Fair Entitlements Guarantee Bill 2012

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Law and Bills Digest Section

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The Bills Digest at a glance

What the Bill does

- This Bill contains the mechanism for determining eligibility for payment of an advance to former employees where the end of their employment is linked to the insolvency or bankruptcy of their employer.
- It replaces the current General Employee Entitlements and Redundancy Scheme (GEERS) with a legislative scheme.
- A person’s advance is comprised of their unpaid entitlements in relation to unused annual leave, unused long service leave, payment in lieu of notice, redundancy pay and wages for a 13 week period. These entitlements are determined in accordance with the person’s ‘governing instrument’.

How the Bill works

- The amount of an advance is worked out using a step by step method which is set out in the body of this Bills Digest.
- The Bill also allows the Commonwealth to assume the person’s recovery right in the winding up process to the extent of the advance so that the Commonwealth is able to recover some, or all, of that advance.
- The Bill provides an additional right of review of a decision by the Administrative Appeals Tribunal.
- The Bill also addresses the use and disclosure of personal information related to the operation of the proposed legislative scheme.

Why the Bill has been introduced

- The Bill arises from the ALP 2010 Election Commitment to strengthen the protection of entitlements of Australian employees impacted by the insolvency or bankruptcy of their employers.
Fair Entitlements Guarantee Bill 2012

Date introduced: 11 October 2012

House: House of Representatives

Portfolio: Education, Employment and Workplace Relations

Commencement: Sections 1–2 on Royal Assent; Sections 3–55 on the seventh day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Fair Entitlements Guarantee Bill 2012 (the Bill) is to replace the current administrative scheme known as the General Employee Entitlements and Redundancy Scheme (GEERS)\(^1\) with a legislative scheme that provides for the Commonwealth to provide financial assistance to former employees where the end of their employment is linked to the insolvency or bankruptcy of their employer and where the former employees cannot get payment of their entitlements from other sources.\(^2\)

Structure of the Bill

This Bill is divided into seven parts. Importantly:

- Part 2 sets out who is, and who is not, eligible for an advance
- Part 3 sets out the way in which the amount of the advance is to be calculated
- Part 4 provides for the payment of the advance by the Commonwealth
- Part 5 sets out the grounds on which an advance may be recovered by the Commonwealth and
- Part 6 contains various administrative measures including review rights and the use and disclosure of personal information.\(^3\)

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2. Clause 3 of the Bill.
3. Clause 4 of the Bill.

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Background

Insolvency

A company is classified as being solvent if, and only if, it is able to pay all of its debts as and when they become due and payable, otherwise the company is insolvent.\(^4\)

If a company is facing financial difficulties and the directors or creditors believe that it is, or may become, insolvent, it may end up in one of the following types of formal administration:

1. voluntary administration or deed of company arrangement
2. receivership or
3. liquidation, also known as winding up.\(^5\)

The appointment of a formal administrator may be voluntary, when it is initiated by the company itself, or involuntary when it is made by a person or organisation that is owed money, or by the courts.\(^6\)

Voluntary administration, possibly leading to a deed of company arrangement

A voluntary administration is a formal standstill type administration where the voluntary administrator investigates and reports on the company’s history and financial position to creditors and makes a recommendation about its future. Creditors then decide whether to accept a deed of company arrangement if one is proposed by the directors, liquidate the company or return the company to the control of directors. A deed of company arrangement is a procedure that permits a company to make a compromise or arrangement which is binding on all creditors. Subject to the terms of the arrangement, the company may then be saved and continue to operate.\(^7\)

Receivership

A receiver or receiver and manager is usually appointed by a secured creditor, or in some cases by the court. The assets of the company are realised for the benefit of the secured creditors. This type

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6. Ibid.
7. Ibid.

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of appointment can occur at the same time that a company is in liquidation or voluntary administration.8

Liquidation

A liquidator is appointed to wind the company up, and its assets are sold to pay outstanding debts. The company is then deregistered and ceases to exist. The most common types of liquidations for insolvent companies are court liquidation and creditors' voluntary liquidation.9 When a company is being liquidated because it is insolvent, the liquidator has a duty to all the company’s creditors. Their role is to:

- collect, protect and realise the company’s assets
- investigate and report to creditors about the company’s affairs, including any unfair preferences which may be recoverable, any uncommercial transactions which may be set aside, and any possible claims against the company’s officers
- enquire into the failure of the company and possible offences by people involved with the company, and report to the Australian Securities and Investments Commission (ASIC)
- after payment of the costs of the liquidation, and subject to the rights of any secured creditor, distribute the proceeds of realisation - first to priority creditors, including employees, and then to other unsecured creditors and
- apply for deregistration of the company on completion of the liquidation.10

The liquidation of a company generally terminates the employment of employees. Employees are considered to be a special type of unsecured creditors. As such, they have the right, if there are funds left over after payment of the fees and expenses of the liquidator, to be paid their outstanding entitlements in priority to other unsecured creditors. Priority employee entitlements are grouped into classes and paid in the following order:

- outstanding wages, superannuation contributions and superannuation guarantee charge
- outstanding leave of absence (including annual leave and sick leave, where applicable, and long service leave) and
- retrenchment pay.11

Each class is paid in full before the next class is paid. If there are insufficient funds to pay a class in full, the available funds are paid on a pro rata basis (and the next class or classes will be paid nothing).

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8. Ibid.
9. Ibid.

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Bankruptcy

On the date of a person’s bankruptcy, his or her property vests in the trustee who is administering the bankruptcy. All of the person’s property that is divisible among his or her creditors is specified in subsection 116(1) of the *Bankruptcy Act 1966* (Bankruptcy Act). Property acquired by the person after the date of bankruptcy, but before the date of discharge, is also available to the trustee.

Establishment of GEERS

The Employee Entitlement Support Scheme (EESS) was put in place after public pressure over high profile corporate collapses, including that of National Textiles. It commenced on 1 January 2000 and was, in its earliest form, a taxpayer-funded scheme which capped benefits for individuals at $20,000 on a strict set of criteria. The EESS was updated and renamed GEERS in the following year.

GEERS is an administrative scheme, funded by the Commonwealth, that was designed to meet certain employee accrued entitlements left unpaid at the time of the relevant employer’s insolvency. Over time, there have been complaints about the adequacy of the amounts paid under GEERS, its limited coverage and its basis as an administrative, rather than a legislative, scheme.

