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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**BUSINESS SERVICES WAGE ASSESSMENT TOOL PAYMENT SCHEME
BILL 2014**

**BUSINESS SERVICES WAGE ASSESSMENT TOOL PAYMENT SCHEME
(CONSEQUENTIAL AMENDMENTS) BILL 2014**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Social Services, the Hon Kevin Andrews MP)**

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OUTLINE

Business Services Wage Assessment Tool Payment Scheme Bill 2014

This Bill will establish a payment scheme for supported employees with intellectual impairment in Australian Disability Enterprises who previously had their wages assessed under the Business Services Wage Assessment Tool.

Supported employees in Australian Disability Enterprises are paid a pro-rata wage, worked out in about half of all cases under the Business Services Wage Assessment Tool.

However, two supported employees were found through a recent court decision to have experienced indirect discrimination because their wages were assessed under the Business Services Wage Assessment Tool.

Following this decision, this Bill establishes a payment scheme to provide reassurance to supported employees, and their families and carers, by removing perceived liability that could impact the ability of Australian Disability Enterprises to deliver ongoing employment support.

The payment scheme will allow registration from 1 July 2014 for payments to former and current eligible employees in relation to work they have performed in the past.

To be eligible for the payment scheme, a person must have an intellectual impairment and have been employed by an Australian Disability Enterprise. Also, the person must have been paid a pro-rata wage determined under the Business Services Wage Assessment Tool, or a training wage paid while waiting for an assessment under the tool to be undertaken. Lastly, the person must have required daily support in the workplace from the Australian Disability Enterprise to maintain his or her employment.

The scheme will deliver payments to eligible workers as quickly as possible. While the scheme will open for registration on 1 July 2014, people planning to submit an application for the scheme have until 1 May 2015 to register. Applications to the scheme can be submitted up until 30 November 2015.

There are strict timeframes for the scheme. While these timeframes are generous, they do require that people wishing to access the scheme take certain actions before set dates. These timeframes will be made very clear in all scheme materials.

Once an application has been received, the applicant's eligibility for the scheme will be determined. Once eligibility is established, a payment amount will be calculated, based on half of the amount the worker would have been paid had the productivity element only of the Business Services Wage Assessment Tool been applied.

If the payment amount is greater than zero, the eligible applicant will receive a letter of offer, including a payment amount. During the acceptance period, the applicant must seek independent financial counselling and legal advice, funded through the scheme. Certificates must be provided, from both the financial counsellor and the legal adviser, along with acceptance of a payment offer. Once an offer has been formally accepted by an eligible applicant, payment will be made.

To ensure people with disability have the opportunity to provide further information or to raise any concerns, the scheme will have both internal and external review processes.

The scheme will not pay compensation, but will provide a payment to eligible people. People who take part in any representative or subsequent proceedings, which could potentially take years to resolve, cannot also access the payment scheme provided by this Bill, which will be available for registration from 1 July 2014.

Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014

This Bill provides the consequential amendments that need to be made to Commonwealth legislation in light of the new scheme. For example, amendments to the taxation law will ensure payments under the scheme are eligible income for the lump sum in arrears tax offset.

Amendments to the social security law and the *Veterans' Entitlements Act 1986* will ensure the payments are not income tested, and so will not reduce the income support payments of supported employees who receive payments under the scheme.

Lastly, the confidentiality provisions in the social security law will be adjusted to make sure personal information can be obtained and disclosed for the purpose of administering the new scheme.

Financial impact statement

The financial impact of these Bills will depend on the number of individuals who apply for the payment scheme, and the payment amounts determined for eligible applicants.

STATEMENTS OF COMPATIBILITY WITH HUMAN RIGHTS

The statements of compatibility with human rights appear at the end of this explanatory memorandum.

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NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

- **BSWAT** means the Business Services Wage Assessment Tool
- **Disability Services Act** means the *Disability Services Act 1986*

BUSINESS SERVICES WAGE ASSESSMENT TOOL PAYMENT SCHEME BILL 2014

Part 1 – Preliminary

Summary

Part 1 contains formal matters in relation to the Business Services Wage Assessment Tool Payment Scheme Bill 2014.

Explanation of the clauses

Short title

Clause 1 sets out how the new Act is to be cited, that is, as the *Business Services Wage Assessment Tool Payment Scheme Act 2014*.

Commencement

Clause 2 provides that the new Act will commence on the day after this Act receives the Royal Assent.

Simplified outline of this Act

Clause 3 provides a simplified outline of the new Act to assist the reader.

Definitions

Clause 4 defines certain terms that are used in the Act. In this explanatory memorandum, the defined terms will be addressed in the context in which they appear.

BSWAT is defined to mean the Business Services Wage Assessment Tool referred to in subparagraph 14.4(b)(ii) of the Supported Employment Services Modern Award 2010 as in force on 1 January 2010.

The BSWAT was developed in 2003 (after extensive research, consultation and trialling) and is administered by the Department of Social Services. The tool's purpose is to determine the level of wages paid to people with disability employed in Department of Social Services funded Australian Disability Enterprises. Funding to Australian Disability Enterprises provides employment support to individuals with disability who may not be able to take part in work in the open labour market. Types of support provided to people with disability in Australian Disability Enterprises include on-the-job training, supervision and workplace setup.

Australian Disability Enterprises are mostly not-for-profit organisations with a dual focus of supporting people with disability in work, and operating a viable business. There are currently 193 Australian Disability Enterprises nation-wide, employing about 20,000 people with disability in a range of industries, including packaging, manufacturing, catering and horticulture.

The BSWAT assesses an employee's competency and productivity in performing a work task. The competency and productivity components each account for 50 per cent of an employee's score under the BSWAT. The overall BSWAT percentage score is applied to the relevant Award wage rate to determine a pro-rata award rate.

Since the introduction of the BSWAT in April 2004, over 15,000 workers in Australian Disability Enterprises have been assessed using the BSWAT. Approximately 7 per cent of employees working in Australian Disability Enterprises have an intellectual disability – as either their primary or secondary disability type.

Part 2 – Key elements of BSWAT payment scheme

Summary

Part 2 of the Bill sets out key elements of the BSWAT payment scheme, including the eligibility criteria a person must satisfy, the definition of intellectual impairment to be used in relation the scheme, the amount payable under the scheme, and the legal consequences of accepting a payment under the scheme.

Explanation of the clauses

Simplified outline of this Part

Clause 5 provides a simplified outline of Part 2 to assist the reader.

Eligibility

The eligibility requirements for a person to participate in the **BSWAT payment scheme** are set out in **clause 6**.

Subclause 6(1) provides that a person is eligible for the **BSWAT payment scheme** if the person meets the conditions set out in subclauses (2), (3) and (4). A person must meet the conditions for an eligible day, received ongoing support in the workplace and have not accepted an **alternative amount**.

Subclause 6(2) sets out the conditions a person must meet for an **eligible day**. A person will meet the conditions in respect of eligible day, if on at least one day in the period starting on 1 January 2004 until 28 May 2014:

- the person had an **intellectual impairment**; and
- the person was employed in an **Australian Disability Enterprise**; and
- the person was provided with employment support by the **Australian Disability Enterprise**; and
- either:
 - the person was paid a training wage while waiting for a **BSWAT assessment** to be completed; or
 - the minimum wage payment to the person was worked out using a **BSWAT assessment** of the person.

If a person meets the conditions set out in subclause 6(2) on any day, any such day is an **eligible day** for the person.

Eligible day is defined in clause 4 and has the meaning given in subclause 6(2).

Australian Disability Enterprise is defined in clause 4. An organisation is an Australian Disability Enterprise in respect of a day if:

- the organisation received funding under the Disability Employment Assistance Program for the purposes of providing employment support to people with disability; and
- the funding came from the appropriation for the Disability Services Act and was made as a grant of financial assistance under section 12AD of the Disability Services Act.

Australian Disability Enterprises provide work in a range of industries including horticulture, cleaning, manufacturing, packaging, catering, laundry and printing.

Disability Employment Assistance Program is defined in clause 4 to mean the program known as Disability Employment Assistance, funding for which is made available by the Department. The funding is provided to Australian Disability Enterprises to provide supported employment assistance to people with disability: <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-service-providers/disability-employment-assistance>

BSWAT assessment is defined in clause 4 to mean an assessment conducted using the **BSWAT**.

Example

Anna is a 38 year old woman with Down Syndrome. She has worked as a laundry assistant five days a week in her local Australian Disability Enterprise since 1 October 2005. The Australian Disability Enterprise is funded by the Australian Government through the Disability Employment Assistance Program, and the funding has been used to support Anna in her day-to-day work activities. Anna had her first BSWAT assessment to determine her pro-rata wage in March 2006. Anna has since had two further BSWAT assessments on which her minimum wage was based: one in February 2009, and one in January 2012. Anna is eligible for the scheme.

Subclause 6(3) sets out the condition a person must meet for ongoing daily support in the workplace. A person will meet the condition if the person required ongoing daily support in the workplace in order to maintain the person's employment in the **Australian Disability Enterprise**.

Subclause 6(4) provides that a person meets the condition if there is no **alternative amount** for the person.

Alternative amount is defined in clause 4. There is an **alternative amount** for a person if:

- the person, otherwise under the Act, has accepted money in settlement of a claim made in relation to a matter set out in subclause 10(2); and
- in accordance with an order of a court money has been paid to a person in connection with a claim made in relation to a matter referred to in subclause 10(2).

If a person has accepted a settlement or accepts a settlement in relation to a matter set out in subclause 10(2), the person will have an alternative amount. If a person receives money as a result of a court order in relation to a matter referred to in subclause 10(2), the person have an alternative amount.

Definition of intellectual impairment

Clause 7 defines the term ***intellectual impairment*** for the purposes of the ***BSWAT payment scheme***.

A person has an intellectual impairment for the purposes of ***BSWAT payment scheme*** if:

- the person has an least one of the following:
 - an intellectual disability;
 - autism spectrum disorder;
 - dementia;
 - impaired intellectual functioning as a consequence of an acquired brain injury; and
- any conditions prescribed by the rules are satisfied.

Every person is unique. There is no single, agreed definition of intellectual disability. Over the past 20 years, new approaches have broadened the concept of disability to place increased emphasis on functional and environmental considerations and less emphasis on deficit. There are a number of authoritative assessment methods for disability including:

- American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders – (Fifth Edition) (DSM-5).
- The Wechsler Adult Intelligence Scale (Fourth edition) (WAIS -IV).
- International Statistical Classification of Diseases and Related Health Problems (ICD-10) (WHO 1992).

There are different types of intellectual disability.

Payment amount

Clause 8 defines the term ***payment amount*** and the principles to be applied when making rules that specify the method for determining the payment amount.

Subclause 8(1) provides that a ***payment amount*** for a person is the amount worked out for the person by a method set out in the rules.

Subclause 8(2) provides that the rules may prescribe different methods for different circumstances.

Subclause 8(3) sets out that, when the Minister makes the rules, which specify the method for determining the payment amount, he or she must have regard to the following principles:

- A payment amount under the scheme should be 50 per cent of the wages the person would have received had the person's wages been assessed using only the productivity component of the **BSWAT assessment** less the amount of actual wages paid.
- To ensure the person retains the payment amount determined after tax, a supplement can be added to the payment amount which takes into account the likely effect of income tax.
- The payment amount should be nil, if the person's productivity wages would have been the same or lower than the amount of actual wages paid.

