalf of the Commonwealth, in a court of competent jurisdiction.

Note: See also section 47 of the *Financial Management and Accountability Act 1997* (duty to pursue recovery of a debt).

### 53 Reports about recoverable payments

- (1) During the applicable publication period for a reporting period, the Secretary must cause to be published, in such manner as the Secretary thinks fit, a report that sets out both:
- (a) the number of payments made under subsection 52(1) during the reporting period; and
  - (b) the total amount of those payments.
- (2) However, a report is not required if the number of payments is zero.



*Deferred reporting*

- (3) Subsection (1) does not require a report to deal with a payment unless, before the preparation of the report, an APS employee in the Department was aware that the payment was made under subsection 52(1).
- (4) For the purposes of this section, if:
- (a) a payment was made under subsection 52(1) in a reporting period; and
  - (b) because of subsection (3) of this section, subsection (1) of this section did not require a report to deal with the payment; and
  - (c) during a later reporting period an APS employee in the Department becomes aware that the payment was made under subsection 52(1);
- the payment is subject to a *deferred reporting obligation* in relation to the later reporting period.
- (5) If one or more payments made under subsection 52(1) during a reporting period are subject to a deferred reporting obligation in relation to a later reporting period, the Secretary must, during the applicable publication period for the later reporting period:
- (a) prepare a report that sets out:
    - (i) the number of those payments; and
    - (ii) the total amount of those payments; and
    - (iii) the reporting period during which the payments were made; and
  - (b) if a report is required under subsection (1) in relation to the later reporting period—include the report under paragraph (a) in the report under subsection (1); and
  - (c) if paragraph (b) does not apply—publish, in such manner as the Secretary thinks fit, the report under paragraph (a).

*Reporting period*

- (6) For the purposes of this section, a *reporting period* is:
- (a) a financial year; or

Section 54

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- (b) if a shorter recurring period is specified in a legislative instrument made by the Finance Minister—that period.

*Applicable publication period*

- (7) For the purposes of this section, the *applicable publication period* for a reporting period is the period of:
  - (a) 4 months; or
  - (b) if a lesser number of months is specified, in relation to the reporting period, in a legislative instrument made by the Finance Minister—that number of months;  
beginning immediately after the end of the reporting period.

**54 Right to financial assistance may be reduced, cancelled etc. without compensation**

A right to payment of financial assistance under this Act is granted on the basis that:

- (a) the amount of the assistance may be reduced under Part 3; and
- (b) the right may be cancelled, revoked, terminated or varied by or under later legislation; and
- (c) no compensation is payable if:
  - (i) the amount of financial assistance is reduced under Part 3; or
  - (ii) the right is cancelled, revoked, terminated or varied as mentioned in paragraph (b).

**55 Regulations**

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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*[Minister's second reading speech made in—  
House of Representatives on 11 October 2012  
Senate on 19 November 2012]*

(184/12)

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*Fair Entitlements Guarantee Act 2012*    *No. 159, 2012*    45