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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SOCIAL SECURITY LEGISLATION AMENDMENT (EMPLOYMENT  
SERVICES REFORM) BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment Participation,  
the Honourable Brendan O'Connor MP)

## SOCIAL SECURITY LEGISLATION AMENDMENT (EMPLOYMENT SERVICES REFORM) BILL 2008

### OUTLINE

The Social Security Legislation Amendment (Employment Services Reform) Bill 2008 will amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* to give effect to measures announced in the 2008-09 Budget to support the new Employment Services, in particular the introduction of a new job seeker compliance system.

The new compliance framework will apply to newstart allowance, youth allowance for persons who are not full-time students or new apprentices, parenting payment for persons who have participation requirements and are not new apprentices and special benefit for nominated visa holders.

A key feature of the new framework is the *no show no pay failure*. This new failure will deter non-compliance and encourage re-engagement. It applies to a job seeker who, without reasonable excuse, fails to attend an activity, fails to attend a job interview or intentionally acts in a manner that it is reasonably foreseeable may result in an offer of employment not being made. The penalty for a *no show no pay failure* will be equivalent to one work day of a job seeker's basic rate of payment and any approved program of work supplement (normally 10% of a job seeker's 14 day instalment).

A job seeker who fails, without reasonable excuse, to attend an appointment with their employment service provider or to meet their job search requirements under their Employment Pathway Plan will commit a *connection failure*. Instead of an immediate penalty for a *connection failure*, the job seeker may be required to comply with a reconnection requirement, which may normally be to attend another appointment or, in the case of a job search-related failure, to complete a Job Seeker Diary. If the job seeker fails, without reasonable excuse, to comply with the reconnection requirement, a *reconnection failure period* (the loss of the job seeker's basic rate of payment and any approved program of work supplement) will apply until they comply with a further reconnection requirement.

A job seeker will commit a *serious failure* if the job seeker has intentionally, recklessly or negligently failed to meet their participation obligations and has persistently failed to comply with those obligations, or they fail to accept, without reasonable excuse, an offer of suitable employment. The consequence of a *serious failure* is to be an eight-week period of non-payment. In order to promote greater participation, a non-payment period may be ceased if the job seeker commences a particular *serious failure requirement* or if the job seeker does not have the capacity to comply with a *serious failure requirement* and serving the penalty would cause severe financial hardship.

A job seeker's participation payment will be not payable for a period of eight weeks if they are unemployed due to a voluntary act (unless the voluntary act is reasonable) or are dismissed from employment due to misconduct (other than misconduct that would constitute minor transgressions). The option of commencing an intensive activity to end these non-payment periods will not be available; however, a non-payment period can be ended if a person would be in severe financial hardship and is in a class of persons specified by the Secretary in a legislative instrument, for example a job seeker with dependent children.

The Bill will also amend the social security law to replace all references to *Activity Agreements* with references to *Employment Pathway Plans* and to allow for Employment Pathway Plans to have optional terms, for example counselling.

The Bill removes references to the Personal Support Programme (PSP), rehabilitation programs and labour market programs from the legislation, while ensuring that participants in similar programs under the new Employment Services do not lose the protections currently available to participants of the discontinued programs.

Amendments will be made to ensure these persons undertaking work experience activities under an Employment Pathway Plan are not treated as employees under Commonwealth legislation, unless the activity they are undertaking is paid work.

The Bill contains several minor technical amendments designed to clarify and improve the operation of the current payment pending review provisions, particularly in relation to the start date of penalties following the affirmation of a decision to apply a penalty following a period of payment pending review.

The Bill redrafts the notice provisions in sections 63 and 64 of the *Social Security (Administration) Act 1999* to resolve some overlapping between those sections and correct drafting inconsistencies and shortfalls. The Bill also contains other consequential amendments that do not reflect policy changes, and various transitional provisions.

## FINANCIAL IMPACT

The estimated financial impact associated with this Bill is:

<b>Year</b>	<b>Expense</b>
2008-09	-
2009-10	\$ 12.8m
2010-11	\$ 13.7m
2011-12	\$ 14.4m
<b>Total</b>	<b>\$ 40.9 m</b>

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**NOTES ON CLAUSES**

**Clause 1** sets out how the Act is to be cited, that is, the *Social Security Legislation Amendment (Employment Services Reform) Act 2008*.

**Clause 2** provides a table that sets out the commencement dates of the various sections to the Act. All substantive measures in the Act commence on 1 July 2009.

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

For ease of description, this explanatory memorandum uses the following abbreviations:

‘Social Security Act’ means the *Social Security Act 1991*; and

‘Administration Act’ means the *Social Security (Administration) Act 1999*; and

‘job seeker’ means a person receiving a *participation payment*, as defined by Item 43 of Schedule 1.

## SCHEDULE 1 – COMPLIANCE WITH OBLIGATIONS IN RELATION TO PARTICIPATION PAYMENTS

### EXPLANATION OF CHANGES

#### PART 1 - COMPLIANCE

##### *Social Security (Administration) Act 1999*

**Item 1** inserts a new Division 3A in the Administration Act. The new Division 3A provides for a new legislative framework for compliance obligations and penalties for persons in receipt of newstart allowance, parenting payment (for those subject to participation requirements), youth allowance (for those who are not full-time students or new apprentices) and special benefit (for nominated visa holders).

Previously, the Act contained different compliance provisions for these four payments. The new provisions are consolidated for all four payments, which are defined as *participation payments*. The existing compliance provisions for austudy are retained, and Items 11-22 amend the existing compliance provisions for youth allowance recipients who are full-time students to remove all employment-related grounds for penalties (eg. refusal of a suitable offer of employment).

##### Section 42A – Simplified outline

The new section 42A of the Administration Act is a simplified outline of the operation of the new Division 3A.