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12. ‘Bankruptcy’ is the process by which the state takes possession of the property of a bankrupt through the Official Trustee in Bankruptcy or a registered trustee. Such property is realised and, subject to certain priorities, is distributed rateably amongst the persons to whom the debtor owes money. Source: *Butterworths Concise Australian Legal Dictionary*, third edn., LexisNexis Butterworths, Australia, 2004.

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How GEERS works

GEERS is currently paid subject to the terms of the Operational Arrangements which have been published by the Government. Essentially a person may be eligible for GEERS assistance if all of the following conditions are satisfied:

- their employer has entered into liquidation or bankruptcy
- the termination of the person’s employment was linked to insolvency
- the person has eligible outstanding employee entitlements
- there are no other funds available to cover the person’s outstanding employee entitlements
- the person is entitled to reside permanently in Australia
- the person lodges a claim for GEERS in the required timeframe and
- the person provides relevant information in the required timeframes.

Significantly, the Operational Arrangements state:

> While these [Operational Arrangements] set out the general policy basis for the administration of GEERS, any Advance is made without any legal obligation on the part of the Commonwealth to do so. The Decision Maker may determine, in their absolute discretion, the eligibility of claimants and the amount of any Advance, in accordance with the objects and principles in ... these [Operational Arrangements].

Problem of phoenix activities

Whilst GEERS addresses the needs of those persons, the termination of whose employment was linked to insolvency, it does not apply in all cases. For example, ‘phoenix’ activity typically involves a company closing down one day and opening up the next with a different name to avoid its obligations. Whilst the phoenix company may close down, its company structure may remain as an ‘empty shell’. In the absence of formal action to liquidate the company, there is no access for the employees of the company to GEERS.

Prior to 1 July 2012, the employees of an abandoned company had to apply to the courts to have the company wound up under the Corporations Act 2001 (Corporations Act) before they could access 20.

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GEERS. If the Australian Securities and Investments Commission (ASIC) had already deregistered the abandoned company, ASIC or the company’s employees had to apply to the courts to have the company re-registered before it could be wound up.

However, since the enactment of the Corporations Amendment (Phoenixing and Other Measures) Act 2012\(^24\), ASIC has a discretionary power to place a company into liquidation where ASIC has reason to believe that the company is no longer carrying on business and there is no objection to the company being placed into liquidation.\(^25\) This does not mean that ASIC will wind up every abandoned company.

ASIC’s Regulatory Guide 242 contains policy guidance on how ASIC intends to exercise its power to wind up abandoned companies.\(^26\) The guidance, which follows consultation with industry earlier this year, also explains how ASIC will prioritise companies for winding up.

In developing the final guidance, ASIC considered how it will exercise this power to facilitate greater access to GEERS. In deciding when to exercise its discretion, ASIC will consider a number of factors including:

- the amount of outstanding employee entitlements claimed
- whether there is another creditor capable of winding up the company and
- the amount of money available in the Assetless Administration Fund (AA Fund)\(^27\) and how this money would best be used.\(^28\)

Whilst the Bill will provide a legal entitlement to an advance, it does not appear to assist those workers whose employers have been involved in phoenix activity—unless ASIC exercises its power to place the company in liquidation.

**Basis of policy commitment**

In the lead up to the 2010 Federal election, the Australian Labor Party (ALP) promised that its:


\(^{28}\) ASIC may appoint a registered liquidator when exercising its power to wind up an abandoned company and will remunerate the liquidator from the AA Fund.

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... Fair Entitlements Guarantee will protect workers’ entitlements including: redundancy pay (up to a maximum of four weeks for each year of service), all annual leave, all long service leave and up to three months of unpaid wages. The Fair Entitlements Guarantee will be enshrined in legislation. 29

As part of its 2010 election commitments the ALP stated that:

The Fair Entitlements Guarantee will protect redundancy pay, up to a maximum of four weeks for each year of service. This will mean that almost all workers will receive all of the redundancy entitlements they are owed. This will give Australian workers the strongest protection of their entitlements they have ever had.

The Fair Entitlements Guarantee will replace the existing General Employee Entitlements and Redundancy Scheme (GEERS). Currently only 16 weeks of redundancy pay is covered by GEERS, even if employees have worked for the same company for decades. 30

This Bill arises from this policy commitment.

Committee consideration

Selection of Bills Committee

At its meeting of 31 October 2012, the Senate Selection of Bills Committee determined that the Bill not be referred to Committee for inquiry and report. 31

Scrutiny of Bills Committee

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) has reported on this Bill. 32 The relevant comments are discussed under the heading ‘Key issues and provisions’ and also referred to under the heading ‘Financial Implications’ in this Bills Digest.


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Human Rights Committee

In its Sixth Report of 2012, the Parliamentary Joint Standing Committee on Human Rights (Human Rights Committee) examined all Bills introduced in the period 9-11 October 2012, which included this Bill. The relevant comments are discussed under the heading ‘Human Rights Statement of Compatibility’ in this Bills Digest.

Policy position of non-government parties

At the time of writing this Bills Digest, neither the non-government parties nor the independents had made public comment about the Bill.

However, the debate on the Bill in the House of Representatives indicates that the Coalition, recognise that GEERS was an initiative of the Howard government, supports the Bill in principle. During the debate the Coalition moved an amendment to cap the basic amount for redundancy pay entitlement to 16 weeks.

The rationale for the amendment was, essentially, that:

- the Government is trying to increase, by stealth, the acceptable community standard for redundancy payments. Four weeks per year has never been the community standard. Rather, it has always been capped at 16 weeks and this is a generous level of cap
- the Bill will establish a new benchmark for redundancy payments and this will, in turn, put pressure on Australian businesses. Smaller businesses may sign up to agreements which include this new standard of four weeks for every year of service in order to avoid disputations in their workplace. The effect will be that those businesses will be stuck with redundancy payments that they cannot possibly pay
- it is the taxpayer who ultimately bears the burden of these higher redundancy entitlements which are beyond community expectations and
- people should not expect that the Government will take over responsibility for paying for an unreasonable level of entitlements in the event of the insolvency or bankruptcy of an employer.

33. Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth report of 2012, viewed 12 November 2012,

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2FF3460e8f-bde4-4fc5-8d67-52fd5190016%2F0049%22

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2FF3460e8f-bde4-4fc5-8d67-52fd5190016%2F0051%22

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The amendment was not passed.\textsuperscript{36}

**Financial implications**

The Bill enshrines existing administrative arrangements under GEERS in legislation. According to the Explanatory Memorandum:

Claims for financial assistance under the Bill are not expected to be more than the claims that would have been administered under GEERS. The existing funding under the GEERS appropriation will be carried forward through a demand driven special appropriation under this Bill.\textsuperscript{37}

This appropriation is in clause 51 of the Bill, which provides that the Consolidated Revenue Fund is appropriated for the purpose of payments under this Act or a regulation made for the purposes of section 50.

The establishment of a standing appropriation is necessary as it is not possible to predict the number or value of entitlements that will be advanced in a particular year. A standing appropriation will also provide certainty to claimants by ensuring that sufficient funds will be available to meet all eligible entitlements.\textsuperscript{38}

**Clause 50** of the Bill allows regulations to be made to provide for a scheme which will give financial assistance to individuals who are not employees and who are owed amounts for work they have undertaken for a specified person who is insolvent, or is reasonably expected to be insolvent. If such regulations were made, they could significantly widen the access to GEERS and therefore, increase the cost to the Commonwealth. The operation of clause 50 has been commented on by the Scrutiny of Bills Committee (see below).

**Statement of Compatibility with Human Rights**

The Statement of Compatibility with Human Rights is annexed to the Explanatory Memorandum to the Bill. As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

\textsuperscript{36} Australia, House of Representatives, *Votes and proceedings*, no. 140, 30 October 2012, p. 1924, viewed 31 October 2012, 

\textsuperscript{37} Explanatory Memorandum, *Fair Entitlements Guarantee Bill 2012*, p. 2, viewed 20 November 2012, 
[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4908_ems_63722485-d71d-4971-b104-26201d98e99e%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4908_ems_63722485-d71d-4971-b104-26201d98e99e%22)

\textsuperscript{38} Ibid., p. 32.

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In addition, as noted above, the Bill was considered by the Human Rights Committee which stated that:

Before forming a view on the compatibility of the bill with human rights, the committee seeks clarification from the Minister for Employment and Workplace Relations with regard to the compatibility of sections 11, 12 and 13 of the bill with the right to social security in article 9 of International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to non-discrimination in article 26 of International Covenant on Civil and Political Rights (ICCPR). 39

Other comments about the Bill’s compatibility with human rights are contained under the heading ‘Key issues and provisions’ in this Bills Digest.

Key issues and provisions

Part 1—preliminary

Part 1 of the Bill contains a simplified outline of the Bill and a number of relevant definitions. Importantly, one of the key triggers for eligibility for an advance payment is that ‘an insolvency event’ happens to an employer of a person. This is when any of the following occurs:

- a liquidator of the employer is appointed (provisionally or otherwise) under the Corporations Act
- the employer becomes a bankrupt under the Bankruptcy Act 40 or
- if the person is, or was, employed for a partnership by two or more of the partners—at the first time that either of the events described above happens to all of the partners by whom the person is, or was, employed. 41

For the purposes of this Act, when enacted, ‘the term ‘employee’ refers to an employee at common law and does not include contractors’. 42

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40. Section 5 of the Bankruptcy Act defines the term ‘bankrupt’ as a person (a) against whose estate a sequestration order has been made; or (b) who has become bankrupt by virtue of the presentation of a debtor’s petition.
41. ‘Insolvency event’ is defined at clause 5 of the Bill.
42. Explanatory Memorandum, op. cit., paragraph 4. At common law an employee is a person who performs work under the control of another in exchange for payment for the services that he or she provides. An employee works under a contract with an employer, whether for manual labour, clerical work or otherwise whether express or implied, oral or in writing, and whether a contract of service or apprenticeship. Whether there is sufficient control by the employer to create an employment relationship is a question of fact based on an objective test. Source: Butterworths Concise Australian Legal Dictionary, third edn., LexisNexis Butterworths, Australia, 2004, p. 147.
The nature of partnerships

Each of the states and territories has enacted legislation governing the operation of partnerships.43 The essential feature of a partnership is that it subsists between persons carrying on a business in common, with a view of profit.44

Persons who have entered into partnership with one another are, for the purpose of the Partnership Acts, called collectively a firm, and the name under which their business is carried on is called the firm-name.45

The Partnership Acts set out the general principle that the actions of every partner bind the firm. This is because every partner in a partnership is an agent of the firm, and his or her other partners, for the purpose of the business of the partnership. That being the case, the acts of every partner who does any act for carrying out the business of the firm of which the partner is a member, bind the firm and his or her partners, unless the partner does not have authority to act for the firm in the particular matter; and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe, the partner is a partner.46

The Partnership Acts do not deal with the administration in bankruptcy of either the assets of the partnership firm or those of the individual partners. However they do provide that, in the absence of an agreement to the contrary, bankruptcy, even if it is of only one of the partners, dissolves the partnership with regard to all of the partners.47 The capacity of a firm to meet its obligations is not necessarily affected by the bankruptcy of one partner. A firm may be in a position to discharge all of its obligations to its creditors, whilst one or some of its members are insolvent. It will not be insolvent, unless all of the constituent members are also insolvent.48 This position is reflected in the definition and accompanying example of ‘insolvency event’.

45. Qld, s. 3; NSW, s. 4; Vic, s. 8; Tas, s. 9; SA, s. 4; WA, s.10, ACT, s. 8; NT, s. 8.
46. Qld, s. 36; NSW, s. 33; Vic, s. 37; Tas, s. 38; SA, s. 33; WA, s. 44, ACT, s. 38; NT, s. 37.
47. Qld, s. 368; NSW, s. 5; Vic, s. 9; Tas, s. 10; SA, s. 5; WA, s. 26, ACT, s.9; NT, s. 9.