Subclause 8(4) provides that, if the payment amount for the person is at least \$1 but less than \$100, the payment amount the person should be offered is \$100 plus a supplement for tax if required. For clarity, this applies despite subclause (3).

Subclause 8(5) defines **actual wages** and **productivity wages** for the purposes of the Act.

Actual wages is defined to mean a wage, worked out in accordance with the rules, that a person was paid in respect of an eligible day. This is the wage the person received from his or her Australian Disability Enterprise.

Productivity-score wage is defined to mean a wage, worked out in accordance with the rules, that a person could reasonably have been expected to have been paid in respect of an eligible day, had the productivity component of the **BSWAT assessment** comprised the whole of the **BSWAT assessment**.

Effect on representative proceedings

The effect of accepting a payment under the **BSWAT payment scheme** on the person's participation in the relevant representative proceedings is set out in **subclause 9**.

Subclause 9(4) sets out those representative proceedings which are relevant representative proceedings from which the person will cease to be a group member. These proceedings include:

- the proceedings commenced in the Federal Court of Australia on 23 December 2013 as proceeding number VID1367/2013;
- any other **representative proceeding**:
 - in which damages or compensation are claimed in connection with the use of a **BSWAT assessment** to work out a minimum wage payable to a person; or
 - in relation to which a person may be a group member on the same or substantially the same basis as the conditions in clause 6;

- any appeal, application for leave to appeal or application for special leave to appeal from any judgement in that proceeding referred to in paragraph (a) or (b);
- any appeal from any judgement in any such appeal referred to in paragraph (a) or (b).

Subclause 9(1) provides that, if a person lodges an **effective acceptance** and the person is a group member in a relevant **representative proceeding** immediately before lodging the acceptance, then, at the time the acceptance is lodged, the person will cease to be a group member in the relevant representative proceedings. The person may not become a member of this proceeding again.

Subclause 9(2) clarifies that a person does not have to opt out of the representative proceedings in accordance with section 33J of the *Federal Court of Australia Act 1976*. This means that a person who accepts a payment from the **BSWAT payment scheme** before the time set by the court for opting out of the representative proceedings does not also have to provide an opt-out notice to the court. Also, a person who accepts a payment from the **BSWAT payment scheme** after the time set by the court for opting out of the representative proceedings will not be a group member of the proceedings and does not have to seek the permission of the court to have the date extended for opting out.

Subclause 9(3) clarifies that a person lodging an effective acceptance or the doing of any other act under this Act or the rules made under this Act does not constitute the taking of a step in a **representative proceeding** or conducting part of the proceeding under section 33F of the *Federal Court of Australia Act 1976*.

Effective acceptance is defined in clause 4, and has the meaning given by clause 38.

Representative proceeding is defined in clause 4 and the same meaning as in Part IVA of the *Federal Court of Australia Act 1976*.

Effect on certain claims

Clause 10 is a statutory release and indemnity.

Subclause 10(1) provides that, if a person lodges an effective acceptance, then the person releases and forever discharges the Commonwealth, each Australian Disability Enterprise and all other people are released from further liability in relation to any matter set out in subclause (2).

The subclause further provides that a person may not bring or continue any claim against the Commonwealth or any other person in relation to any matter set out in subclause (2).

The release and indemnity operates immediately from the time the effective acceptance is lodged.

Subclause 10(2) sets out the matters to which the release and indemnity apply. These include any matter, to the extent to which it relates to the use of a **BSWAT assessment** to work out a minimum wage payable to a person, which relates to:

- unlawful discrimination; or
- the contravention or breach of, or failure to comply with, a law whether written or unwritten, of the Commonwealth, a State or a Territory; or
- any other conduct or failure on the part of the Commonwealth, an Australian Disability Enterprise or any other person, that might give rise to a liability to the person.

Evidence of eligibility

Clause 11 provides that the rules may prescribe matters in relation to the evidence needed to do with both of the following:

- establishing a person's eligibility under clause 6; and
- working out the amount of the payment to be offered to a person.

Part 3 – How to obtain a payment under the BSWAT payment scheme

Summary

Part 3 of the Bill sets out how a person may obtain a payment under the BSWAT payment scheme. A person must register for the scheme, make an application, receive an offer and accept a payment. The decision whether or not to accept a payment under the scheme is a decision for the person.

Explanation of the clauses

Division 1 – Simplified outline of this Part

Simplified outline of this Part

Clause 12 provides a simplified outline of this Part to assist the reader.

Division 2 – Registration and application

Registration

Clause 13 sets out that a person must contact the Secretary and register their interest in receiving a payment under the **BSWAT payment scheme** providing their name and contact details.

Subclause 13(1) provides that the Secretary must establish a register.

Subclause 13(2) provides that, if the person contacts the Secretary before 1 May 2015 to register for the **BSWAT payment scheme**, the Secretary must add the person's name, contact details and any other details the Secretary considers appropriate to the register. Registration is the first step in participation in the **BSWAT payment scheme**.

Subclause 13(2) contains the first in a series of deadlines for taking a step to obtain a payment under the **BSWAT payment scheme**. A person is required to take action to register before 1 May 2015.

The methods by which a person may contact the Secretary are set out in **subclause 13(3)**. The methods are telephone, email or other electronic means, or any other means approved by the Secretary.

Subclause 13(4) clarifies that a person's name will be taken to be on the register if a person has makes an application for the BSWAT payment scheme before 1 May 2015.

When a person may not be included on the register

Clause 14 provides two circumstances when the Secretary must not include a person's name on the register.

Subclause 14(1) provides that the Secretary cannot include on the register a person who has an **alternative amount**. This provision applies to all those who have accepted or accept settlements or as a result of a court order in proceedings of a matter referred to in subclause 10(2) whether before the **BSWAT payment scheme** is established or during the currency of the scheme.

Subclause 14(2) provides that the Secretary may not include a person's name on the register on or after 1 May 2015. Failure to register a person's name and contact details before 1 May 2015 will mean that, even if the person were eligible, he or she may not make an application and may not receive any payment under the scheme.

Subclause 14(3) applies despite anything else in this Act.

Example

David has autism, and works in a lawn mowing crew for an Australian Disability Enterprise in a major city. He has worked for the same Australian Disability Enterprise for three years, three days a week, and is paid wages assessed under the BSWAT. David thinks he may be eligible for the **BSWAT payment scheme**. He has heard about the scheme for about a year now, but has not taken any action because he has heard the scheme is open for two years. He calls to register his interest on 5 May 2015. David is advised that he is unable to register and will not be able to submit an application for payment because he has not met the registration deadline of 30 April 2015.

Application

Clause 15 provides that a person must make an application. The application is the second step for those people who wish to participate in the **BSWAT payment scheme**.

Subclause 15(1) provides that a person may make an application for the **BSWAT payment scheme** between 1 July 2014 and 30 November 2015. For clarity, a person must have their name included on the register before they may make an application. Applications made on or after 1 May 2015 may only be made by those who have had their names, contact details and other information required by the Secretary entered on the register prior to 1 May 2015.

Subclause 15(1) contains the second in the series of deadlines for taking a step to obtain a payment under the **BSWAT payment scheme**. A person is required to take action before 30 November 2015.

The requirements for an application are set out in **subclause 15(2)**. The application must be:

- in an approved form; and
- lodged in a manner prescribed by the rules; and
- made before 1 December 2015.

Subclause 15(3) provides that an application must be accompanied by the information and documents prescribed by the rules.

When a person cannot make an application

The circumstances when a person may not make an application are set out in **clause 16**.

Subclause 16(1) provides that a person may not make an application if the person has an **alternative amount**.

Subclause 16(2) provides that a person who is not on the register cannot make an application on or after 1 May 2015.

Subclause 16(3) provides that an application cannot be made on or after 1 December 2015.

Subclause 16(4) provides that the section has effect despite anything else in the Act. This subclause reinforces that in no circumstances can an application be made and acted upon after 1 December 2015. Therefore, a person interested in accepting an offer under the scheme must make their application prior to 1 December 2015.

Example

Edgar has Down Syndrome, and has worked at an Australian Disability Enterprise in manufacturing since 2004. Edgar's sister, Margaret, as his nominee, registered him with the scheme when it first opened in July 2014. Following consideration of Edgar's circumstances, Margaret submitted an application form to the scheme on his behalf in October 2015. Edgar's application is accepted for determination.

Division 3 – Determinations, offers and refusals

Determination of application

Clause 17 provides that the Secretary must make a decision about each application.

Subclause 17(1) provides that the Secretary must determine each application in accordance with this clause.

Subclause 17(2) provides that the Secretary must:

- make a determination that the applicant is eligible for the scheme if he or she is satisfied that an applicant has meet the conditions for eligibility for the scheme;
- make a determination that the applicant is not eligible for the scheme if he or she is satisfied that an applicant has not meet the conditions for eligibility for the scheme.

Subclause 17(3) provides that the Secretary must make a determination of a **payment amount** if he or she is satisfied that an applicant is eligible for the **BSWAT payment scheme**.

Example

The Secretary has received an application from the nominee of Anna, a 38 year old woman with Down Syndrome who has worked as a laundry assistant in her local Australian Disability Enterprise since 1 October 2005. The Secretary reviews Anna's eligibility against the eligibility criteria. Anna meets the eligibility criteria, and the Secretary is satisfied that she meets the eligibility for the Scheme. The Secretary makes a determination that Anna is eligible for the Scheme.

Example

The Secretary has received an application from Edward. Edward has schizophrenia, and has worked in an Australian Disability Enterprise as a nursery assistant since 2007. Edward's wages are assessed using the Supported Wage System. Edward registered for the Scheme on 1 February 2015 and submitted an application to the Secretary shortly afterwards. The Secretary reviews Edward's eligibility against the eligibility criteria. Edward does not meet the eligibility criteria, and the Secretary is not satisfied he meets the eligibility for the scheme. The Secretary makes a determination Edward is not eligible for the Scheme.

Subclause 17(4) sets out the interaction between this clause and requests for information made by the Secretary made under clauses 68 or 69. If the Secretary makes a request or requirement for further information under clauses 68 or 69, the Secretary does not need to make a determination under this clause until the information requested or required has been produced.

Certain applications must not be determined

The circumstances when certain applications must not be determined are set out in **clause 18**.

Subclause 18(1) provides that the Secretary must not determine an application made by a person if:

- the person has already lodged an **effective acceptance**; or
- the person still has an earlier application that has not be finally determined; or
- there is an **alternative amount** for the person.

Subsection 18(2) provides that the Secretary cannot determine an application made on or after 1 December 2015.

Subsection 18(3) defines when an earlier application has been **finally determined**. An application will be **finally determined** if:

- the person has declined an offer in response to an application;
- the person has been given a refusal and has not sought review before the period for review has expired; or
- the person has been given a refusal that includes a determination made by an external reviewer.

Subject to the person meeting all the requirements for making an application under the scheme, a person is not stopped from making a further application for a payment under the scheme if all previous applications have been determined.

Subsection 18(4) provides that the section has effect despite anything else in the Act. This subclause reinforces that in no circumstances can an application be made and acted upon after 1 December 2015. Therefore, a person interested in accepting an offer under the scheme must make their application prior to 1 December 2015.

Offer

The Secretary is required to make an offer to an applicant in certain circumstances. The requirements for the information to be set out in an offer are set out in **clause 19**.