##### Section 42B - Objects

The new section 42B sets out the objects of Division 3A. It is intended that decision makers will have regard to these objects in interpreting and applying Division 3A.

##### Section 42C – *No show no pay failures*

The new Section 42C provides for the Secretary to determine that a job seeker has committed a *no show no pay failure*. *No show no pay failures* are committed in respect of particular days.

The Secretary must determine that a job seeker has committed a *no show no pay failure* if any of the grounds in section 42C are met.

Paragraph 42C(1)(b) provides that the Secretary may only determine that a job seeker has committed a *no show no pay failure* if the job seeker receives an instalment of a *participation payment* for the instalment period in which the failure occurred (*participation payment* is defined by Item 44).

Paragraph 42C(1)(a) sets out the four grounds on which a *no show no pay failure* is determined.

*Subparagraph 42C(1)(a)(i) - Failure to participate in activity under Employment Pathway Plan*

The first ground (subparagraph 42C(1)(a)(i)) is where a job seeker fails to participate in an activity in which they are required to participate by their Employment Pathway Plan (Schedule 2 provides for Employment Pathway Plans to replace Activity Agreements). Because of the use of the word *required*, a job seeker will not commit a *no show no pay failure* by failing to participate in an activity that their Employment Pathway Plan sets out as being optional (Items 19, 69, 129 and 179 of Schedule 2 allow Employment Pathway Plans to provide for optional terms).

The term *activity* is used in subparagraph 42C(1)(a)(i), while the failure to comply with a requirement to attend an *appointment* under a job seeker's Employment Pathway Plan may be a *connection failure* (see the new paragraph 42E(2)(c)). Accordingly, if a job seeker fails to comply with a requirement of their Employment Pathway Plan, a decision maker must examine the requirement to determine whether it is properly characterised as an activity or an appointment, as the potential penalty will depend on that characterisation. It is intended that Employment Pathway Plans will explicitly describe requirements as being either activities or appointments, in order to assist decision makers in this task. *Activities* are intended to capture vocational or non-vocational tasks that a job seeker is required to undertake, such as training, work experience or Work for the Dole (eg. a failure to attend Work for the Dole on a particular day will be a *no show no pay failure*). *Appointments* are intended to capture requirements that relate to a job seeker's expected attendances at an office of their employment service provider or Centrelink at stated times.

Subsection 42C(2) is intended to ensure that a 'failure to participate' for the purposes of subparagraph 42C(1)(a)(i) includes both failures to attend activities at all, and failures to attend punctually. For example, a job seeker will still be subject to a *no show no pay failure* if they are substantially late in their attendance at an activity, or they leave or cease the activity before they are permitted. It is not intended that a *no show no pay failure* would apply to inconsequential lateness to an activity.

*Subparagraph 42C(1)(a)(ii) - Failure to comply with serious failure requirement*

The new section 42Q allows for a job seeker's *serious failure period* (an eight week non-payment period) to be ended upon the commencement of a *serious failure requirement*. If a job seeker commences complying with a *serious failure requirement*, but then fails to comply with that requirement on a particular day, subparagraph 42C(1)(a)(ii) provides for that failure to be treated as a *no show no pay failure*. However, if a job seeker does not commence a *serious failure requirement* at all, section 42Q will not apply, so the job seeker's *serious failure period* will continue and the job seeker would be not payable, rather than have *no show no pay failures* applied.

*Subparagraph 42C(1)(a)(iii) - Committing misconduct*

Subparagraph 42C(1)(a)(iii) provides that a job seeker will also commit a *no show no pay failure* if the job seeker attends an activity or purports to comply with a *serious failure requirement* on a particular day, but the job seeker commits misconduct whilst doing so. The legislation does not define *misconduct*, intending to capture its ordinary meaning. It is intended that in determining whether a job seeker commits misconduct, decision makers will have reference to commonly expected standards of behaviour, and if applicable, any expressly stated standards of conduct for participation in a particular activity. It is intended that subparagraph 42C(1)(a)(iii) should not be applied in circumstances where a job seeker's behaviour is beyond their own control, but should apply to behaviour of a deliberate and serious nature.

*Subparagraph 42C(1)(a)(iv) - Failure to attend job interview etc.*

The new subparagraph 42C(1)(a)(iv) is designed to address circumstances where a job seeker intentionally acts in a manner where it is reasonably foreseeable that acting in that manner could result in a job offer not being made. The previous compliance provisions only had a specific penalty for failing to attend job interviews, which made it possible for job seekers to avoid penalties by attending job interviews but deliberately behaving in a manner that would make it unlikely they would be offered employment. The new subparagraph 42C(1)(a)(iv) is designed to address this circumstance.

The new subparagraph 42C(1)(a)(iv) is intended to encompass any intentional course of action that may result in an offer of employment not being made to a job seeker. The consequence of a job offer not being made must have been reasonably foreseeable. This ground will also apply to failures to attend job interviews. The provision uses the test of 'could result in an offer of employment not being made' in order to indicate that a course of action does not definitely have to lead to an offer of employment not being made. For example, if a job seeker is one of a number of candidates for a job, their failure to attend a job interview would fall within subparagraph 42C(1)(a)(iv) even if there was no guarantee the job seeker would have been offered the job had they attended the interview.

Recognising that some job seekers may fall within subparagraph 42C(1)(a)(iv) for reasons beyond their control (eg. a medical, psychiatric or psychological impairment), a job seeker will not commit a *no show no pay failure* under subparagraph 42C(1)(a)(iv) if their actions were not intentional, or the job seeker had a reasonable excuse for their actions (see paragraph 42C(4)(a)).