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Part 2—eligibility for advance

Who is eligible

The occurrence of an ‘insolvency event’ is one of a number of conditions, all of which must be satisfied, for a person to be eligible for an advance. Subclause 10(1) of the Bill sets out those conditions, being:

- the person’s employment by a particular employer has ended (paragraph 10(1)(a))
- an insolvency event happened to the employer (paragraph 10(1)(b))
- the end of the employment was due to the insolvency of the employer; occurred less than six months before the appointment of an ‘insolvency practitioner’ for the employer; or occurred on, or after, the appointment of an insolvency practitioner for the employer (paragraph 10(1)(c))
- the person is (or would be) owed one or more debts wholly or partly attributable to ‘employment entitlements’ (paragraph 10(1)(d))
- the person has taken steps, so far as reasonable, to prove those debts in the winding up or bankruptcy of the employer (paragraph 10(1)(e))
- if the person was owed any of those debts before the insolvency event happened, the person took reasonable steps before that event to be paid those debts (paragraph 10(1)(f))
- when the employment ended, the person was an Australian citizen or, under the Migration Act 1958, the holder of a permanent visa or a special category visa (paragraph 10(1)(g))
- an effective claim that the person is eligible for the advance has been made to the Secretary by or on behalf of the person (paragraph 10(1)(h)).

For the purposes of satisfying the eligibility conditions, an ‘insolvency practitioner’ is defined in clause 5 of the Bill as:

- a liquidator of the employer (paragraph(a) of the definition of ‘insolvency practitioner’ in clause 5)
- an administrator of the employer who has been appointed under the Corporations Act (paragraph (b) of the definition)
- a person appointed as a receiver of property of the employer (paragraph (c) of the definition)
- a person who has possession or control of property for the purpose of enforcing a charge, mortgage, lien, pledge or a security interest within the meaning of the Personal Property

49. Under clause 5 of the Bill, ‘employment entitlements’ are annual leave, long service leave, payment in lieu of notice, redundancy pay and wages entitlements.

50. The Parliamentary Joint Committee on Human Rights acknowledged that this section engages the right to non-discrimination in article 26 of the International Covenant on Civil and Political Rights. The Committee considered that the eligibility criteria in this paragraph (paragraph 10(1)(g)) appear to have a reasonable relationship of proportionality between the means employed and the objective sought to be realised. Parliamentary Joint Committee on Human Rights, op. cit., p. 13.

51. Clause 14 of the Bill sets out the requirements for the manner and form of the claim. The claim must be made no later than 12 months after the later of the insolvency event occurring, or the person’s employment ending.

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Proof of debt

As noted above, to be eligible for an advance a person must have taken reasonable steps to prove the debt (paragraph 10(1)(e) of the Bill). Regulation 5.6.45 of the Corporations Regulations 2001 (Corporations Regulations) provides that if the employees of a company make demands for wages or salaries, annual leave, long service leave or for retrenchment payments it is sufficient that one claim (proof of debt) which annexes a schedule setting out the names of the employees and the amounts due to each of them is submitted. In addition, regulation 5.6.40 of the Corporations Regulations allows for a claim to be prepared by the creditor personally or by a person authorised by the creditor. That being the case, this requirement would not appear to be so onerous as to preclude an employee from eligibility.

Who is not eligible

The ALP’s 2010 election commitment to the Fair Entitlements Guarantee indicated that it would ‘apply to all Australian workers other than company directors and their close associates’. Consistent with this commitment, clause 11 of the Bill sets out the persons who are not eligible for an advance, being:

- in the case of a company which is wound up in accordance with section 556 of the Corporations Act—a director, spouse of a director, or a relative of a director of a company and the person is an ‘excluded employee’ under that section: subclause 11(1)
- in the case of the bankruptcy of an employer under the Bankruptcy Act—a relative of the employer, or a person who was the spouse or de facto partner of the employer at any time within the 12 months ending on the date of the bankruptcy: subclause 11(2) or

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55. Section 9 of the Corporations Act defines a ‘relative’ of a person as the spouse, parent or remoter lineal ancestor, child or remoter issue, or brother or sister of the person.
56. Section 556 of the Corporations Act defines an ‘excluded employee’ as (a) an employee of the company who has been at any time during the period of 12 months ending on the relevant date, or at any time since the relevant date, or who is, a director of the company; (b) an employee of the company who has been at any time during the period of 12 months ending on the relevant date, or at any time since the relevant date, or who is, the spouse of an employee of the kind referred to in paragraph (a); or (c) an employee of the company who is a relative (other than a spouse) of an employee of the kind referred to in paragraph (a).
• a person who was employed by a partnership—if the conditions in subclauses 11(1) or (2) exist in relation to any of the partners who employed the person: subclause 11(3).

Two other classes of persons will not be eligible for an advance—people who have been newly employed as employees after working as a contractor and employees of certain employers.

Contractors who become new employees

It should be noted that government amendments were made to clause 12 (and clause 25) of the Bill during the second reading debate. Speaking on behalf of the Bill, Gai Brodtman explained the amendments as follows:

Clauses 12 and 25 of the Bill refer to exclusions for changes in terms and conditions in the six months before the insolvency event; and, following the introduction of the Bill, the department has re-examined these provisions and advised that the current drafting is not sufficiently wide enough to capture redundancy and payment in lieu of notice, as these are contingent liabilities that arise only on termination of employment. So the department has recommended that these provisions be amended to correctly reflect the intent that redundancy and payment in lieu of notice are captured.

Under amended subclause 12(1) of the Bill, in the case of a person previously employed on a contract, that person is not eligible for an advance if all of the following are satisfied:

• the person started to be employed by the employer in the six months ending at the earlier of the end of the employment and the appointment of an insolvency practitioner for the employer (paragraph 12(1)(a))
• the person was engaged by the employer, but not as an employee of the employer, before the start of the employment (paragraph 12(1)(b)) and
• it was reasonable to expect at the start of that employment that the employer would not be able to meet the employer’s obligations under the terms and conditions of that employment (paragraph 12(1)(c)—as amended).

57. Section 5 of the Bankruptcy Act defines a ‘relative’ in relation to a person, as: (a) the spouse of the person; or (b) a parent or remoter lineal ancestor of the person or of the person’s spouse; or (c) a child or remoter lineal descendant of the person or of the person’s spouse; or (d) a brother or sister of the person or of the person’s spouse; or (e) an uncle, aunt, nephew or niece of the person or of the person’s spouse; or (f) the spouse of a person specified in paragraph (b), (c), (d) or (e).

58. Clause 12 of the Bill prescribes the exclusion from eligibility for being newly employed after working as a contractor.