Subclause 19(1) provides that, if the Secretary has determined that an applicant is eligible under the **BSWAT payment scheme** for a **payment amount** (subclause 17(3)), the Secretary must make an offer to the applicant of a **payment amount**. The Secretary must also make an offer if a determination is affirmed under subclause 24(6) or 28(1). The offer must be made in writing. A **payment amount** has the meaning given by subclause 8(1).

Subclause 19(2) provides that the offer must do the following:

- specify the date of the offer;
- inform the applicant that he or she is eligible for the **BSWAT payment scheme**;
- set out the reasons why the Secretary considers the applicant to be eligible;
- specify the payment amount (and where applicable the amount of the tax supplement);
- set out the reasons why the Secretary considers this is the payment amount to be offered;
- it is an affirmed determination under subclauses 24(6) or 28(1), set out the affirmed determination and the reasons for the affirmed determination;
- specify a period within which the person may accept the offer (the **acceptance period**) (the acceptance period cannot be less than 14 days, and starts to run from the date on which the offer is made);
- explain how an applicant can accept an offer, if the applicant would like to accept the offer (the explanation must state that the applicant will be required to obtain a lawyer's certificate (clause 36) and a financial counsellor's certificate (clause 37));
- explain that the applicant does not have to accept the offer and that, by doing nothing, the applicant will be taken to have declined the offer at the end of the acceptance period;

- explain how a request for an extension of time to accept an offer can be made if the applicant cannot make his or her decision about accepting the offer within the **acceptance period**;
- explain how to make an application for review before the end of the acceptance period, if the applicant wishes to have his or her offer reviewed;
- draw the applicant's attention to clauses 9 and 10.

Example

Following the Secretary's determination that Anna is eligible for the scheme, the Secretary must make an offer of a payment amount. Anna receives a letter in the post. Her nominee is her mother, Glenda. Glenda reviews the information in the letter, and explains it to Anna. The letter tells Anna of her eligibility for the scheme and why the Secretary found her eligible, the amount of her offer, the length of the period to accept her offer, why she is eligible, how her payment amount was determined, how Anna may accept her offer, and how to apply for an extension of time or for a review before the end of the acceptance period.

The minimum period the Bill allows for an acceptance period is 14 days. It is anticipated that, during the life of the BSWAT payment scheme, most applicants will receive a period of at least 60 days, with some applicants receiving more depending on their circumstances, regarding whether to accept an offer or not. This will allow the applicant time to consult with a legal practitioner and a financial counsellor. If the applicant requires an extension, the Secretary may extend the acceptance period for a further 28 days. However, as the 31 December 2016 deadline approaches, the period of time will be reduced for making an effective acceptance. A minimum period of 14 days will allow an applicant to receive an offer up until 15 days before 31 December 2016.

Example

Anna has an offer from the scheme. As Anna applied to the scheme early in the application period, the Secretary has given Anna three months to consider acceptance of her offer.

Subclause 19(3) applies to the form of an offer the Secretary must provide after a determination of an external reviewer. If an external reviewer reviews a determination and determines that a payment amount for the applicant is more than nil or affirms a determination of the Secretary in relation to a payment amount, the resulting offer to the applicant made by the Secretary is not to include information about:

- an extension of time to accept an offer; or
- review.

Subclause 19(4) clarifies that subclause 19(2) does not limit the matters that may be dealt by an offer.

Refusal

Clause 20 addresses the circumstances where the Secretary determines that a person does not meet the eligibility criteria or the payment amount is payable is nil.

Subclause 20(1) provides that the Secretary must refuse an applicant's application if:

- the payment amount is nil; or
- the applicant is not eligible for the **BSWAT payment scheme**; or
- the relevant determination above is affirmed under subclause 24(6) or 28(1).

The Secretary must inform the applicant of his or her refusal in writing.

Subclause 20(2) provides that the written notice of refusal must:

- set out the date of the refusal;
- explain the reason for refusing the applicant's application;
- if it is an affirmed determination under subclauses 24(6) or 28(1), set out the affirmed determination and the reasons for the affirmed determination;
- inform the applicant that he or she may seek review of the refusal within 21 days of the date of refusal and explain how to make an application for review;
- inform the applicant that he or she may seek an extension of time and explain how a request for an extension of time to review the refusal.

Subclause 20(3) applies to a refusal the Secretary must provide after review by an external reviewer. If an external reviewer reviews a refusal determination and determines that an applicant is not eligible for the **BSWAT payment scheme** or affirms a determination of the Secretary, the resulting written notice of refusal to the applicant made by the Secretary is not to include information about:

- an extension of time to accept an offer; or
- review.

Subclause 20(4) clarifies that subclause 20(2) does not limit the matters that may be dealt by an offer.

Example

Following the Secretary's determination that Edward is ineligible for the scheme, the Secretary must refuse Edward's application. Edward receives a letter in the post notifying him of his refusal. The letter explains why Edward's application has been refused, provides details of how Edward can request a review of the decision if he wants to, and gives further details of how to request an extension of time if Edward wants further time to review his refusal.

Certain circumstances in which offers and refusals cannot be given

The Secretary may not make an offer or give a refusal to a person in certain circumstances, and these are set out in **clause 21**.

Subclause 21(1) provides that the Secretary must not make an offer or give a refusal to a person whose application has been determined if the person has, since the determination was made, received an **alternative amount**.

Subclause 21(2) provides that the Secretary must not make an offer or give a refusal to a person on or after 1 September 2016, except where the offer or refusal is made as a consequence of a review of a determination made before 1 September 2016. Subclause 21(2) contains the third in the series of deadlines for taking a step to obtain a payment under the **BSWAT payment scheme**. A person is required to take action before 1 September 2016.

Subclause 21(3) provides that the Secretary must not make an offer or give a refusal on or after 1 December 2016. Subclause 21(3) contains the fourth in the series of deadlines for taking a step to obtain a payment under the **BSWAT payment scheme**.

Subclause 21(4) clarifies that, where a notice under clause 68 or clause 69 has been given and no response has been provided to the notice on or before 1 September 2016, the Secretary must not make an offer or give a refusal after 1 September 2016 even if the information is provided. This reinforces that 1 September 2016 is a deadline for the making of offers or the giving of refusals.

Subclause 21(5) provides that the section has effect despite anything else in the Act. This subclause reinforces the deadlines set out in subclauses 21(2) and (3).

Extensions

The **BSWAT payment scheme** recognises that applicants may have to make some difficult choices and may not be able to make these decisions in the time allowed. The requirements in relation to extension are set out in **clause 22**.

Subclause 22(1) provides that, if an applicant makes a request within the relevant period the Secretary may extend the time of:

- the acceptance period for an offer; or
- the period within which to apply for review of a refusal.

The Secretary may extend the period for no more than 28 days.

The rules may set out how a request is made.

Subclause 22(2) provides that an acceptance period extended under paragraph 100(1)(a) must end on or before 31 December 2016. No acceptances will be acted upon on or after 1 January 2017. Subclause 22(2) contains the fifth in the series of deadlines for taking a step to obtain a payment under the **BSWAT payment scheme**.

Subclause 22(3) provides that an extension of period for review of a refusal under paragraph 100(1)(b) must end on or before 30 November 2016.

Subclause 22(4) clarifies that a request to extend a period must be made before the end of the original period.

Subclause 22(5) provides that the Secretary may only extend a period once.

Example

Anna has an offer from the scheme. As Anna applied to the scheme early in the application period, the Secretary has given Anna three months to consider acceptance of her offer. However, during the three month acceptance period, Anna's father passes away. Anna and her mother, Glenda, are unable to undertake the tasks required to lodge an effective acceptance in the three months of the offer period. Glenda's mother contacts the call centre to advise of Anna's circumstances and to request additional time to consider the application. An extension of 28 days is given, and Glenda is advised that the extension can be provided once only and an effective acceptance has to be received in that time frame.

Division 4 – Internal review

Internal review at Secretary's initiative

Clause 23 provides that the Secretary may review determinations he or she has made.

Subclause 23(1) provides that the Secretary may, on his or her own initiative, review a determination under clause 17 if the Secretary is satisfied there is enough reason to do so.

Subclause 23(2) sets out the circumstances where the Secretary cannot review a determination. These include:

- after an application has been made for external review of the determination under Division 5; or
- after a person has accepted an offer; or
- after a determination has been made or affirmed in an external review under Division 5.

Subclause 23(3) provides that, if the Secretary reviews a determination, the Secretary may:

- affirm the determination; or
- set aside the determination and substitute a new determination in accordance with the requirements of Division 6.

Internal review on application

The requirements for making an application for internal review are set out in **clause 24**.

Subclause 24(1) provides that a person may make an application made to the Secretary for internal review of a determination made for the person under clause 17. However, no internal review can be made of a determination made by the Secretary under this Division or by an external reviewer under Division 5.

Subclause 24(2) provides that, if the determination was included in an offer, the application for review must be made before the end of the acceptance period and before the offer is accepted.

Subclause 24(3) provides that, if the determination was included in a refusal, the applicant must either make the application within the 21-day period starting on the date of the refusal or, if an extension of time has been given under clause 22, by the end of the extended period.

Subclause 24(4) provides that the application must be made:

- by sending or delivering a written application to the Secretary; or
- making an oral application, in person or by telephone or other means to the Secretary.

The Secretary may set out in the rules further details about how an application for internal review is made.

Subclause 24(5) provides that, if a person makes an oral application, the person receiving the application must:

- make a written record of the details of the application; and
- note on the record the date the application is made.

Subclause 24(6) provides that the Secretary must make his or her decision in relation to the review as soon as reasonably practicable. The Secretary must either affirm the determination or set aside the original determination and make a new determination in accordance with the requirements of Division 6.

Withdrawal of application for external review

The requirements for withdrawing an application for internal review are set out in **clause 25**.

Subclause 25(1) provides that the applicant may withdraw an application for internal review at any time before a decision is made under subclause 24(6) by:

- sending or delivering a written notice to the Secretary; or
- contacting the Secretary and withdrawing the application orally, in person or by telephone or other means.

The Secretary may set out in the rules further details about how an application for internal review is withdrawn.

Subclause 25(2) provides that, if a person withdraws the application orally, the person receiving the application must:

- make a written record of the details of the withdrawal; and
- note on the record the date the withdrawal is made.

Subclause 25(3) provides that, where an application is withdrawn, the application for internal review is taken not to have been made. As a result, if there is still time in the acceptance period, a person may accept the offer made. If there is no time left in the acceptance period, the person will be taken to have declined the offer. A person cannot seek external review of an application that has been withdrawn.

Example

Edward receives a letter in the post notifying him of his refusal. Edward believes he should be able to receive a payment from the BSWAT payment scheme. Edward contacts the call centre the day after he receives his letter, saying he would like a review of the decision because he works in an Australian Disability Enterprise and thinks he should receive a payment offer. The call centre takes down Edward's details, the date and time Edward made contact, and the reason for his request for review. The Secretary commences a review of Edward's application. On review, the Secretary determines that Edward is ineligible to receive a payment from the scheme. The Secretary is satisfied that Edward does not have an intellectual disability and his minimum wage was not worked out using a BSWAT assessment. The Secretary affirms the decision and writes to Edward to advise him of the review outcome. Edward may seek external review.

Division 5 – External review

Application for external review

The requirements for making an application for external review are set out in **clause 26**.

Subclause 26(1) provides that a person may make an application for external review of a determination under clause 17 made by the Secretary or if the Secretary has reviewed the determination under Division 4. However, no external review can be made of a determination made by an external reviewer under this Division.