*Subsection 42C(3) – more than one failure on a day*

The new subsection 42C(3) is intended to give effect to the concept of 'no show no pay'. This provision makes it impossible for the Secretary to determine that a job seeker has committed more than one *no show no pay failure* on a particular day. Not having this rule could result in a job seeker committing multiple *no show no pay failures*, and having multiple penalty amounts, in respect of failures committed on the one day.

However, it is intended that a job seeker may commit multiple *no show no pay failures* within an instalment period, including *no show no pay failures* in relation to the same activity.

*Example: Sue is required by her Employment Pathway Plan to attend Work Experience on the mornings of Monday, Tuesday and Wednesday each week. She must also attend Job Search Training sessions on Monday afternoons. One week, Sue fails to attend her Work Experience on Monday, Tuesday or Wednesday, and also fails to attend Job Search Training on Monday. Sue has no reasonable excuse for any of these failures. Sue will have committed three no show no pay failures - one on Monday, one on Tuesday and one on Wednesday – and will have three penalty amounts. Even though Sue failed to attend two activities on Monday, subsection 42C(3) provides that a decision maker may only determine that she committed one no show no pay failure on that day.*

#### *Subsection 42C(4) - Reasonable excuse*

Subsection 42C(4) precludes the Secretary from determining that a job seeker commits a *no show no pay failure* under subparagraphs 42C(1)(a)(i), (ii) or (iv) if the job seeker satisfies the Secretary they have a reasonable excuse for the failure. This exception is directly replicated from the reasonable excuse exceptions in the previous compliance framework (eg. the previous subsection 624(2)). There is no intended change in policy in the reasonable excuse exception, such that previous authorities on the application of the exception should remain applicable (see for example *Secretary, Department of Employment and Workplace Relations v Real* [2007] FCA 988). The intent of this exception is that job seekers should not be penalised for actions that are beyond their control.

The new section 42U provides the Secretary with the power to make a legislative instrument setting out the matters that must be taken into account in deciding whether a job seeker has a reasonable excuse. However, these matters are not to be exhaustive (see subsection 42U(2)).

#### *Subsection 42C(5) - Determination of an instalment period*

Subsection 42C(5) requires a decision maker to determine the instalment period in which a *penalty amount* for a *no show no pay failure* is to apply to a job seeker's participation payment.

#### Section 42D – Deducting penalty amounts

Section 42D sets out the consequence of committing a *no show no pay failure*: a job seeker will have a penalty amount deducted from their instalment for the instalment period determined under subsection 42C(5). The legislative instrument made under the new section 42T will provide for the method for calculating and deducting a penalty amount. Because of section 42V, there may be circumstances where a penalty amount is deducted from multiple instalments, notwithstanding section 42D.

## Section 42E – Connection failures

The new section 42E provides for the Secretary to determine that a job seeker has committed a *connection failure*. There is no immediate penalty applicable for a *connection failure*; instead, the commission of a *connection failure* will result in a *reconnection failure period* if a job seeker is required, and fails, to comply with a *reconnection requirement* (see the new sections 42G-42J).

The Secretary must determine that a job seeker has committed a *connection failure* if the grounds in section 42E are met.

Paragraph 42E(1)(b) provides that the Secretary may only determine that a job seeker has committed a *connection failure* if the job seeker receives an instalment of a *participation payment* for the instalment period in which the failure occurred (*participation payment* is defined by Item 44). Subsection 42E(3) clarifies that a job seeker may commit multiple *connection failures* on a particular day (in contrast to the rule for *no show no pay failures* in subsection 42C(3)).

Subsection 42E(2) sets out the grounds on which a *connection failure* is determined.

### *Paragraph 42E(2)(a) – failure to comply with section 63 requirements*

Section 63 of the Administration Act (as amended by Item 11 of Schedule 4) provides the Secretary with the power to require certain persons to do certain things (eg. attending appointments with service providers). The consequence of failing to comply with such a requirement is that a person's payment is not payable (see the new section 64).

However, it is intended to retain the existing legislative policy that for persons in receipt of activity tested payments or payments with participation requirements, failures to comply with some requirements notified under section 63 or its precursors should not be dealt with under section 63 or its precursors, but as part of the compliance framework applicable to the particular payments.

The new paragraph 42E(2)(a) provides that where a job seeker is issued with a requirement under the new section 63, a failure to comply with that requirement is a *connection failure* if the notice of the requirement did not inform the job seeker that their payment might not be payable if they fail to comply with the requirement.

As there are no direct punitive consequences for committing a *connection failure*, notices under section 63 that may trigger *connection failures* will not be required to set out that there may be consequences for failing to comply. However, there are provisions relating to the validity of notices of *reconnection requirements* and *further reconnection requirements* (see section 42K).

*Paragraph 42E(2)(b) – Failure to enter Employment Pathway Plan*

The new paragraph 42E(2)(b) provides that a job seeker commits a *connection failure* if they fail to comply with a requirement to enter an Employment Pathway Plan. There are specific provisions regarding requirements to enter Employment Pathway Plans (see for example section 605 of the Social Security Act, as amended by Schedule 2). Ordinarily, if a job seeker is required to attend a particular place at a particular time to negotiate an Employment Pathway Plan, they will fail to enter the plan if they do not enter the plan at that place and time.

However, paragraphs 42E(4)(b) and (c) provide for exceptions to paragraph 42E(2)(b) where sections 547AA or 615 of the Social Security Act apply. Sections 547AA and 615 of the Social Security Act (as amended by Items 87 and 146 of Schedule 2) provide that youth allowance and newstart allowance are not payable to new claimants for those payments who fail to comply with requirements to enter Employment Pathway Plans. It is intended that where sections 547AA and 615 apply, they should override paragraph 42E(2)(b), maintaining the operation of sections 547AA and 615.