60. The words ‘employ the person on the terms and conditions of that employment beyond the time that employment actually ended’ were replaced with the words ‘meet the employer’s obligations under the terms and conditions of

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The Bill does not prescribe a list of matters which are to be considered in making the decision about whether it was reasonable to expect that the relevant employment would continue beyond the time that the employment actually ended. That being the case, the test to be applied is an objective test.

It should be noted that clause 50 provides for the making of regulations to provide for a scheme for assistance of workers who were not employees. (Further comments about the operation of clause 50 of the Bill are set out below.)

Certain employees

Finally, clause 13 of the Bill provides that a person whose employment was within the scope of the Special Employee Entitlements Scheme for Ansett Group Employees will not be eligible for an advance.

As stated above, the Parliamentary Joint Committee on Human Rights has sought clarification from the Minister for Employment and Workplace Relations with regard to the compatibility of clauses 11–13 of the Bill with the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights and the right to non-discrimination in Article 26 of the International Covenant on Civil and Political Rights.

Deciding an effective claim

Clause 15 of the Bill provides that the Secretary must decide whether an effective claim has been made and, if so, the amount of the advance to be paid. Notably, the Bill does not contain any statutory time frames for the making of these decisions. Nor does it contain any express timeframes for payment. However, clause 35 permits the Secretary to presume that information about a person is accurate if it is given by an insolvency practitioner for the employer, so that the process of evidence gathering is not unduly complicated.

61. Subclause 12(2) applies to a person who was employed for a partnership by two or more of the partners. In that case, subclause 12(1) applies as if each reference to the employer were a reference to each of the partners who employed the person.


65. Clause 47 provides that the Secretary may delegate any or all of his or her functions and powers under this Act to an APS employee, except for decisions under section 25, subsection 28(2) and subsection 38(5).

66. See further information in relation to the operation of Part 4 of the Bill (payment of advance).
The Secretary must give a person a written notice of these decisions, setting out the terms of the decision, the reasons for the decision and the person’s rights of review. 67

**Part 3—amount of advance**

The Bill requires that in working out the total amount of an advance, each employment entitlement must be worked out separately. The reason for this is that the employment entitlements of each employee will be based on their position and length of service. 68

The process for working out the amount of the advance is a step by step process as outlined below.

**Step 1—identify the governing instrument**

The first step is to determine the ‘governing instrument’ that applies. 69

Clause 25 of the Bill applies in circumstances where an employer agreed to change the terms and conditions of a person’s employment less than six months before the end of the employment, or the appointment of an insolvency practitioner for the employer, and the change was in favour of the person.

Government amended paragraph 25(1)(b) of the Bill now provides that if the Secretary is satisfied that, at the time of the change, it was not reasonable to expect that the employer would be able to continue to employ the person on those more favourable terms and conditions for the actual duration and end of the person’s employment, the Secretary can determine that clause 25 is to apply. 71 In that case, the calculation of the basic amount of the advance is to be made as if the ‘governing instrument’ for the employment was not changed.

For a person who is employed by a partnership of two or more partners, clause 25 applies as set out above if any of the partners agreed to change the terms and conditions of a person’s employment

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67. Clause 36 of the Bill.
68. Subclause 16(1) of the Bill provides that the amount of any advance is the total of each of the person’s employment entitlements as worked out in accordance with Division 2 of Part 3 of the Bill. This is subject to the exclusions outlined under subclause 16(2) (and taking into account subclause 16(3)) in relation to payment in lieu of notice entitlement or redundancy pay entitlement.
69. The term ‘governing instrument’ is defined in clause 5 of the Bill as any of the following: (a) a written law of the Commonwealth, a state or a territory; (b) an award, determination or order that is made or recorded in writing; (c) a written instrument; (d) an agreement (whether a contract or not).
70. The words ‘continue to employ the person on those more favourable terms and conditions beyond the time of the actual end of the person’s employment’ were replaced with the words ‘meet the employer’s obligations under those more favourable terms and conditions for the actual duration and end of the person’s employment’ to give effect to the Government amendment to paragraph 25(1)(b) of the Bill.
71. The Secretary can delegate this decision to an SES employee: paragraph 47(1)(a) and paragraph 47(2)(a) of the Bill.
less than six months before the end of the employment, or the appointment of an insolvency practitioner for all of the partners.

If the circumstances outlined above apply, the first step is to ascertain whether the Secretary has determined that clause 25 is to apply so that an earlier version of the governing instrument is to be used as the basis for calculating the amount of the advance.

Step 2—whether the maximum weekly wage cap applies

Clause 5 of the Bill defines the term ‘maximum weekly wage’ as $2,364.00 (equivalent to $122,928 per annum) or, that amount increased by indexation, or in accordance with the regulations, by reference to estimates of full-time adult average weekly ordinary time earnings published by the Australian Statistician.  

Clause 26 of the Bill operates so that, in working out the employment entitlement under clauses 20-23, the weekly rate of pay as set out in the governing instrument is capped at the ‘maximum weekly wage’ where it would otherwise exceed this amount.

The second step, then, is to work out whether employment entitlements under clauses 20–23 are to be calculated using the wage rate in the governing instrument or using the ‘maximum weekly wage’.

Basic amounts for employee entitlements

Clauses 20-23 of the Bill set out the basic amounts for each of the employee entitlements:

- annual leave (clause 20)
- long service leave (clause 21)
- payment in lieu of notice (clause 22) and
- redundancy pay (clause 23)

As further described below, once steps 1 and 2 above are determined, each amount for these entitlements can be calculated, any deductions can be made (as outlined under step 3) and any exceptions can be applied (as outlined under steps 5 and 6). The amount of each person’s advance is the total of these amounts plus the wage entitlement amount.

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73. See footnote 68 for working out the amount of an advance under clause 16 of the Bill.

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Step 3—calculate basic amount of annual leave entitlement

Calculate the basic amount for *annual leave entitlement* taking into account the matters determined under steps 1 and 2. According to subclause 6(2) of the Bill, this is the amount that the person is entitled to under the governing instrument which had accrued at the end of the employment but which had not been taken by then.

Apply the deductions

As already stated, the liquidation of a company generally terminates the employment of employees. However, in order to properly collect, protect and realise the company’s assets a liquidator may engage some of the company’s employees. Similarly, the trustee in bankruptcy is empowered to exercise powers and perform functions in a commercially sound way—which may include engaging former employees. In either case, any employee entitlements that subsequently accrue will be a cost of the winding up or bankruptcy and cannot be included in the calculation of the advance.