Subclause 26(2) provides that, if the determination was included in an offer, the application for review must be made before the end of the acceptance period and before the offer is accepted.

Subclause 26(3) provides that, if the determination was included in a refusal, the applicant must either make the application within the 21-day period starting on the date of the refusal or, if an extension of time has been given under clause 22, by the end of the extended period.

Subclause 26(4) provides that the application must be made:

- by sending or delivering a written application to the Secretary; or

- making an oral application, in person, or by telephone or other means, to the Secretary.

Subclause 26(5) provides that, if a person makes an oral application, the person receiving the application must:

- make a written record of the details of the application; and
- note on the record the date the application is made.

Example

Edward receives a letter in the post notifying him of the Secretary's determination in relation to his internal review request. Edward is still dissatisfied with the outcome of the determination made by the Secretary. On receipt of the letter from the Secretary, Edward telephones the call centre and requests an external review of the decision. Edward is advised his request has been taken and an external review will commence.

Appointing an external reviewer

The requirements for the appointment of external reviewer are set out in **clause 27**.

Subclause 27(1) provides that, if the Secretary receives an application for external review of a determination, the Secretary must appoint a person to review the determination. The appointment must be made in writing.

Subclause 27(2) sets out the people who the Secretary may appoint. These are:

- a retired Judge; or
- a legal practitioner who has been enrolled for at least 10 years.

The Secretary anticipates that those legal practitioners appointed as external reviewers will be senior members of the bar or of the profession, who have experience in undertaking reviews with similar schemes.

Subclause 27(3) provides that, if an external reviewer is unable to complete a review of a determination (for example, the reviewer becomes ill, is incapacitated, no longer meets the criteria for appointment or is in a conflict of interest), the Secretary must appoint another person who meets the requirements of subclause 27(2) to undertake the determination.

Subclause 27(4) provides that a person who is appointed as an external reviewer is to be paid the remuneration and allowances determine in writing in accordance with the rules.

External review

Clause 28 provides that the external reviewer must undertake the review as soon as reasonably practicable.

Subclause 28(1) provides that the external reviewer must:

- affirm the determination; or
- set aside the determination and substitute a determination made in accordance with Division 6.

An external reviewer in undertaking his or her review must comply with any requirements that are prescribed in the rules (**subclause 28(2)**).

Material that may be considered by the external reviewer

The material that may be considered by the external reviewer is set out in **clause 29**.

Subclause 29(1) provides that, in completing a review, the external reviewer may only consider:

- a statement or document given to the external reviewer under this clause; or
- information or document given to the external review under clause 30.

Subclause 29(2) sets out the material that is to be provided by the Secretary. This includes:

- a written statement that:
 - sets out the finding of facts made by the Secretary in making the determination; and
 - refers to the evidence upon which the findings were based; and
 - the reasons for the making of the determination; and
- the original or copy of every document or part of document that:
 - is relevant to the review of the determination of the applicant; and
 - is in the possession or under the control of the Secretary.

The statement must be provided to the external reviewer as soon as is practicable after the appointment of the external reviewer.

Subclause 29(3) provides that the applicant may give the Secretary:

- a written statement supporting the application for review; and
- any other document that the applicant considers relevant to the review.

The statement or document must be given to the Secretary within 14 days of making the application for external review.

Subclause 29(4) provides that the Secretary must forward the material to the external reviewer as soon as practicable after receiving it.

Subclause 29(5) provides that, if:

- a document comes into the possession or under the control of the Secretary before the completion of the review; and

- the Secretary considers the document or part of the document is relevant to the review; and
- a copy of the document or the part of the document has not been given to the external reviewer in accordance with subclause 29(1);

the Secretary must provide a copy of the document or the part of the document to the external reviewer as soon as is reasonably practicable.

Subclause 29(6) provides that the Secretary must also provide a copy of document or the part of the document to the applicant. The Secretary must provide the document as soon as is reasonably practicable after giving the document to the external reviewer (unless the statement or document was provided by the applicant).

External reviewer may request Secretary to seek further information

Clause 30 provides that an external reviewer may request the Secretary to seek further information, if the Secretary considers it appropriate to do so.

Subclause 30(1) provides that the external reviewer may request the Secretary to exercise his or her powers to seek information from the applicant (clause 68) or from another person (clause 69), if the external reviewer is satisfied that a person has information, or possession or control of a document, that is relevant to the review.

Subclause 30(2) provides that the Secretary must, as soon as practicable, either:

- comply with the request, if the Secretary is satisfied that he or she may exercise his or her powers, and, upon receiving the information or document, give the information or document to the external reviewer;
- refuse to comply with the request and inform the external reviewer.

An example of where the Secretary may refuse a request is where the Secretary has already sought the information and the applicant or person has provided a reasonable explanation as to why the information cannot be provided.

Example

Edward writes a statement supporting his request for review. In his statement, he says he should be eligible for a payment from the scheme because he has worked in an Australian Disability Enterprise. Edward submits it by email to the call centre email address the same day he contacts the call centre to request his external review. All information pertaining to Edward's determination is collated and, with Edward's submission, is provided to the external reviewer, who is a retired judge.

Withdrawal of application for external review

The requirements for withdrawing an application for external review are set out in **clause 31**.

Subclause 31(1) provides that the applicant may withdraw an application for external review at any time before a decision is made under subclause 28(1) by:

- sending or delivering a written notice to the Secretary; or
- contacting the Secretary and withdrawing the application orally, in person or by telephone or other means.

Subclause 31(2) provides that, if a person withdraws the application orally, the person receiving the application must:

- make a written record of the details of the withdrawal; and
- note on the record the date the withdrawal is made.

The Secretary may set out in the rules (if any) further details about how an application for external review may be withdrawn.

Subclause 31(3) provides that, where an application is withdrawn, the application for external review is taken not to have been made. As a result, if there is still time in the acceptance period, a person may accept the offer made. If there is no time left in the acceptance period, the person will be taken to have declined the offer.

Notice of decision of external review

Clause 32 provides that the external reviewer must give the Secretary:

- a copy of the external reviewer's decision on review; and
- reasons for the decision.

Division 6 – Determination made on a review

Substituting determinations on a review

Set out in **clause 33** are requirements which apply in relation to the review of determinations made under Divisions 4 and 5.

Subclause 33(1) provides that clause 33 applies in relation to:

- an internal review conducted by the Secretary under Division 4;
- an external review conducted by an external reviewer appointed under Division 5.

In this clause, the Secretary and the external reviewer are referred to as ***the reviewer***.

Subclause 33(2) addresses the circumstance where, on a review of a determination involving a ***payment amount***, the reviewer is satisfied that the applicant is not eligible for the ***BSWAT payment scheme***. If a reviewer is satisfied that the applicant is not eligible for the ***BSWAT payment scheme***, the reviewer must set aside the determination which found the applicant eligible and substitute a new determination that the applicant is not eligible. The Secretary will be required to refuse the application for a payment under the BSWAT payment scheme (clause 20).

Subclause 33(3) provides that subclause 33(2) does not apply if the determination that the applicant is eligible was made on external review. Therefore, if an external reviewer determines that an applicant is eligible for the **BSWAT payment scheme**, the decision may not be reviewed.

Subclause 33(4) provides that, in relation to the review of payment amount by a reviewer, the reviewer may reduce the payment amount for the applicant.

Subclause 33(5) addresses the circumstance where, on review, a reviewer is determining the eligibility of an applicant who has been determined by the Secretary to be ineligible. If the reviewer is satisfied that the person is eligible for the BSWAT payment scheme, he or she must set aside the determination of the Secretary that the applicant is not eligible and substitute a decision that the applicant is eligible. The Secretary must then determine the payment amount for the person under subclause 17(3).

Example

The external reviewer re-examines all of Edward's documentation, including his written statement. The external reviewer finds that, while Edward has worked in an Australian Disability Enterprise and needs ongoing daily support to maintain employment, he does not have an intellectual impairment as defined by the Act, and he has never had a BSWAT assessment, or wages paid according to a BSWAT assessment. The external reviewer affirms the Secretary's determination that Edward is not eligible for the scheme. The external reviewer provides this determination to the Secretary, along with her reasons. The Secretary writes to Edward, again providing a refusal, and setting out the reasons for refusal. Edward is advised in the letter that the determination of the external reviewer is final.

Effect of review on previous offer or refusal

The effect of a review by either the Secretary or an external reviewer on a previous offer or refusal is set out in **clause 34**.

Subclause 34(1) provides that, if a person makes an application for review under Division 4 or Division 5, any offer or refusal made as a result of the determination is taken never to have been made because it is not current and cannot be accepted.

The note to subclause 34(1) informs the reader that an offer that is not current cannot be accepted.

Subclause 34(2) provides that, if the Secretary, after undertaking an internal review at his or her own initiative, substitutes a new determination, any offer or refusal that had been previously made ceases to be current and is taken not to have been made.

The note to subclause 34(2) informs the reader that an offer that is not current cannot be accepted.

Subclause 34(3) clarifies that, if person withdraws an application for review in accordance with either clause 25 or clause 31, the offer or refusal which was in effect before the application for review was lodged is in effect again. Further, in the case of an offer, the number of days that remained in an acceptance period prior to the application for review being lodged are now available again, and the person may accept an offer in that remaining period.

Division 7 – Accepting an offer

Accepting an offer

The requirements for accepting an offer under the **BSWAT payment scheme** are set out in **clause 35**.

A person who wants to accept an offer made by the Secretary must do so in accordance with the requirements set out in clause 35 – (**subclause 35(1)**).

Subclause 35 (2) provides that the acceptance must be:

- in an approved form;
- lodged in a manner prescribed by the rules; and
- lodged before the end of the acceptance period for the offer.

Subclause 35(3) provides that an acceptance must be accompanied by:

- a legal advice certificate that complies with clause 36; and
- a financial counselling certificate that complies with clause 37; and
- an acknowledgement that the person understands the effect of accepting the offer; and
- any other information or document prescribed by the rules.

An acceptance must be accompanied by the documents set out in subclause 35(3).

Example

Charlie lodged an acceptance which is not accompanied by a legal advice certificate and a financial counselling certificate. Charlie states that he has not had time to get to see his lawyer or the financial counsellor, but he really wants to accept the offer. Charlie has already received an extension of 28 days to the acceptance period within which to accept the offer. Unless Charlie can lodge the legal advice certificate and the financial counselling certificate by the end of the acceptance period, the offer to Charlie will be taken to have been declined.

Legal advice certificate

The requirements for a legal advice certificate are set out in **clause 36**.

A legal advice certificate must:

- be in an approved form; and
- certify the matters specified in the approved form; and
- be signed by a **legal practitioner**.

The applicant will have access under the scheme to legal advice. The applicant will need to see a legal practitioner to seek advice on the impact of receiving a payment under this scheme and whether the offer made is consistent with the requirements of the Act. The form will set out the matters on which a legal practitioner should provide advice to an applicant. The legal practitioner will be required to certify that he or she has provided advice. An applicant will be able to have his or her nominee present at this meeting if he or she desires.

Legal practitioner is defined in clause 4 and means a person who:

- is enrolled as a legal practitioner of the High Court, of another federal court or the Supreme Court of a State or Territory; and
- who holds a practising certificate (however described).

Financial counselling certificate

The requirements for a financial counselling certificate are set out in **clause 37**.