*Paragraph 42E(2)(c) – Failure to attend appointment under Employment Pathway Plan*

The new paragraph 42E(2)(c) provides that a job seeker will commit a *connection failure* by failing to attend an appointment they are required to attend by their Employment Pathway Plan.

The word *appointment* is used in paragraph 42E(2)(c), while the failure to comply with an *activity* under a job seeker's Employment Pathway Plan is a *no show no pay failure* (see the new subparagraph 42C(1)(a)(i)). Accordingly, if a job seeker fails to comply with a requirement of their Employment Pathway Plan, a decision maker must examine the requirement to determine whether it is properly characterised as an activity or an appointment, as the potential penalty will depend on that characterisation. It is intended that Employment Pathway Plans will explicitly describe requirements as being either activities or appointments, in order to assist decision makers in this task. *Activities* are intended to capture vocational or non-vocational tasks that a job seeker is required to undertake, such as training, work experience or Work for the Dole. *Appointments* are intended to capture requirements that relate to a job seeker's expected attendances at an office of their employment service provider or Centrelink at stated times.

*Paragraphs 42E(2)(d)-(g) – Job search-related failures*

Paragraphs 42E(d)-(g) set out grounds for a *connection failure* relating to job search requirements. There are three potentially relevant sources of a requirement to undertake job searches: a standard provision in an Employment Pathway Plan to undertake a certain number of job searches per fortnight (paragraph 42E(2)(f) refers); a provision in an Employment Pathway Plan relating to the maintenance of a job seeker diary (paragraph 42E(2)(g) refers); and a requirement issued under the new

section 42F relating to applying for job vacancies (paragraphs 42E(2)(d) and (e) refer).

Failure to comply with any of these requirements at first instance will be a *connection failure* (unless one of those requirements has been imposed as a *reconnection requirement* or *further reconnection requirement* in relation to an earlier *connection failure*).

A *connection failure* may not be imposed under any of the job search grounds for parenting payment recipients (see paragraph 42E(2)(e)). This continues existing policy.

#### *Paragraph 42E(4)(a) – Reasonable excuse*

Paragraph 42E(4)(a) precludes the Secretary from determining that a job seeker commits any *connection failure* if the job seeker satisfies the Secretary they have a reasonable excuse for the failure. This exception is directly replicated from the reasonable excuse exceptions in the previous compliance framework (eg. the previous subsection 624(2)). There is no intended change in policy in the reasonable excuse exception, such that previous authorities on the application of the exception should remain applicable (see for example *Secretary, Department of Employment and Workplace Relations v Real* [2007] FCA 988). The intent of this exception is that job seekers should not be penalised for actions that are beyond their control.

The new section 42U provides the Secretary with the power to make a legislative instrument setting out the matters that must be taken into account in deciding whether a job seeker has a reasonable excuse. However, these matters are not to be exhaustive (see the new subsection 42U(2)).

#### Section 42F – Requiring a person to apply for job vacancies

Section 42F directly replicates previous provisions in the Social Security Act allowing the Secretary to require job seekers to apply for and report on a certain number of job vacancies (see for example the previous section 625). Failure to comply with a requirement under section 42F to either apply for or provide a statement on a certain number of job vacancies may be a *connection failure* (see paragraphs 42E(2)(d) and (e)). A requirement of the kind in section 42F could also be made as a *reconnection requirement* or *further reconnection requirement* under section 42H or 42J).

#### Section 42G – Reconnection requirements

The new section 42G provides the Secretary with the power to issue a *reconnection requirement* to a job seeker who has committed a *connection failure*. The identification of an appropriate *reconnection requirement* is within the discretion of the Secretary. In cases where a job seeker's *connection failure* is the failure to attend an appointment, it may be appropriate for a further appointment to be scheduled. Where a job seeker's *connection failure* is the failure to enter an Employment Pathway Plan, it may be appropriate for a further requirement to enter an Employment Pathway Plan to be made (eg. under section 605 of the Social Security Act). Where a

job seeker's *connection failure* is related to unsatisfactory job searching, it may be appropriate for a further job search requirement to be issued (eg. in the form of a requirement to maintain and return a job seeker diary or a requirement under section 42F).

The new section 42K sets out specific requirements for the notification of reconnection requirements. In particular, the notice must inform the recipient that failing to comply with the requirement may result in the application of a penalty amount.

The failure to comply with a reconnection requirement may result in a *reconnection failure period* (see the section 42H) and the issuing of a *further reconnection requirement* (see the section 42J).

#### Section 42H – Reconnection failures

The new section 42H provides that the consequence of failing to comply with a *reconnection requirement* (see section 42G) or a *further reconnection requirement* (see section 42J) is a *reconnection failure*.

However, if the job seeker has a reasonable excuse for failing to comply with a reconnection requirement or a further reconnection requirement, the job seeker can not be determined to have committed a *reconnection failure* (subsection 42H(3)). This exception is directly replicated from the reasonable excuse exceptions in the previous compliance framework (eg. the previous paragraph 626(2)(a)). There is no intended change in policy in the reasonable excuse exception, such that previous authorities on the application of the exception should remain applicable (see for example *Secretary, Department of Employment and Workplace Relations v Real* [2007] FCA 988). The intent of this exception is that job seekers should not be penalised for actions that are beyond their control. The new section 42U provides the Secretary with the power to make a legislative instrument setting out the matters that must be taken into account in deciding whether a job seeker has a reasonable excuse. However, these matters are not to be exhaustive (see the new subsection 42U(2)).

The consequence of committing a *reconnection failure* is a *reconnection failure period* (subsection 42H(4)). A *reconnection failure period* begins on the day the job seeker commits a failure. It is intended that this day would be the day on which a job seeker fails to attend an appointment, fail to enter an Employment Pathway Plan, or the day at the end of the period in which they are required to undertake or report on a particular number of job searches. The *reconnection failure period* ends the day before the job seeker complies with a further reconnection requirement (see section 42J).