Once the basic amount for annual leave entitlement is calculated the following amounts are to be deducted:

- an amount attributable to the annual leave entitlement that has been paid to the person, or to someone else for the person’s benefit which is not a cost of the winding up or bankruptcy and
- an amount attributable to the annual leave entitlement that is payable, but has not yet been paid to the person, or to someone else for the person’s benefit which is not payable under the Corporations Act in the winding up of the employer, the Bankruptcy Act from the proceeds of the property of the bankrupt employer, or under this Act (when enacted).

According to the Explanatory Memorandum, the reductions provided for in subclauses 19(2) and 19(3) ensure that:

... in working out the amount of an advance, the amount will not include payments that have already been received ... or that will be received in future through another source ... This could include money paid or owed by redundancy trusts or where the entitlement relates to employment after the appointment of an insolvency practitioner with responsibility for meeting those debts.

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74. Clause 20 of the Bill.
75. In the case of a compulsory winding up the publication of the winding up order serves as a notice of dismissal to the company employees.
76. Paragraph 19(1)(k) of the Bankruptcy Act
77. Subclause 19(2) of the Bill.
78. Subclause 19(3) of the Bill.
79. Explanatory Memorandum, op. cit., p. 15.

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Step 4—calculate basic amount of long service leave entitlement

Calculate the basic amount for ‘long service leave entitlement’ taking into account the matters determined under steps 1 and 2. According to subclause 6(3), this is the amount that the person is entitled to under the governing instrument which either had accrued at the end of the employment but which had not been taken by then, or on account of long service leave that, had the person’s employment continued until the person qualified for long service leave, would have been attributable to the period before the actual end of the person’s employment.

Apply the deductions

Once the basic amount for long service leave entitlement is calculated, deduct any amounts attributable to the long service leave entitlement as set out in step 3.

Step 5—calculate basic amount of payment in lieu of notice entitlement

An amount for payment in lieu of notice will not be included in the amount of an advance where the business in which the employer employed the person is transferred to someone else (known as the transferee) and, the transferee has, within 14 days of the end of the person’s employment by the employer, offered to employ the person to do work that is the same, or substantially the same, and on terms and conditions that are substantially similar to and no less favourable than, those that applied to the employment with the employer.

Subclause 16(3) of the Bill provides an exception to this rule where the transferee employs the person and either that employment is terminated because the transferee no longer requires the job done by the person to be done by anyone (except where this is due to the ordinary and customary turnover of labour) or an insolvency event happens to the transferee and the person’s employment ends in any of the circumstances set out in subparagraphs 16(3)(b)(i)–(iii).

If a payment in lieu of notice is not to be excluded from the advance, calculate the basic amount for ‘payment in lieu of notice entitlement’ taking into account the matters determined under steps 1 and 2. According to subclause 6(4), this is the amount that the person is entitled to under the governing instrument that represents the shortfall in the period of notice of termination of employment.

This amount is capped so that it does not exceed five weeks’ pay.

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80. Clause 21 of the Bill.
81. Subclause 16(2) of the Bill.
82. Clause 22 of the Bill.
83. Paragraph 22(b) of the Bill.
Apply the deductions

Once the basic amount for payment in lieu of notice entitlement is calculated, deduct any amounts attributable to that entitlement as set out in step 3.

Step 6—calculate basic amount of redundancy pay entitlement

An amount for redundancy pay will not be included in the amount of an advance where the business in which the employer employed the person is transferred as outlined in step 5 above.

If a payment for redundancy pay is not to be excluded from the advance, calculate the basic amount for ‘redundancy pay entitlement’ taking into account the matters determined under steps 1 and 2.\(^84\) According to subclause 6(5) of the Bill, this is the amount that the person is entitled to under the governing instrument for the termination of the employment.

This amount is capped so that it does not exceed:

- four weeks’ pay for each full year of the person’s service with the employer for which the employer was required to pay redundancy pay under the governing instrument and
- where the governing instrument requires a payment of redundancy pay for a period of less than a full year, the proportion of four weeks’ pay which corresponds to that period.\(^85\)

Apply the deductions

Once the basic amount for redundancy pay entitlement is calculated, deduct any amounts attributable to that entitlement as set out in step 3.

Step 7—calculate basic amount of wages entitlement

Calculate the basic amount for ‘wages entitlement’ taking into account the matters determined under step 1.\(^86\) A person’s ‘wages’ include allowances, loadings, amounts payable for overtime, amounts payable at penalty rates and other amounts that the relevant governing instrument identifies separately and pays regularly. Importantly, payments such as bonuses, reimbursements and payments of expenses relating to travel or relocation are not included.\(^87\)

‘Wages entitlement’ must be calculated taking into account the following:

- the matters determined under step 1 above

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\(^84\) Clause 23 of the Bill.
\(^85\) Paragraph 23(b) of the Bill.
\(^86\) Clause 24 of the Bill.
\(^87\) Clause 7 of the Bill.
• the ‘wages entitlement period’ defined in clause 5 and
• the terms of clause 27 about whether the ‘maximum weekly wage’ is to apply.

The wages entitlement period

Clause 5 of the Bill defines the ‘wages entitlement period’ (for the purpose of calculating the advance amount) as 13 weeks ending at the earlier of the time the person’s employment ended, or the first time an insolvency practitioner has power to control or manage employment by the employer. This means that, in calculating the basic amount of ‘wages entitlement’, a cap of 13 weeks’ pay applies.

Whether the maximum weekly wage is to apply

Clause 27 of the Bill operates to deem that the governing instrument entitles the person to wages at the ‘maximum weekly wage rate’ in each of the following circumstances:

• the governing instrument for the employment provided for a rate of pay at the end of the wages entitlement period for work that the instrument envisaged that the person would do regularly; and that rate, when expressed as a weekly rate, exceeded the maximum weekly wage rate at the end of that period (subclause 27(2))
• the governing instrument for the employment did not provide for a rate of pay at the end of the wages entitlement period for work that the instrument envisaged that the person would do regularly; and the person’s average weekly wage for that period is greater than the maximum weekly wage at the end of that period (subclause 27(3)) and
• the Secretary is satisfied that, over the weeks for which the person was employed in the wages entitlement period, there is not a regular pattern of the hours worked by the person and/or the wages to which the person was entitled for work done or leave taken within those weeks; and the person’s average weekly wage for that period is greater than the maximum weekly wage at the end of that period (subclause 27(4)).