Subclause 37(1) provides that a financial counselling certificate must:

- be in an approved form; and
- certify the matters specified in the approved form; and
- be signed by the financial counsellor or by the person's nominee (where applicable).

A participant's nominee can sign a financial counselling certificate, including where the nominee is a public guardian or public trustee, or a private financial manager who is a solicitor with a current practicing certificate or an accountant.

Financial counsellor is defined in subclause 37(2), and means a person who is a fully accredited member of a State or Territory association of financial counsellors prescribed in the rules.

Effective acceptance

The requirements for effective acceptance are set out in **clause 38**.

An acceptance will be an effective acceptance for the purposes of the BSWAT payment scheme only if:

- the person accepts the offer in accordance with the requirements set out in clause 35; and
- the acceptance is lodged before 1 January 2017; and
- at the time the acceptance is lodged:

- if the offer has ceased to be current under subclause 34(1) or (2) – the offer has become current again under subclause 34(3);
- there is no **alternative amount** for the person; and
- the person is not the **representative party** in a relevant **representative proceeding**.

The note clarifies that a representative party in a relevant representative proceeding must first seek the leave of the court before accepting an offer under this BSWAT payment scheme.

Representative party is defined in clause 4, and has the same meaning as in Part IVA of the *Federal Court of Australia Act 1976*.

Clause 38 contains the final deadline in a series of dealings for the purposes of the **BSWAT payment scheme**.

Notice to Federal Court

A notice must be forwarded to the Federal Court if a person lodges an effective acceptance. The requirements for this notice the sending of this notice are set out **clause 39**.

Subclause 39(1) provides that the Secretary must notify the Federal Court if a person lodges an effective acceptance.

Subclause 39(2) provides that notice must:

- be in writing; and
- be accompanied by copies of:
 - the acceptance; and
 - a legal advice certificate and a financial counselling certificate.

Subclause 39(3) clarifies that a notice does not need to be forwarded to the Federal Court if all relevant representative proceedings have been determined, settled or discontinued.

Payment of amount

The requirements for paying the amount of an offer accepted by an applicant are set out in **clause 40**.

Subclause 40(1) provides that, if a person lodges an effective acceptance, the Secretary must pay the payment amount offered to the person. The Secretary must pay the amount on the date which is determined to be the earliest date on which it is reasonably practicable for the payment to be made.

The amount must be paid to the credit of a bank account nominated and maintained by the person. The account may be maintained by the person alone or jointly with another person (**subclause 40(2)**).

The Secretary may direct that the whole or part of the amount is paid in a different manner than to a bank account. If the Secretary gives this direction, then the money is to be paid in accordance with the direction (**subclause 40(3)**).

Example

Sophia has worked since 2005 in an Australian Disability Enterprise, packaging cosmetics. Her wages have been assessed using the BSWAT, she meets the eligibility criteria for the scheme and she has been determined as eligible and made an offer by the Secretary. Sophia is under a guardianship order. The guardian accepts the offer on her behalf and payment is made for Sophia to the responsible guardian.

Declining an offer

Clause 41 provides that, if a person does not lodge an effective acceptance of an offer before the end of the acceptance period, the person has been taken to have declined the offer.

Part 4 – Nominees

Summary

Part 4 of the Bill sets out the process by which a person can be appointed as a nominee. A nominee is a person who can make decisions on behalf of a participant, while ensuring that the rights, preferences and dignity of the person with disability are maintained.

Explanation of the clauses

Division 1 – Introduction

Simplified outline of this Part

Clause 42 provides a simplified outline of this Part to assist the reader.

Definition of participant

Clause 43 sets out a definition of ***participant*** for use in this Part. Participant means a person who:

- might be eligible for the ***BSWAT payment scheme***; or
- has an intellectual impairment and wants to make or has made an application under clause 15.

Clause 44 provides that, for the purposes of the Part, a reference to making a decision by a participant includes a decision to refrain from doing an act to give effect to that decision.

Division 2 – Functions and responsibilities of nominee

Actions on behalf of a nominee

The actions that may be taken by a nominee on behalf of a participant are set out in **clause 45**.

Subclause 45 (1) provides that a nominee may do things that can be done by a participant under the Act. The instrument of appointment of the nominee may limit the extent to which a nominee can do things on behalf of a participant, in which case the plan nominee may only do things to the extent specified in the instrument.

Without limiting subclause 45(1), a plan nominee can make a request under the Act that can be made by the participant (**subclause 45(2)**).

Anything done by the nominee under the clause has effect as if it had been done by the participant (**subclause 45(3)**).

If a nominee is appointed on the initiative of the Secretary, the nominee may only do something if the nominee considers that the participant is not capable of doing the thing himself or herself (**subclause 45(4)**).

Duties of nominee to participant

Clause 46 sets out the duties of a nominee are to the participant.

Subclause 46(1) states that it is the duty of a nominee to ascertain the preferences of the participant and to act in a way that gives effect to the preferences expressed by the participant.

However, a nominee does not breach this duty by doing an act if, when the act is done, the nominee reasonably believes they have ascertained the preferences of the participant in relation the act, and are giving effect to those preferences expressed by the participant (**subclause 46(2)**).

A nominee also does not breach this duty by not doing an act if, at the relevant time, the nominee reasonably believes they have ascertained the preferences of the participant in relation to the act and, by not doing the act, are giving effect to those preferences expressed by the participant (**subclause 46(3)**)

Subclause 46(4) provides that the rules may modify the duty of a nominee under **subclause 46(1)** to address the situation where a participant cannot formulate preferences. The rules will be able to further prescribe the duties of those nominees who are nominees for a person who is not able to formulate preferences because of their disability. The responsibility for making a decision for a person with disability in this situation may require further articulation of the nominee's duties.

Subclause 46(5) provides that the rules may prescribe other duties of a nominee, including duties requiring them:

- to support the participant to make their own decisions; or
- to have regard to the appropriate weight to be given to the views of the participant; or
- to inform the Secretary and the participant if the nominee acquires, or is likely to acquire, any interest, pecuniary or otherwise, that conflicts or could conflict with the performance of the nominee's duties.

Giving notices to a nominee

Clause 47 sets out how notices are to be provided to a nominee.

Subclause 47(1) provides that any notice the Secretary is authorised or required to give under the Act to a participant may be given to the nominee. The notice must be in the same form and terms as if it were being given to the participant, and may be given to the nominee personally, by post, or by any other means approved by the Secretary, according to **subclause 47(2)**.

If the Secretary gives notice to the nominee (a nominee notice) of something in relation to which the Secretary has already given notice, or afterwards gives notice to the participant, that is expressed in the same way and makes the same requirement, then clause 48 ceases or does not come into effect, as the case requires, in relation to the nominee notice.

Compliance by nominee

Clause 48 sets out the effect of a notice given to a participant's nominee.

Subclause 48(1) provides that, if a notice is given to a participant's nominee, then the notice is taken to have been given to the participant on the day the notice was given to the nominee. Any requirement made of the participant to inform the Secretary of a matter or to give information or documents to an officer can be satisfied by the nominee, and any act done by the nominee to satisfy such a requirement is taken to be done as if it were done by the participant. Equally, if the nominee fails to satisfy a requirement, then the participant is taken to have failed to satisfy the requirement.

To avoid doubt, the participant is taken to have complied with a requirement if, within the specified period, the nominee complies with a requirement. Also, to avoid doubt, if the nominee fails to comply with a requirement within a specified period, the participant is taken not to have complied (**subclauses 48(2) and 48(3)**).

Nominee to inform Secretary of matters affecting ability to act as nominee

Clause 49 sets out the circumstances where a nominee must inform the Secretary of matters affecting their ability to act as a nominee. **Subclause 49(1)** allows the Secretary to give a nominee written notice that they are required to inform the Secretary of events or changes of circumstances (or where such an event or change is likely to happen) if it is likely to affect:

- the ability of the nominee to act as the nominee;
- the ability of the Secretary to give notices to the nominee; or
- the ability of the nominee to comply with notices given to the nominee by the Secretary under this Act.

Subclause 49(2) sets out what the notice must specify:

- how the nominee is to inform the Secretary; and
- the period within which the nominee must inform the Secretary, which must be at least 14 days from the day on which the event or change of circumstances happens, or the day on which the nominee becomes aware that the event or change of circumstances is likely to happen.

A notice will not be ineffective if it only fails to include information on how the nominee is to inform the Secretary (**subclause 49(3)**).

The provision is expressed to apply to acts, omissions, matters and things outside Australia, whether in a foreign country or not, and to all persons irrespective of their nationality or citizenship (**subclause 49(4)**).

Division 3 – Appointment and cancellation or suspension of appointment

Appointment of nominee

Clause 50 allows for the appointment of nominees. **Subclause 50(1)** provides that the Secretary may appoint (in writing) a person to be the nominee of a participant. The appointment may be made at the request of the participant or on the initiative of the Secretary (**subclause 50(2)**). An appointment may set out limitations on the matters for which the appointee is the nominee of the participant (**subclause 50(3)**) and may have effect for a specified term (**subclause 50(4)**). The manner of specifying a term in subclause (4) may be by reference to the expiry of the specified or the occurrence of a specified event but is not limited to just these two (**subclause 50(5)**).

To avoid doubt, the Secretary may appoint more than one person to be the nominee of a participant.

Provisions relating to appointments

Clause 51 sets out the requirements in relation to the appointment of nominees. **Subclause 51(1)** specifies that the Secretary must not appoint a nominee of a participant under clause 5 except:

- with the written consent of the person to be appointed; and
- after taking into consideration the preferences (if any) of the participant regarding the making of such an appointment.

Subclause 51(2) requires the Secretary to consider whether the person is able to comply with clause 46 (duties of the nominee) before appointing someone as a nominee.

Subclause 51(3) requires the Secretary to have regard to whether a person has guardianship of a participant under a law of the Commonwealth, a State or Territory before appointing a nominee.

Subclause 51(4) requires the Secretary to give a copy of a clause 50 appointment to the nominee and the participant.

The rules may prescribe certain persons who must not be appointed as nominees, and criteria to which the Secretary must have regard in considering the appointment of a nominee (**subclause 51(5)**).

Circumstances in which the Secretary must cancel appointment of nominees

Clause 52 provides the circumstances in which the Secretary must cancel the appointment of nominees.

If a nominee has been appointed at the request of the participant, and the participant requests the Secretary to cancel the appointment, the Secretary must cancel the appointment by written instrument as soon as practicable (**subclause 52(1)**). The request need not be in writing, but, if not, then the Secretary must make a written record of the request (**subclause 52(2)**).

If a nominee notifies the Secretary in writing that they no longer wish to be a nominee, the Secretary must cancel the appointment as soon as practicable (**subclause 52(3)**).

The instrument of cancellation must be given to the person whose appointment is cancelled, and the participant (**subclause 52(4)**).

General circumstances in which Secretary may cancel or suspend appoint of nominee

Clause 53 provides for the general circumstances in which the Secretary may suspend or cancel nominee appointments.

If a person has been appointed as a nominee at the initiative of the Secretary, and the participant requests the appointment to be cancelled, the Secretary may cancel the appointment (**subclause 53(1)**). The request need not be in writing, but, if not, then the Secretary must make a written record of the request (**subclause 53(2)**).

Subclause 53(3) requires the Secretary to decide whether to cancel the appointment within 14 days after receiving the request, and, if the Secretary decides not to cancel the appointment, written notice of the Secretary's decision must be given to the nominee and the participant.