Subparagraph 42H(4)(b)(ii) is a provision that did not exist in the previous legislation, allowing a job seeker's *reconnection failure period* to end if the job seeker has a reasonable excuse for failing to comply with a further reconnection requirement. This provision ensures that job seekers cannot be subject to a compliance penalty while they have had a reasonable excuse for failing to comply with a requirement. However, while the *reconnection failure period* may end in these circumstances, a further

reconnection requirement may still be issued (see subsection 42J(2)), which may result in another *reconnection failure period* if the job seeker fails to comply with that further reconnection requirement and does not have a reasonable excuse for that failure.

Subsection 42H(5) requires a decision maker to determine the instalment period in which a *penalty amount* for a *reconnection failure period* is to be deducted from a job seeker's participation payment. Accordingly, unlike the previous compliance framework (see sections 626-628 of the Social Security Act), a payment is not automatically withheld from the time of a *reconnection failure*. Section 42V also allows for unserved penalty amounts to be carried forward.

#### Section 42J – Further reconnection requirements

Section 42J provides the Secretary with the power to issue a *further reconnection requirement* to a job seeker who has committed a *reconnection failure*, or has failed to comply with a reconnection requirement or further reconnection requirement but had a reasonable excuse for doing so. The identification of an appropriate further reconnection requirement is within the discretion of the Secretary. In cases where a job seeker's connection and *reconnection failures* related to attendance at appointments, it may be appropriate for a further appointment to be scheduled. Where a job seeker's connection and *reconnection failures* related to the entry into an Employment Pathway Plan, it may be appropriate for a further requirement to enter an Employment Pathway Plan to be made. Where a job seeker's connection and *reconnection failures* related to unsatisfactory job searching, it may be appropriate for a further job search requirement to be issued (eg. in the form of a job seeker diary or a requirement under section 42F).

The reasonable excuse exception ensures that a *reconnection failure period* ceases if a job seeker has a reasonable excuse for failing to comply with a reconnection requirement or further reconnection requirement. However, the *reconnection failure period* may recommence if a further reconnection requirement is then issued, and the job seeker has a reasonable excuse for failing to comply with it.

Section 42K sets out requirements for the notification of reconnection requirements.

The failure to comply with a further reconnection requirement may result in a new *reconnection failure period* (see section 42H) and the issuing of another *further reconnection requirement*.

#### Section 42K – Notification requirements

Section 42K contains requirements for the notice of reconnection requirements and further reconnection requirements. It is intended that if a notice does not comply with section 42K, it will not be valid and no *reconnection failure* can be determined for a job seeker's failure to comply with the purported requirement. However, it is intended that substantial, rather than strict compliance, would be sufficient for the validity of a notice under section 42K, consistent with the likelihood that many requirements under section 42K will be issued orally and at short notice.

Section 42K is intended to ensure that if a job seeker is issued with a reconnection requirement or further reconnection requirement, they are informed in advance of the potential consequence of failing to comply with that requirement (i.e. that a penalty amount may be deducted from the job seeker's payment).

Subsection 42K(2) is intended to maintain the existing legislative policy that notices of participation-related requirements do not have to be made in writing.

#### Section 42L – Deduction of penalty amount

If a job seeker has committed a *reconnection failure* and a further reconnection requirement is imposed, the job seeker is subject to a *reconnection failure period* under subsection 42H(4). According to section 42L, the consequence of a *reconnection failure period* will be the deduction of a penalty amount (calculated in accordance with the legislative instrument to be made under section 42T). The penalty amount will relate to the number of days in the *reconnection failure period*, and it is intended the penalty amount will generally result in the deduction of the job seeker's full amount of their basic rate of payment and any approved program of work supplement for the *reconnection failure period*.

#### Section 42M – *Serious failure* for persistent non-compliance

Section 42M sets out the first of two grounds on which a *serious failure* may be determined. The imposition of a *serious failure* under section 42M is discretionary, in that a decision maker may determine that a *serious failure* should not apply even if the conditions in section 42M have been satisfied. However, the purpose of section 42M is to provide a deterrence against persistent non-compliance, and there are specific rules to end *serious failure periods*. Accordingly, it is intended there would have to be good reason for a decision maker to not determine that a job seeker has committed a *serious failure* despite the conditions in section 42M being satisfied.

Paragraph 42M(1)(a) requires a decision maker to assess, at a point in time, a job seeker's compliance until that point in time. The decision maker is to determine whether the job seeker has persistently failed to comply with their participation-related obligations. In practice, it is intended that the decision maker will conduct a Comprehensive Compliance Assessment to determine if the job seeker's compliance until that point in time demonstrated persistent non-compliance. A decision maker may only make a determination that a job seeker has committed a *serious failure* under section 42M if the job seeker received an instalment of a participation payment in the instalment period in which the determination is made (paragraph 42M(1)(b)).

The particular failures listed in the parentheses in subsection 42M(1) are not intended to be exclusive. To avoid doubt, failures that do not constitute particular failures under the new compliance provisions may also be taken into account in determining persistent non-compliance.

The term *persistent* is used in its ordinary meaning. The non-compliance does not need to be total: a job seeker may be persistently non-compliant over a period despite

complying with some or even most of their obligations during that period. The intention of the provision is to deter certain patterns of behaviour. It is therefore intended that a decision maker under paragraph 42M(1)(a) will look at a job seeker's recent compliance history to determine whether the job seeker has been persistently non-compliant.