The basic amount for ‘wages entitlement’ is the amount of wages entitlement which has been calculated taking into account the matters above—less any amount required to be withheld as Pay as you go withholding under the Taxation Administration Act 1953 (clause 24).

88. In the case of a person employed by a partnership of two or more persons, the ‘wages entitlement period’ is 13 weeks ending on the earlier of the time the person’s employment ended or the first time an insolvency practitioner has power to control or manage employment by any of the partners who employed the person.

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Apply the deductions

Once the basic amount for wages entitlement is calculated, deduct any amounts attributable to that entitlement as set out in step 3.

Step 9—deduction of debts to the employer

Add up the basic entitlement amounts calculated under steps 3–8—this is the amount of the advance. Clause 17 of the Bill provides that the Secretary may reduce the amount of the advance by an amount not exceeding the sum of the person’s debts to the employer.90

Step 10—whether the advance is to be paid

Clause 18 of the Bill operates so that the Secretary may reduce the amount of the advance to nil if the Secretary is satisfied that the liquidator or bankruptcy trustee of the employer expects to have enough money to pay the person the amount of the advance in the next 112 days.

Part 4—payment of advance

Where a person is eligible for an advance, the Secretary, on behalf of the Commonwealth, must pay the advance to the person, or to the liquidator or bankruptcy trustee of the employer or another person (known as the payee)—to be passed on to the person subject to any withholding or deduction required by law.91

The Bill does not contain any statutory time limits within which the payment is to be made. However, subclause 28(2) authorises the Secretary to pay an instalment of the advance where doing so would result in the person receiving an instalment of the advance sooner than the person would receive the advance in full.92

In addition, the Minister may direct the Secretary to pay the advance in respect of a specified person, or persons that were employed by a specified employer, in instalments of amounts and at

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90. For the purpose of recovery of an advance, clause 32 of the Bill provides the manner for working out the amounts of an advance that are attributable to particular employment entitlements if the advance is reduced for debts to the employer.

91. Subclause 28(1) of the Bill.

92. Subclause 47(3) of the Bill provides that the Secretary may delegate his or her power to make decisions under subclause 28(2) to an SES employee (or acting SES employee) or an APS employee who holds (or is acting in) an Executive Level 2 position.

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times which are to be determined by the Secretary. 93 In that case, the Secretary must comply with the direction. Any such direction is not a legislative instrument. 94

As the Bill does not regulate the number of instalments to be paid, there is flexibility to pay the advance in a number of instalments as, and when, information about employee entitlements comes to hand. For example, where members of a large workforce become eligible for an advance under the Act at the same time, this provision would allow for an initial payment to be made to all workers whilst the full amount of the advance was being worked out.

Part 5—recovery of advance

As part of its 2010 election commitment to the Fair Entitlements Guarantee, the ALP stated:

The Australian Government will continue to seek to recover these payments through the liquidation process. The Australian Government currently recovers approximately $15 million per year through this process. It is anticipated that a similar level of recovery would continue under the Fair Entitlements Guarantee. 95

The provisions of Part 5 of the Bill are consistent with this commitment.

Section 560 of the Corporations Act provides that if an advance has been made on account of wages or superannuation contributions, or in respect of leave of absence or termination of employment, under an industrial instrument then the person by whom the money was advanced has:

- the same rights as a creditor of the company and
- the same right of priority of payment in the winding up of the company in respect of the money which was advanced and paid as the person who received the payment would have had.

Clause 29 of the Bill creates a link to section 560 of the Corporations Act so that an advance paid to the liquidator of the employer in respect of those payments is taken to be an advance of money by the Commonwealth within the meaning of 560 of the Corporations Act. This provides the authority for the Commonwealth to seek recovery of the advance.

Similarly, clause 30 of the Bill creates a link to section 109 of the Bankruptcy Act so that where an advance is paid to the trustee in bankruptcy in respect of certain specified payments the person who advances those moneys has the same right of priority as the person who received the payment would have had if the payment had not been made.

93. Subclause 28(3) of the Bill.
94. Section 5 of the Legislative Instruments Act 2003 defines a ‘legislative instrument’ as an instrument of a legislative character that is, or was, made under a delegation of power from Parliament. An instrument has a legislative character if it determines or alters the content of the law rather than applying the law in a particular case; and if it affects a privilege or interest, imposes an obligation, or creates, varies or removes a right.
95. J Gillard, Protecting workers’ entitlements package, op. cit.

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Clause 31 of the Bill is a blanket provision which captures those circumstances where an advance is paid under clause 28 to an eligible person or an intermediary who was not a liquidator or bankruptcy trustee of the employer. The provision operates to give the Commonwealth the same priority as the eligible person in respect of the employment entitlements that comprised the advance.

Where a person has received an advance under this Act (when enacted) clause 34 of the Bill provides a right of recovery by the Commonwealth if the person later receives an employment entitlement for an amount that formed part of the original advance. The amount to be recovered is the lesser of:

- the later amount and
- the advance paid, less the sum of the amounts paid to the Commonwealth under clauses 29–31 plus any debts already created by the operation of this section.

Part 6—administration

Review rights

Clauses 37–39 of the Bill provide for the Secretary’s role in the review of a decision about whether a person is eligible for an advance, and the amount of the advance:

- the Secretary may review the decision on his, or her, own initiative (clause 37) or
- a person may apply to the Secretary for a review of the decision within 28 days of the making of the decision or such longer time as the Secretary allows (clause 38).

In either case, the Secretary must review the decision and affirm it, vary it or set it aside and substitute a new decision.\(^{96}\) In addition, the Secretary must give the person written notice of the decision setting out the terms of the review decision and reasons for the review decision.\(^{97}\)

Clause 40 of the Bill provides for review by the Administrative Appeals Tribunal (AAT).\(^{98}\) A person may apply for a review of a decision by the Secretary about whether a person is eligible for an advance, and the amount of the advance.\(^{99}\) It is possible for the Secretary to review the relevant decision after the application to the AAT has been lodged.\(^{100}\) If the Secretary varies the decision, or substitutes a new decision, the application for review by the AAT is taken to be in respect of the varied or new decision.\(^{101}\)

\(^{96}\) Subclause 37(4) and subclause 39(1) of the Bill.