The Secretary may also suspend or cancel one or more nominee appointments, by written instrument, if the Secretary gives the nominee a notice under clause 49 and the nominee informs the Secretary that an event or change of circumstances has happened or is likely to happen, and, after considering the nominee's response, the Secretary considers it appropriate to cancel or suspend the appointment (**subclause 53(4)**).

The Secretary may also suspend or cancel one or more nominee appointments, by written instrument, if the Secretary gives a nominee a notice under clause 49 and the nominee does not comply with the requirements set out in the notice (**subclause 53(5)**).

Both the nominee and the participant must be given a copy of an instrument cancelling or suspending an appointment under this clause (**subclause 53(6)**).

Suspension etc. of appointment of nominee in cases of physical, mental or financial harm

Clause 54 provides for the suspension of the appointment of nominees in cases of severe physical, mental or financial harm. **Subclause 54(1)** provides that the Secretary may, by written instrument, suspend the appointment of a nominee if the Secretary has reasonable grounds to believe the person has caused, or is likely to cause, this kind of harm to a participant and the person has failed to act to fulfil the person's duties.

Subclause 54(2) clarifies that the term financial harm does not include a decision of the nominee to act in accordance with the participant's preferences in relation to the **BSWAT payment scheme**. This reinforces that the decision to accept or decline an offer made under the scheme is one for the participant.

Subclause 54(3) requires the Secretary, upon suspending a person's appointment, to give the person and the participant a copy of the instrument of suspension, and a written notice requiring the person to provide a statement of reasons as to why their appointment should not be cancelled within 28 days after the notice is given.

If the person provides the statement, the Secretary may cancel the appointment by written instrument, and must make a decision as soon as practicable after receiving the statement (**subclauses 54(4) and 54(5)**). If the person does not provide the statement, the Secretary must cancel the appointment by written instrument (**subclause 54(6)**).

If the Secretary makes a decision to cancel the appointment, a copy of the cancellation instrument must be given to the person and the participant (**subclause 54(7)**).

If the Secretary decides not to cancel the appointment, the suspension of the appointment ends, and the Secretary must give the person and the participant written notice of the decision (**subclause 54(6)**).

Other matters relating to cancellation or suspension of appointment

Clause 55 is concerned with other matters in relation to the cancellation or suspension of appointment of nominees.

Subclause 55(1) provides that, while a person's appointment as a nominee is suspended, they are unable to do things on behalf of a participant, because the appointment has no effect for the purposes of the Act.

Subclause 55(2) allows the Secretary to appoint another person under clause 53 or clause 54 to be the nominee for a participant during a period when a person's appointment is suspended.

Rules may prescribe requirements etc.

Clause 56 provides that rules may be made to set out requirements with which the Secretary must comply relating to nominee appointments, cancellations or suspensions, and matters to which the Secretary must have regard in appointing nominees, or cancelling or suspending appointments of nominees.

Secretary's powers of revocation

Clause 57 clarifies that nothing in this Part is to be taken to be an expression of a contrary intention for the purposes of subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that a power to make an instrument is to be construed to include also a power to repeal, rescind, revoke, amend, or vary the instrument.

Division 4 – Review of certain decision about nominees

Review of decisions about nominees

Clause 58 provides that the Secretary may review certain decisions made in relation nominees if he or she is satisfied there is good reason to do so.

Subclause 58(1) provides that the Secretary may, on his or her own initiative, review a decision to appoint a person to be a nominee of a participant or a decision to cancel or suspend, or not to cancel or suspend, the appointment of a nominee, if the Secretary is satisfied there is enough reason to do so.

The decisions the Secretary can make are set out in **subclause 58(2)**. These are:

- affirm the decision; or
- vary the decision; or
- set aside the decision and substitute a new decision.

The review permitted under this provision will be undertaken by an officer of the Department who is more senior and independent of the original decision-maker.

Application for review

Clause 59 provides that a person whose interest is affected by a decision referred to in subclause 58(1) may apply to the Secretary for review of that decision. The application for review must be in writing and be made within 28 days after the day the person first received notice of the decision. The period in which a person can apply can be extended if the Secretary allows (**subclause 59(1)**). The application must give reasons for seeking the review (**subclause 59(2)**). An application may be made to the Secretary in writing or orally in accordance with the rules (if any) (**subclause 59(3)**). If an application is made orally, the person receiving the application must record the details of the application and record the day the application is made (**subclause 59(4)**).

Withdrawal of application

The requirements for withdrawing an application for review under this Division are set out in **clause 60**.

Subclause 60(1) provides that the person may withdraw an application for review at any time before the review is completed by:

- sending or delivering a written notice to the Secretary – the notice must be in accordance with the rules (if any);
- contacting the Secretary and withdrawing the application orally – this may be done in person by telephone or in a manner prescribed by the rules (if any).

Subclause 60(2) provides that, if an application is withdrawn, the person receiving the oral withdrawal application must make record of the application, including the day the application was made.

Subclause 60(3) provides that, where an application is withdrawn, the application for review is taken not to have been made.

Review of decisions following application under clause 59

Clause 61 provides that, if a person applies for review of decision under clause 59, the Secretary must review the decision and do one of the following:

- affirm the decision;
- vary the decision;
- set aside the decision and substitute a new decision.

Notice and date of effect

Clause 62 sets out the requirements for informing a person of the outcome of the review and the date the decision on review will take effect.

Subclause 62(1) provides that the decision on review will take effect on the day specified in the decision on review or, if no date is specified, on the day on which the decision on review was made. The Secretary must notify the applicant as soon as practicable after making the decision of the outcome of the review. The decision on review must set out the reasons for the decision.

Division 5 – Other matters relating to nominees

Secretary's powers to notices to a participant

Clause 63 clarifies that nothing in this Part is intended to affect the Secretary's powers under other provisions of this Act to give notices to, or make requirements of, a participant who has a nominee.

Notification of nominee where notice is given to the participant

Clause 64 is concerned with the provision of notification to a nominee where notice is given to a participant. If the Secretary gives a participant with a nominee a notice under a provision in the Act (other than a provision of this Part), the Secretary must inform the nominee of the giving of the notice and of the terms of the notice.

Protection of participant against liability for actions of nominee

Clause 65 provides that a participant is not guilty of an offence relating to an act or omission of their nominee.

Protection of nominee against criminal liability

Clause 66 is concerned with the protection of nominees from criminal liability. The clause provides that a nominee is not subject to any criminal liability under this Act in relation to an act or omission of the participant or anything done, in good faith, by the nominee in their capacity as nominee.

Part 5 – Administration

Summary

Part 5 of the Bill sets out a number of administrative matters associated with the BSWAT payment scheme, including comprehensive rules to protect personal information, the circumstances in which a debt may be owed to the Commonwealth, and the methods through which the Commonwealth may recover a debt.

Explanation of the clauses

Division 1 – Introduction

Simplified outline

Clause 67 provides a simplified outline of this Part to assist the reader.

Division 2 – Information gathering

Further information from applicant

The requirements for obtaining information from the applicant are set out in **clause 68**.

Subclause 68(1) provides that the Secretary may request from the applicant further information, if the Secretary considers the information would assist in determining a person's application. The Secretary must make the request by a notice in writing.

The notice may be given personally or by post, in a manner approved by the Secretary, and must specify:

- the nature of the information requested; and
- how the person is to give the information; and
- the period with which the person must give the information; and
- the officer or class of officer (if any) to whom the information must be provided; and
- that the notice is given under this clause (**subclause 68(2)**).

Subclause 68(3) clarifies that a notice is not invalid because it does not comply strictly with the requirements set out in subparagraphs (2)(b)(ii) to (v).

Subclause 68(4) clarifies that the period for answering the notice must not end earlier than 14 days after the notice is given. The period for answering the notice must be at least 15 days and, depending on the circumstances, may be a longer period.

Subclause 68(5) makes it clear that the Secretary does not have to take any further action in relation to an application until the information is provided. If a person does not provide the information, it is possible for the person not to receive a payment under the scheme.

General power to obtain information

The requirements for obtaining information or documents from a person other than the applicant are set out in **clause 69**.

Subclause 69(1) provides that the Secretary may require a person other than the applicant who has information, or a document in his or her custody or under his or her control, to the Department if:

- it may assist in determining an application for the **BSWAT payment scheme**;
- whether the person received an alternative payment at any time before making an effective acceptance;
- whether a debt arises under Division 4 in relation to the payment of a person.

The Secretary must make the request by a notice in writing.

Subclause 69(2) clarifies that the Secretary does not have to take any further action in relation to an application until the information is provided. If a person who has been given a notice under this clause does not provide the information, it is possible for a person seeking a payment under this **BSWAT payment scheme** not to receive a payment under the scheme.

Power to obtain information from a person who owes a debt to the Commonwealth

Clause 70 allows the Secretary to require person who owes a debt to the Commonwealth under the Act to give or produce to the Secretary information or documents relevant to their financial situation, and also to inform the Secretary of a change of address within 14 days of the change occurring.

Obtaining information about a person who owes a debt to the Commonwealth

Clause 71 allows the Secretary to require a person who may have information or documents relevant to the location of a person who owes a debt to the Commonwealth, or relevant to the debtor's financial situation, to give the information or documents to the Secretary.

Written notice

Clause 72 sets out the requirements for notices under clauses 69, 70 and 71.

A notice seeking a document or information under clauses 69, 70 and 71 must be made in writing (**subclause 72(1)**).

The notice may be given personally or by post, or in any other manner determined by the Secretary. The notice must specify:

- how the person is to give the information or produce the document;
- the period with which the person must give the information or produce the document, which must be a period not less than 14 days;
- the officer or class of officer to whom the information or document must be provided; and
- that the notice is given under this clause (**subclause 72(2)**).

Subclause 72(3) clarifies that a notice is not invalid because it does not comply strictly with the requirements set out in subparagraphs (2)(b)(i) to (iv).

Subclause 72(4) clarifies that the period for answering the notice must not end earlier than 14 days after the notice is given. The period for answering the notice must be at least 15 days and depending on the circumstance may be a longer period.

Offence

Clause 73 makes it an offence, with a penalty of 30 penalty units, if the person refuses or fails to comply with a notice under clause 69, 70 or 71 without reasonable excuse. A penalty unit is prescribed for the purposes of the *Crimes Act 1914*. That Act also provides that, if a body corporate is convicted of an offence, a fine of up to five times the penalty stated can be imposed.

The burden of providing whether a person has a reasonable excuse is on the defendant, by virtue of subsection 13.3(3) of the *Criminal Code*. This provision is the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

Obligations not affected by State or Territory laws

A person must comply with a requirement made under this Act to provide information or a document to the Department despite any other law of a State or Territory (**clause 74**).

Division 3 – Privacy

Protection of information

Clause 75 sets out the measures that must be taken for the protection of personal information that the Secretary may obtain in the course of performing his or her functions under the Act. The protection of personal information likely to be acquired by the Secretary through the operation of the scheme, and the person's right to privacy, are considered paramount.

Protected information for the purposes of the Act means information about a person that was obtained for the purposes of this Act and is or was held in the records of the Department.

A person may obtain protected information for the purposes of the Act (**subclause 75(1)**).

A person may make a record, disclose or otherwise use protected information in the following circumstances:

- for the purposes of the Act; or
- for the purpose for which the information was disclosed to the person under clause 81; or
- with the expressed or implied authorisation of the person to whom the information relates (**subclause 75(2)**).