Subsection 42M(2) ensures that job seekers cannot commit *serious failures* for behaviour beyond their control. The acts considered to determine persistent non-compliance must be intentional, reckless or negligent. A decision maker must be satisfied of the matters in subsection 42M(2) before determining that a job seeker has committed a *serious failure*. However, even if some of a job seekers individual failures have not satisfied section 42M(2), the job seeker may nonetheless be persistently non-compliant if there remain other failures that constitute persistent non-compliance under subsection 42M(1) that also satisfy subsection 42M(2).

The phrase 'up to the day the Secretary makes the determination' in paragraph 42M(1)(a) is intended to fix the focus of a decision maker to the period of time before making their determination. Decision makers reviewing determination under section 42M should not take into account a job seeker's conduct after an original determination of persistent non-compliance has been made.

Subsection 42M(3) precludes the Secretary from determining that a job seeker has committed a *serious failure* under section 42M while the job seeker is in a *serious failure* period for another failure under section 42M. This subsection does not extend to *serious failures* committed, or *serious failure periods* being served, under section 42N (*serious failures* not related to persistent non-compliance).

However, if a job seeker's *serious failure* period ends, either by expiry or because of section 42Q, further *serious failures* may be imposed if a decision maker is subsequently satisfied of further persistent non-compliance.

Subsection 42M(4) requires the Minister to make a legislative instrument to assist decision makers in applying the persistent non-compliance test. Decision makers must take the matters listed in this instrument into account (subsection 42M(5)), but that those matters are not exhaustive (subsection 42M(6)). It is intended that such an instrument might deal with matters such as the number and frequency of failures constituting persistent non-compliance, and the wilfulness of a pattern of compliance.

## Section 42N – *Serious failure* for refusing or failing to accept an offer of suitable employment

Section 42N maintains the existing ground for a *serious failure* for refusing offers of suitable employment. Paragraph 42N is drafted slightly differently to its precursors (see for example paragraph 629(1)(d) of the Social Security Act) by referring to offers of suitable employment rather than suitable offers of employment. This drafting change is intended to ensure that decision makers assess the suitability of the employment being offered, not the suitability of the offer itself, and that decision makers will be guided in this assessment by the kind of factors the Act recognises as being relevant to the suitability of employment (see for example subsection 601(2A) of the Social Security Act. Subsection 601(2A) sets out nine factors relevant to the suitability of employment, including the terms and conditions of work and the skills, experience, family and other personal circumstances of an employee). It is intended that defects in the nature of an offer of employment should not automatically result in no *serious failure* being applied for a failure to accept the offer. However, the unsuitability of an offer of employment may, depending on the circumstances, be relevant to the question whether a job seeker has a reasonable excuse for refusing or failing to accept the offer (see subsection 42N(2)).

Subsection 42N(2) precludes the Secretary from determining that a job seeker commits a *serious failure* for refusing or failing to accept an offer of suitable employment if the job seeker satisfies the Secretary they have a reasonable excuse for the failure. This exception is directly replicated from the reasonable excuse exception in the previous compliance framework (see the previous paragraph 629(1)(d)). There is no intended change in policy in the reasonable excuse exception, such that previous authorities on the application of the exception should remain applicable (see for example *Secretary, Department of Employment and Workplace Relations v Real* [2007] FCA 988). The new section 42U provides the Secretary with the power to make a legislative instrument setting out the matters that must be taken into account in deciding whether a job seeker has a reasonable excuse. However, these matters are not to be exhaustive (see the new subsection 42U(2)).

## Section 42P – Consequences of a *serious failure*

### *Serious failure periods*

Subject to sections 42Q and 42R, section 42P provides for participation payments to be not payable for a period of eight weeks if a job seeker commits a *serious failure*. These periods are defined to be *serious failure periods*.

Paragraph 42P(2)(a) sets the start dates for *serious failure periods*. The start date of a *serious failure period* is subject to the payment pending review provisions, as amended by Item 37 and 39. Job seekers who commit *serious failures* will have their *serious failure periods* commence on the first day of the instalment period after the decision maker determines the *serious failure* was committed (as opposed to after the *serious failure* was actually committed). Because instalments are usually fortnightly and paid in arrears, this rule generally enables job seekers at least two weeks before being subject to the impact of a *serious failure period*.

Section 42Y clarifies that if a decision is made on review, affirming an original decision that a job seeker committed a failure, the ‘day the Secretary determines’ for the purposes of paragraph 42P(2)(a) is the day of the Secretary’s original decision, not the day of the review decision. However, the payment pending review provisions may in these circumstances cause a deferral of the *serious failure period* (see the amendments in Item 37 and 39).

#### *Serious failure requirements*

Subsection 42P(3) provides the Secretary with the power to issue a *serious failure requirement*. Section 42Q allows for *serious failure periods* to end if a job seeker begins to comply with a *serious failure requirement*. The amendment in Item 37 provides that a decision under subsection 42N(2) relating to the imposition of a particular *serious failure requirement* is not subject to review by the Social Security Appeals Tribunal (although a decision that a job seeker has the capacity to undertake a *serious failure requirement* would be).

It is intended that *serious failure requirements* will be requirements to undertake a particular intensive activity over a period of time; and it is intended that job seekers undertake eight weeks of an intensive activity, in lieu of serving an eight *week serious failure period*. Failures to comply with a *serious failure requirement* once a job seeker has commenced a *serious failure requirement* will result in *no show no pay failures* in respect of each day on which the requirement was failed (see subparagraph 42C(1)(a)(ii)).

#### Section 42Q – Ending *serious failure periods*

One of the principal purposes behind the new compliance provisions is to facilitate re-engagement. In light of this purpose, section 42Q is designed to enable job seekers to re-engage with their participation obligations by undertaking certain activities in lieu of serving a *serious failure period*.

The ending of a *serious failure period* results in the restoration of a job seeker’s participation payment (assuming the job seeker remains qualified and the payment remains payable) from the day after the *serious failure period* ends.