\(^{97}\) Subclause 37(5) and subclauses 39(2) and (3) of the Bill.


\(^{99}\) Subclause 40(1) of the Bill.

\(^{100}\) Subclause 37(2) of the Bill.

\(^{101}\) Subclause 40(3) of the Bill.

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Importantly, where the amount of an advance is reduced (under clause 17) to take into account a person’s debt to the employer, the AAT cannot review the exercise of that power\footnote{Subclause 41(2) of the Bill.} and cannot exercise that power in its own right.\footnote{Subclause 41(3) of the Bill.}

According to the Explanatory Memorandum:

This provision has been included to recognise the Department’s reliance on the information provided by insolvency practitioners in relation to debts owed by employees to their former employer. In practice, the advice provided by insolvency practitioners in relation to debts would be acted on automatically in many situations. Review of this consideration by the AAT would be problematic as any findings would not affect the decision making of the insolvency practitioner, who ultimately has the power to decide whether a person’s debts to their employer should be offset against their employment entitlements. Removing the ability of the AAT to review the offsetting of debts would not hinder a claimant’s ability to contest the insolvency practitioner’s decision under the Corporations Act.\footnote{Explanatory Memorandum, op. cit., pp. 27–28.}

Information management

Clauses 42–45 of the Bill set out the terms for the use and disclosure of personal information by the Department, insolvency practitioners, payment intermediaries and persons making payments to former employees for the purpose of this Act (when enacted).

It is these clauses which attracted the most attention in the Statement of Compatibility with Human Rights (Statement of Compatibility), touching as they do on the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits unlawful or arbitrary interferences with a person’s privacy, family, home and correspondence.\footnote{The text of the International Covenant on Civil and Political Rights can be viewed at: \url{http://www.unhcr.org/refworld/docid/3ae6b3aa0.html}}

Under Article 17 there is an implied permissible limitation on the right to privacy where those limitations are not arbitrary or unlawful. According to the Statement of Compatibility:

\begin{quote}
In order for an interference with the right to privacy not to be ‘arbitrary’, the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.\footnote{Statement of Compatibility with Human Rights annexed to Explanatory Memorandum, p. 2.}
\end{quote}

The use of personal information and the disclosure of personal information in clauses 42–45 of the Bill is for the purpose of assessing claims for eligibility to an advance. Without the disclosure of the relevant information it would not be possible for the Department to comply with its decision making

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obligations—that is, to determine whether a person is eligible for an advance, and if so, the amount of the advance.

It would appear, then, that the disclosures authorised by clauses 42–45 are ‘proportionate, appropriate and necessary to facilitate the effect administration of the Bill’. 107

Regulations

Clause 55 of the Bill authorises the Governor-General to make regulations prescribing matters that are required or permitted by the Act to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Clause 50 of the Bill allows for regulations to provide for a scheme which will give financial assistance to individuals who are not employees (for example, contractors) and who are owed amounts for work they have undertaken for a specified person who is insolvent, or is reasonably expected to be insolvent. The regulations would also provide for the recovery by the Commonwealth of that financial assistance.

Importantly, subclause 50(3) of the Bill provides that a regulation made for this purpose does not take effect before the end of the period in which it could be disallowed in either House of the Parliament. 108

Clause 50 drew the following comments from the Scrutiny of Bills Committee:

Although the evolving nature of employment and work suggests that it may be appropriate for further schemes to be created, the details of any such scheme will raise important issues which may be thought to be more appropriately contained in primary legislation. Although the explanatory memorandum indicates that the regulation power ‘provides flexibility to cover employment relationships that extend beyond the traditional employee/employer paradigm’ … the powers involved cannot be said to relate to matters of detail but raise core issues of eligibility, assessment and review rights under any new scheme for financial assistance. 109

Accordingly, the Committee has sought the Minister advice about the rationale for, and the appropriateness of, the delegation of legislative power.

107. Ibid., p. 3.
108. A legislative instrument can be subject to disallowance if either a Senator or Member of the House of Representatives moves a motion of disallowance within 15 sitting days of the day that the legislative instrument is tabled. The motion to disallow must be resolved or withdrawn within a further 15 sitting days of the day that the notice of motion is given. However, it should be noted that if there is no notice of motion to disallow a legislative instrument, then there is no debate about its contents. Source: House of Representatives Practice, p. 413-14, http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6

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**Clause 51** of the Bill provides that the Consolidated Revenue Fund is appropriated for the purposes of payments under this Bill.

In scrutinising standing appropriations, the Scrutiny of Bills Committee looks to the Explanatory Memorandum to the Bill for an explanation of the reason for the standing appropriation. Ideally, the Committee seeks:

- some limitation placed on the amount of funds that may be appropriated and
- a sunset clause that ensures the special appropriation cannot go on indefinitely without any further reference to the Parliament.

According to Scrutiny of Bills Committee:

> The justification provided in the explanatory memorandum for the appropriation in clause 51 is that it is ‘necessary as it is not possible to predict the number or value of entitlements that will be advanced in any particular year’. It is also argued that the standing appropriation will ‘provide certainty to claimants by ensuring that sufficient funds will be available to meet all eligible entitlements’.

Although the Committee noted this justification, it has sought further advice as to whether consideration has been given to a sunset clause, especially in light of the capacity for entitlements payable under the Bill to grow through the introduction of further schemes for financial assistance under clause 50.

**Concluding comments**

This Bill is mechanical in nature, setting out the statutory basis for the Fair Entitlements Guarantee, including the trigger events for the advance, those persons who are, and are not eligible, and the method of calculating the amount of the advance. As the amount of the advance will depend on the terms and conditions of each individual’s employment, the Bill does not contain a ‘one size fits all’ entitlement. Rather, there is a step by step method to be followed to calculate the amount of the advance for each individual. In addition, the Bill provides the Commonwealth with priority to recover payments of the advance arising out of the insolvency or bankruptcy of an employer.

In creating the Fair Entitlements Guarantee, the Bill provides some improvements on GEERS—in particular, a more transparent process for determining eligibility and a statutory right of review to the AAT.

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110. Ibid., p. 11.

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