Offence – unauthorised access to protected information

Clause 76 creates an offence of unauthorised access to protected information. The rationale for this offence (and the other offences relating to protected information) is that the injury caused by unauthorised access to protected information to an individual can be severe. The penalty is a maximum of two years' imprisonment, or 120 penalty units, or both.

Clause 77 creates an offence of unauthorised use or disclosure of protected information. The rationale for this offence is that the injury caused by unauthorised use and disclosure of protected information to an individual can be severe. A person commits an offence if they make a record of information, disclose information to any other person, or otherwise make use of information (and are not otherwise authorised to so under the Act). The penalty is a maximum of two years' imprisonment or 120 penalty units, or both.

Offence – soliciting disclosure of protected information

Clause 78 creates an offence of soliciting disclosure of protected information. A person commits an offence if they solicit the disclosure of protected information from an officer or another person (whether or not any protected information is actually disclosed), the disclosure would contravene this Division, and the information is protected information. The penalty is two years' imprisonment or 120 penalty units, or both.

Clause 79 creates an offence of supplying protected information.

Subclause 79(1) provides that a person commits an offence if they offer to supply (whether to a particular person or otherwise) information about another person and they know it is protected information. The penalty is two years' imprisonment or 120 penalty units, or both.

Subclause 79(2) provides that a person also commits an offence if they hold themselves out as being able to supply (whether to a particular person or otherwise) information about another person, and they know it is protected information.

Subclause 79(3) clarifies that subclauses 79(1) and 79(2) do not apply to an officer acting in the performance or exercise of their duties, functions or powers under this Act.

Protection of certain documents etc. from production to court etc.

Clause 80 provides that an officer must not, except for the purposes of this Act, be required to produce any document in their possession or disclose any matter or thing they had or knew because of their performance, exercise of their duties, functions or powers under the Act to a court, tribunal, authority or person who has the power to require the production of documents or the answering of questions.

Disclosure of information by Secretary

Clause 81 gives the Secretary the power to disclose protected information in strictly limited circumstances. This includes the power to disclose protected information if it is necessary in the public interest to do so – for example, if it is necessary for the investigation of a criminal offence.

In addition, the Secretary may disclose protected information to the head of a Department of State or authority of the Commonwealth (including Centrelink and Medicare). Information may also be disclosed to persons expressly or impliedly authorised by the person to whom the information relates (**subclause 81(1)**).

Subclause 81(2) provides that, if the Secretary certifies that protected information may be disclosed in the public interest, or to the head of a Department of State of the Commonwealth, then the Secretary must act in accordance with any rules made for the purposes of clause 82.

Subclause 81(3) clarifies that the Secretary may give protected information to a participant's nominee if it relates to the participant and the information is or was held in the records of the Department.

Rules for exercise of the Secretary's disclosure powers

Clause 82 provides that rules may be made relating to:

- the Secretary's power to certify the necessity for disclosure of protected information in the public interests (paragraph 82(1)(a)); or
- the Secretary's power to disclose information to the heads of Commonwealth departments or authorities (subparagraph 82(1)(b)(i)).

Part does not affect the operation of the Freedom of Information Act 1982

Clause 83 clarifies that nothing in this Part relating to the disclosure of information affects the operation of the *Freedom of Information Act 1982*.

Division 4 – Debt recovery

Debts due to the Commonwealth

Clause 84 sets out when a debt will arise under this Act.

Clause 84(1) provides that, if a payment amount has been paid to a person, the amount (or an amount equivalent to the amount) is a debt due to the Commonwealth only to extent that it is expressly provided for by this clause.

An amount will be a debt due to the Commonwealth if an amount was paid to a person (the recipient) but was not payable because:

- the amount was paid to the wrong person;
- there is no determination of a payment amount, or no effective acceptance, that relates to the payment; or
- the amount exceeds that payment amount determined for the person.

The recipient will have a debt to the Commonwealth for the amount paid (or an amount equivalent to that amount) (**subclause 84(2)**).

A payment amount paid wholly or partly because of a false or misleading statement or misrepresentation by the recipient or another person is a debt due to the Commonwealth, but only so much of the payment amount as is attributable to the false or misleading statement or the misrepresentation (**subclause 84(3)**).

Subclause 84(4) clarifies that a debt due by a person (the recipient) arises at the time the amount is paid to the person.

Joint and several liability for debts arising because of false and misleading statements

Clause 85 provides that the recipient and another person are jointly and severally liable to repay a debt if:

- under this Division, the recipient is required to repay an amount known as an unauthorised amount; and
- the unauthorised amount was paid because the person contravened Part 7.4 of the *Criminal Code* (which deals with false and misleading statements); and
- the other person is convicted of an offence:
 - that is taken to have been committed in relation to that contravention because of section 11.2 or 11.2A of the *Criminal Code* (which deal with complicity, common purpose and joint commission); or
 - in relation to that contravention against section 11.4 or 11.5 of the *Criminal Code* (which deal with incitement and conspiracy).

Legal proceedings

Clause 86 allows the Commonwealth to recover debts due by means of legal proceedings brought by the Commonwealth in a court of competent jurisdiction.

Arrangements for the payment of debts

Clause 87 allows the Secretary on behalf of the Commonwealth to enter into an arrangement with the person owing the debt for the debt to be repaid. The arrangement will take effect either from the day specified in the arrangement as the day from when the arrangements commence, or from the day the arrangement was entered into. Such an arrangement would normally set out matters including a timetable for repayment (**subclauses 87(1), (2) and (3)**).

The Secretary may terminate an arrangement for payment of a debt at the request of the person who owes the debt, after giving 28 days' notice to the person that they propose altering or terminating the arrangement, or without notice if the Secretary is satisfied the person has failed to disclose material information about their true capacity to repay the debt (**subclause 87(4)**).

Recovery from financial institutions

Clause 88 enables the Secretary to recover debts from financial institutions in circumstances where amounts are paid to an account in error – for example, where the account-holder is not the intended recipient of the money.

In those circumstances, the Secretary can issue the financial institution with a notice requiring the institution to pay an amount of money to the Commonwealth within a reasonable period, as stated in the notice. The amount of money to be paid will be the lesser of the amount specified in the notice that is equal to the amount or the amount standing to the credit of the account when the notice is received by the institution (**subclause 88(1)**).

It is an offence to fail to comply with a notice, unless the institution proves it was incapable of complying with the notice, the penalty for which is a maximum of 300 penalty units. The amount of a penalty unit is determined under the *Crimes Act 1914* (**subclauses 88(2) and (3)**).

Subclause 88(4) clarifies that an amount recovered by the Commonwealth from an institution under this provision reduces any debt owed to the Commonwealth in respect of the amount.

A **financial institution** is defined in **subclause 88(5)** to mean a corporation that is an ADI for the purposes of the *Banking Act 1959*.

Overseas application of debts

Clause 89 provides that the operation of the provision creating a debt under this Part has extra-territorial effect.

Division 5 – Non-recovery of debts

Secretary may write off debt

Clause 90 provides for circumstances in which the Secretary may write off debts owed to the Commonwealth.

Subclause 90(2) provides that the Secretary may write off debts only if the law makes the debt irrecoverable, if the person who owes the debt (debtor) has no capacity to repay it, if, after all efforts have been made to locate the debtor, they cannot be found, or if it is not cost effective for the Commonwealth to take action to recover the debt.

Subclause 90(3) sets out when a debt is irrecoverable at law for the purposes of paragraph 90(2)(a). This will apply only when the debt cannot be proved in legal proceedings, the debt was not incurred by fraud and was incurred before a debtor became bankrupt and they are discharged from bankruptcy, or the debtor has died and there is either no estate or insufficient funds in the estate to repay the debt.

A decision by the Secretary to write off a debt takes effect on the day the decision is made or on the day specified in the decision (**subclause 90(4)**).

If a debt is written off by the Secretary under this provision, this does not mean that action cannot be taken at any time to recover the debt.

Power to waive Commonwealth's right to recover debt

Clause 91 provides the Secretary with the power to waive all or part of a debt in the circumstances that are set out in the following clauses. Unlike the write-off of a debt, which does not prevent the Secretary subsequently taking action to recover a debt, a waiver of a debt will prevent the Secretary from attempting to recover a debt. If the Secretary decides to waive a debt, the waiver takes effect on the day specified in the decision, or on the day the decision is made.

Waiver of debt arising from error

Clause 92 requires the Secretary to waive the right to recover that part of a debt that is solely the result of an administrative error made by the Commonwealth. The debtor must have received the payment or payments that gave rise to the debt in good faith, and more than eight weeks must have passed since the later of when the first payment was made or the end of the notification period where a person has complied with a notification obligation.

Waiver of small debt

Clause 93 requires the Secretary to waive debts that are less than, or likely to be less than, \$200, and it is not cost effective for the Commonwealth to take action to recover the debt. This is because the cost of instituting legal proceedings, as well as any administrative costs of the Commonwealth to issue notices, or do other things necessary, would significantly outweigh the amount of a debt of less than \$200.

Waiver in relation to settlements

Clause 94 requires the Secretary to waive debts where the Secretary or the Commonwealth has agreed to settle a claim against a debtor for less than the full amount of the debt.

Subclauses 94(2) to (4) require the Secretary to waive debts where at least 80 per cent of the amount owing has been paid and the debtor is unable to pay any more, where the debtor and the Commonwealth agree for the debt to be paid by instalments, and the total of the instalments is at least the current value of the amount outstanding.

Subclause 94(5) provides that, for the purposes of subclause 95(4), the present value of the unpaid amount is the amount worked out in accordance with method prescribed in the rules

Waiver in special circumstances

Clause 95 provides an additional power to the Secretary to waive debts in special circumstances. The Secretary may waive the right to recover a debt where it did not arise as a result of the contravention of the Act or rules, or a false and misleading statement or misrepresentation. He or she must be satisfied that there are special circumstances, other than the financial hardship or disability of the person, and that a waiver is more appropriate than a write-off of the debt.

Part 6 – Miscellaneous

Summary

Part 6 of the Bill sets out a number of miscellaneous matters, including the effect a person's death will have on an application, and the fact that this new legislation makes no admissions that may be used in litigation. The Part also addresses formal matters dealing with the making of approved forms, delegations, the making of rules and how money is to be appropriated for the purposes of the Bill.

Explanation of the clauses

Simplified outline

Clause 96 provides a simplified outline of this Part to assist the reader.

Effect of person's death

Clause 97 sets out the effect a person's death may have in relation to actions that may be taken under the **BSWAT payment scheme**.

Subclause 97(1) provides that the Act continues to apply if a person dies after making an application and before lodging an effective acceptance.

The rules will allow for the application to continue to be maintained by a person appointed by the Secretary. The money that would have been paid to the person, if the person was eligible and any offer is accepted, will be paid to the person's estate. The modification made by the rules in this instance would be beneficial.

Subclause 97(2) clarifies that an application cannot be made on behalf of someone who has died.

No admissions

Clause 98 clarifies that none of the following constitutes an admission by the Commonwealth that it is liable for unlawful discrimination or any of the matters referred to in subclause 10(2), or that a particular method should be adopted for assessing damages or compensation in relation to a **BSWAT assessment**:

- the determination of a payment amount for the person;
- the making of an offer to a person;
- the paying of a payment amount to a person;
- anything else does under this Act;
- anything in this Act or the rules.