#### *Paragraph 42Q(1)(a) - Undertaking serious failure requirements*

The first ground on which a *serious failure period* may be ended is if the job seeker begins to comply with a *serious failure requirement* imposed under subsection 42P(3). When this occurs, the *serious failure period* ends on the day before the job seeker commenced complying with the requirement (paragraph 42P(2)(a)). In other words, payment is restored on and from the day the job seeker commences complying with the requirement. If the job seeker begins to comply with a *serious failure requirement* and subsequently fails to comply with the requirement, those failures will be treated as *no show no pay failures* in relation to the days on which the failures to comply occur (see subparagraph 42C(1)(a)(ii)).

### *Paragraph 42Q(1)(b) - Capacity and hardship*

The second ground on which a *serious failure period* may be ended is if the job seeker does not have the capacity to undertake any *serious failure requirement* and serving the *serious failure period* would cause the job seeker to be in severe financial hardship. The word *any* is used in subparagraph 42Q(1)(b)(i) to make it clear that a job seeker must not have the capacity to do any activity as a *serious failure requirement*, not merely one particular activity or type of activity.

For a job seeker who is not a member of a couple, the term *severe financial hardship* means where their liquid assets are below \$2,500. A job seeker who is a member of a couple is in *severe financial hardship* if their and their partner's liquid assets are less than \$5,000 (see Items 2-4).

### Section 42R - Payment pending commencement of a *serious failure requirement*

Section 42R is intended to provide for a job seeker's payment to be paid pending their commencement of a *serious failure requirement*. This provision is designed to deal with circumstances in which there may be a delay between a job seeker's agreement to commence a *serious failure requirement*, and the commencement of their *serious failure requirement*.

*Example: Centrelink has made a decision that Sabrina has committed a serious failure, and her serious failure period will commence on 1 March. On 1 March, Centrelink imposes a serious failure requirement for Sabrina to undertake work experience for eight weeks. However, there is no work experience placement available until 15 March. On 1 March, Sabrina agrees to undertake the work experience activity to have her serious failure period ended. Accordingly, Centrelink determines Sabrina should be paid for the period 1 March to 14 March. Sabrina then commences her placement on 15 March, such that her serious failure period ended on 14 March. Sabrina therefore served none of her serious failure period and was not disadvantaged by a delay in the availability of a serious failure requirement.*

Subsection 42R(3) provides that if a job seeker does not comply with a *serious failure requirement* they had agreed to commence, the period of payability under section 42R does not count towards the job seeker's *serious failure period*.

*Example: Geoff commits a serious failure, and his serious failure period is due to commence on 1 January. On 1 January, Centrelink imposes a serious failure requirement to undertake a work experience placement, but the placement does not commence until 8 January. Geoff agrees to commence the placement. He is therefore paid from 1 January to 7 January. However, Geoff does not commence the placement on 8 January. Because of subsection 42R(3), he still has eight weeks of his serious failure period to serve, commencing on 8 January.*

## Section 42S – Unemployment resulting from a voluntary act or misconduct

Section 42S maintains the existing provisions for participation payments to be non-payable for a period of eight weeks for being unemployed due to a voluntary act or misconduct as an employee (other than misconduct that would constitute a minor transgression). There is intended to be no change in policy from the existing provisions (see paragraphs 551(1)(b) and (c), 629(1)(b) and (c), and 745(1)(b) and (b) of the Social Security Act). The difference between a non-payment period under section 42S and a *serious failure period* is that the former cannot be ended prior to eight weeks under section 42Q or 42R.

Subsection 42S(2) retains the exception that an eight week non-payment period will not apply to a voluntary act that is reasonable.

*Example: Alex resigns from his employment having been the subject of bullying and harassment by a fellow employee. While Alex's resignation is a voluntary act, his act is reasonable because it would not be reasonable to expect Alex to remain in his employment in these circumstances. Therefore, no penalty applies.*

Subsection 42S(3) sets out the start dates for non-payment periods. If a person is not receiving a participation payment when they become unemployed, the eight weeks will start immediately from the day of unemployment. This rule has a beneficial intention of allowing new claimants for a participation payment to 'self-serve' part or all of their non-payment period prior to making a claim. An eight week non-payment period has the effect of being a waiting period for new claimants, because of clause 5 of Schedule 2 to the Administration Act.

If a person is receiving a participation payment, paragraph 42S(3)(b) affords a decision maker the discretion to commence the non-payment period either on the date of the job seeker's unemployment, or the instalment period following the decision maker's determination. This discretion is also intended to be exercised beneficially, depending on a job seeker's circumstances at the time.

Subsection 42S(4) allows non-payment periods to end at any time if the Secretary determines the person would be in severe financial hardship by serving a non-payment period, and is in a class of persons specified by the Secretary. The Secretary is to make a legislative instrument under subsection 42S(5) specifying classes of persons for the purposes of subsection 42S(4). Examples of the classes specified might include parents with dependent children, or persons who incur significant costs associated with a medical condition.

## Subsection 42T – Calculation of penalty amounts (legislative instrument)

Section 42T requires the Minister to make a legislative instrument setting out, principally, the method by which penalty amounts for *no show no pay failures* and *reconnection failures* are to be calculated. However, section 42T itself provides for significant restrictions on the method to be determined in the legislative instrument.

### *No show no pay failures*

Subsection 42T(2) provides for a maximum penalty amount for which the legislative instrument can provide in respect of a *no show no pay failure*. Most job seekers are paid on the basis of fortnightly instalments. The rule in subsection 42T(2) would preclude a penalty amount for a job seeker from being any more than 10% of their fortnightly instalment (an instalment being the final amount paid to a job seeker). This restriction is intended to give effect to the concept of ‘*no show no pay*’; that is, the penalty amount for a *no show no pay failure* should be no more than the amount paid to a job seeker in respect of a day of an instalment period, in proportion to the number of weekdays in that instalment period.