Standing appropriation

Clause 99 provides that payments under subclause 27(4) and clause 40 are to be made from the Consolidated Revenue Fund.

The payments made from the Consolidated Revenue Fund for the purposes of the BSWAT payment scheme are dependent upon the number of people who choose to accept an offer under the scheme. The BSWAT payment scheme will make payments to people who may be presently involved in litigation. The last payments under the scheme will be made in early 2017. This scheme is not designed as a settlement scheme for present litigation.

Delegation

Clause 100 provides that the Secretary may delegate to an officer in the Department any or all of his or her powers under the Act. The Secretary may make a direction setting out how a delegate is to exercise or perform his or her functions under the delegation. A delegate must comply with a direction given under this clause.

The BSWAT payment scheme may have up to 15,000 applicants. A scheme of this size and duration will require a suitable number of departmental officers at varying employment levels to undertake the administration of the scheme. The officers undertaking work will be led by an experienced Senior Executive Service Officer. It is anticipated that decision-making will take place at the Executive Level.

Approved forms

Clause 101 provides that the Secretary may approve forms for the purposes of this Act or the rules.

Rules

Clause 102 provides that the Minister may make rules for the ***BSWAT payment scheme*** prescribing matters:

- required or permitted by the Act to be prescribed by the rules; or
- necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The rules are legislative instruments.

**BUSINESS SERVICES WAGE ASSESSMENT TOOL PAYMENT SCHEME
(CONSEQUENTIAL AMENDMENTS) BILL 2014**

Clause 1 sets out how the new Act is to be cited, that is, as the *Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Act 2014*.

Clause 2 provides a table setting out the commencement dates of the various sections in, and the Schedule to, the new Act.

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

Schedule 1 – Amendments

Summary

This Bill provides the consequential amendments that need to be made to Commonwealth legislation in light of the new scheme. For example, amendments to the taxation law will ensure payments under the scheme are eligible income for the lump sum in arrears tax offset.

Amendments to the social security law and *Veterans' Entitlements Act 1986* will ensure the payments are not income tested, and so will not reduce the income support payments of supported employees who receive payments under the scheme.

Lastly, the confidentiality provisions in the social security law will be adjusted to make sure personal information can be obtained and disclosed for the purpose of administering the new scheme.

Explanation of clauses

Amendments of the Income Tax Assessment Act 1936

Item 1 inserts into subsection 159ZR(1) of the *Income Tax Assessment Act 1936* a definition of ***BSWAT payment amount***. ***BSWAT payment amount*** means a payment amount paid to a person under the *Business Services Wage Assessment Tool Payment Scheme Act 2014*.

Item 2 inserts a new subsection (2) at the end of section 159ZR of the *Income Tax Assessment Act 1936*.

Income of individuals is taxed annually at progressive marginal rates, and an individual will generally need to pay more tax when they receive a lump sum payment in lieu of payment being made over time. Acceptance of an offer under the BSWAT payment scheme for some may result in a significant impact. Most people who are paid wages based on a BSWAT assessment are likely to have low enough income that they would pay little or no tax. However, when a person receives a lump sum in a single income year, it is likely that individual's total income for that year will be increased to the point where some or all of the money received is taxed at higher marginal tax rates.

The lump sum in arrears tax offset addresses this issue. Broadly, the lump sum in arrears tax offset places an individual, who receives an amount of eligible income in the form of an eligible lump sum, in the same tax position as if they had received the amounts as income over the period in which the entitlement arose. Payments of payment amounts under the *Business Services Wage Assessment Tool Payment Scheme Act 2014* will be eligible income for the purposes of the lump sum in arrears tax offset.

Amendments of the Social Security Act 1991

Item 3 inserts a new paragraph (jb) into subsection 8(8) of the *Social Security Act 1991*. Accordingly, payments made to a person under the BSWAT payment scheme will not be income for the purposes of the social security law.

Amendments of the Social Security (Administration) Act 1999

Item 4 amends the *Social Security (Administration) Act 1999* to insert a new paragraph (g) into subsection 202(1), and **item 5** inserts a new paragraph (dd) into subsection 202(2).

Accordingly, there will be capacity to obtain, disclose and use personal information, for the purposes of the BSWAT payment scheme.

Amendments of the Veterans' Entitlements Act 1986

Item 6 insert a new paragraph (ma) into subsection 5H(8) of the *Veterans' Entitlements Act 1986*. Accordingly, payments made to a person under the BSWAT payment scheme will not be income for the purposes of that Act.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

BUSINESS SERVICES WAGE ASSESSMENT TOOL PAYMENT SCHEME BILL 2014

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

This Bill will establish a payment scheme for supported employees with intellectual impairment in Australian Disability Enterprises who previously had their wages assessed under the Business Services Wage Assessment Tool (BSWAT).

Supported employees in Australian Disability Enterprises are paid a pro-rata wage, worked out in about half of all cases under the BSWAT.

However, two supported employees were found through a recent court decision to have experienced indirect discrimination because their wages were assessed under the BSWAT.

In light of this decision, this Bill establishes a payment scheme to improve certainty for supported employees, and their families and carers, about their future employment with the Australian Disability Enterprises.

The payment scheme will allow registration from 1 July 2014 for payments to former and current eligible employees in relation to work they have performed in the past.

To be eligible for the payment scheme, a person must have an intellectual impairment and have been employed by an Australian Disability Enterprise. Also, the person must have been paid a pro-rata wage determined under the BSWAT, or a training wage paid while waiting for an assessment under the tool to be undertaken. Lastly, the person must have required daily support in the workplace from the Australian Disability Enterprise to maintain his or her employment.

The scheme will deliver payments to eligible workers as quickly as possible. While the scheme will open for registration on 1 July 2014, people planning to submit an application for the scheme have until 1 May 2015 to register. Applications to the scheme can be submitted up until 30 November 2015.

There are strict timeframes for the scheme. While these timeframes are generous, they do require that people wishing to access the scheme take certain actions before set dates. These timeframes will be made very clear in all scheme materials.

Once an application has been received, the applicant's eligibility for the scheme will be determined. Once eligibility is established, a payment amount will be calculated, based on half of the amount the worker would have been paid had the productivity element only of the BSWAT been applied.

If the payment amount is greater than zero, the eligible applicant will receive a letter of offer, including a payment amount. During the acceptance period, the applicant must seek independent financial counselling and legal advice, funded through the scheme. Certificates must be provided, from both the financial counsellor and the legal adviser, along with acceptance of a payment offer. Once an offer has been formally accepted by an eligible applicant, payment will be made.

To ensure people with disability have the opportunity to provide further information or to raise any concerns, the scheme will have both internal and external review processes.

The scheme will not pay compensation, but will provide a payment to eligible people. People who take part in any representative or subsequent proceedings, which could potentially take years to resolve, cannot also access the payment scheme provided by this Bill, which will be available for registration from 1 July 2014.

Human rights implications

Human rights engaged include rights to self-determination, equality and non-discrimination, effective remedy, privacy and reputation, fair trial and fair hearing rights, right to work and rights in work.

The Bill promotes the realisation of economic rights by providing a payment to eligible applicants who have been paid a wage assessed using the BSWAT. It provides people with intellectual impairment the opportunity to choose either to access a payment through the scheme or to remain in the representative proceeding. It also works to ensure, as far as possible, that people with disability are able to make their own decisions about accepting a scheme payment, and, where this is not possible, that any nominee has a duty to ascertain the preferences of the applicant in relation to the scheme.

The Bill recognises that there has been an issue in the application of the BSWAT to determine the wages of workers with intellectual impairment and provides a payment to provide certainty to those workers in relation to their ongoing employment with their Australian Disability Enterprise, and for work performed.

The Bill provides an effective remedy to those workers, while also providing effective mechanisms for internal and external appeal for the scheme itself. The Bill provides for the protection of the privacy of individuals where personal information is collected.

There could be a perception that a human right to an effective remedy is being limited because the Bill will not provide a payment to individuals who have sought redress through the courts or other systems. Additionally, acceptance of a payment from the scheme releases the Commonwealth, Australian Disability Enterprises and all other persons from liability in relation to unlawful discrimination associated with the use of a BSWAT assessment to determine the wages of that individual.

The legitimate objective in this instance is to prevent the Commonwealth utilising taxpayer funds to pay more than once for the same, or similar, claims in relation to the payment of wages assessed using the BSWAT. Acceptance of a payment from the scheme, following consultation with a financial counsellor and receiving legal advice, simply means that an individual is unable to participate in the representative proceeding currently on foot or any other legal proceeding in connection with the BSWAT. Should an individual wish to continue in the representative proceeding, they have every right to do so. However, they will not receive a payment from the scheme.

The Bill works to provide choice and control for applicants with disability.

Any perceived limitation is proportionate. While there may be concerns that the scheme's target group is vulnerable because they have an intellectual disability, the Bill works to increase the choice and control of those individuals by:

- allowing the provision of nominees;
- requiring nominees to ascertain the preferences of the applicant and to act in a manner giving effect to those wishes;
- protecting the rights of the person with disability by requiring the nominee to declare any interest, pecuniary or otherwise, in the outcome;
- requiring the delivery of free financial counselling and legal advice before the acceptance of any offer;
- allowing adequate timeframes for consideration of offers and other decision points, including opportunities for extension; and
- having both internal and external review processes.

There is no obligation for individuals to join the scheme or accept a payment.

Conclusion

The Bill is compatible with human rights because, to the extent that it may be perceived to limit human rights, those limitations are reasonable, necessary and proportionate.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

BUSINESS SERVICES WAGE ASSESSMENT TOOL PAYMENT SCHEME (CONSEQUENTIAL AMENDMENTS) BILL 2014

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Business Services Wage Assessment Tool Payment Scheme Bill 2014 will establish a payment scheme for supported employees with intellectual impairment in Australian Disability Enterprises who previously had their wages assessed under the Business Services Wage Assessment Tool (BSWAT).

This companion Bill provides the consequential amendments that need to be made to Commonwealth legislation in light of the new scheme. For example, amendments to the taxation law will ensure payments under the scheme are eligible income for the lump sum in arrears tax offset.

Amendments to the social security law and the *Veterans' Entitlements Act 1986* will ensure the payments are not income tested, and so will not reduce the income support payments of supported employees who receive payments under the scheme.

Lastly, the confidentiality provisions in the social security law will be adjusted to make sure personal information can be obtained and disclosed for the purpose of administering the new scheme.

Human rights implications

The Bill promotes the realisation of the right to social security for eligible participants in the BSWAT payment scheme.

The Convention on the Rights of Persons with Disability (CRPD) requires countries to recognise the right of people with disability to social protection and to take appropriate steps to ensure access by people with disability to social protection and poverty reduction programs and to retirement benefits and programmes.

This consequential amendments Bill does this by ensuring a payment received under the BSWAT payment scheme by an eligible individual with intellectual impairment is not income-tested under the social security law or *Veterans' Entitlements Act 1986*. It also provides the benefit of a lump sum in arrears tax offset for eligible individuals where tax is payable, and ensures personal information can be obtained, disclosed and used for the purposes of administering the new scheme, thus delivering the payments, review rights, etc, to eligible individuals.

BUSINESS SERVICES WAGE ASSESSMENT TOOL PAYMENT SCHEME
(CONSEQUENTIAL AMENDMENTS) BILL 2014
Statement of compatibility with human rights

Conclusion

The Bill is compatible with human rights because it advances the protection of human rights

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