Paragraph 42T(4)(a) then provides that the penalty amount for a *no show no pay failure* must relate to the amount of the participation payment paid to the job seeker on the day of the failure. Subsection 42T(5) requires that rent assistance, pharmaceutical allowance and youth disability supplement (components of various rates of payment) must be unaffected by a penalty amount for a *no show no pay failure*. Because of the restriction in subsection 42T(5), a job seeker’s penalty amount will ordinarily be less than the maximum provided for in subsection 42T(2).

### *Reconnection failures*

Subsection 42T(3) provides for a maximum penalty amount for which the legislative instrument can provide in respect of a *reconnection failure*. The penalty amount cannot be more than the aggregate of the daily rates of payment to a job seeker in their *reconnection failure period*. For example if a job seeker’s *reconnection failure period* is two days in length, the penalty amount may not be more than those two days of payment.

Paragraph 42T(4)(b) then provides that the penalty amount for a *reconnection failure* must related to the amount of participation payment paid to the job seeker during their *reconnection failure period*. Subsection 42T(5) requires that rent assistance, pharmaceutical allowance and youth disability supplement (components of various rates of payment) must be unaffected by a penalty amount for a *reconnection failure*.

### *Other matters*

Subsection 42T(6) ensures that it is possible to have a penalty amount of nil (eg. in circumstances where a job seeker’s participation payment was not payable for another reason on the day of a *no show no pay failure* or in a *reconnection failure period*).

Subsection 42T(7) allows the legislative instrument to provide rules relating to the quantum of a penalty amount that may be deducted from an instalment. For example, the legislative instrument might provide that a penalty amount can only be deducted from an instalment to the extent of the maximum basic rate component of that instalment (i.e. so that supplements such as rent assistance are not affected by either the calculation or deduction of a penalty amount). If there is any part of a penalty amount that is left over after a deduction, section 42V allows for such a balance to be deducted from subsequent instalments.

### Section 42U – Legislative instruments relating to reasonable excuse

Section 42U requires the Secretary to make a legislative instrument determining the matters that decision makers must take into account for determining whether a job seeker has a reasonable excuse for a *no show no pay failure*, *connection failure*, *reconnection failure* or *serious failure*, where a reasonable excuse exception is relevant to those failures.

Subsection 42U(2) retains the existing policy that legislative instruments determining matters that must be taken into account in making decisions relating to reasonable excuse are not exhaustive (see for example the previous subsection 624(2B)).

### Section 42V – Deductions from participation payments

There may be occasions in which the deduction of a penalty amount from an instalment under section 42D (*no show no pay failures*) or section 42L (*reconnection failures*) may not reduce that penalty amount to nil. Primarily this will occur because the penalty amount is deducted from a different instalment period to the instalment period in which the failure occurred, and the instalment for that instalment period is smaller than the outstanding penalty amount. In these cases, section 42V is designed to allow for the deduction of any balance of a penalty amount from future instalments of a job seeker's participation payment (paragraph 42V(a)) or any other participation payment received by the job seeker (paragraph 42V(b)).

*Example 1: Ian commits three no show no pay failures in an instalment period, resulting in a penalty amount of \$75. Centrelink determines the penalty amount will be deducted from Ian's next instalment. However, Ian earned income in the next instalment period, so his instalment of newstart allowance was only \$50. Accordingly, not all the penalty amount can be deducted from this instalment. \$50 is deducted, reducing Ian's instalment to nil, and the remaining penalty amount is deducted from Ian's subsequent instalment.*

*Example 2: Nasir incurs a penalty amount for a reconnection failure period, totalling \$60. The reconnection failure period extended across two instalment periods. In the second of these instalment periods, Nasir only received \$25 in newstart allowance, because he earned income in that instalment period. Centrelink determines that the \$60 penalty amount should be deducted from the second instalment period; however, the most that can be deducted is \$25 as that is all the newstart allowance Nasir received. Accordingly, section 42V will provide that the balance of \$35 should be deducted from Nasir's next instalment periods until the balance is reduced to nil.*

Because of 42V(b), a job seeker's penalty amount is not extinguished if they cease receiving a particular participation payment. If the job seeker transfers to another participation payment or later claims a new participation payment, their penalty amount will be carried forward to the new payment.

### Section 42W – Penalty amount not a debt

Section 42W provides, to avoid doubt, that a penalty amount that has not yet been deducted is not a debt under Part 5.2 of the Social Security Act. Sections 42D, 42L and 42V provide specific rules for the deduction of penalty amounts and the balance of penalty amounts that are not reduced to nil. These rules apply to the deduction of penalty amounts, not the debt recovery rules in Chapter 5 of the Social Security Act.

### Section 42X – Payability

Section 42X is a deeming provision enabling job seeker's participation payments to remain payable even if they are not actually receiving any payment because of the deduction of a penalty amount for a *no show no pay failure* or a *reconnection failure*.

### Section 42Y – Day of determination

Section 42Y is intended to resolve a lack of clarity in the previous compliance provision about the meaning of the 'day the Secretary determines' in relation to the application of *serious failures*. Section 42Y provides that for the purposes of the *serious failure* provisions, the day the Secretary makes a determination is the day of an original determination, rather than any decision on review of that original determination under Part 4 of the Administration Act.

However, the amendments made to the payment pending review provisions of the Administration Act set out in Items 37 and 39 mean that the commencement of a *serious failure period* may be altered by a payment pending review declaration.

### Section 42Z – Relationship with section 80

Section 80 of the Administration Act provides a general power for the Secretary to cancel or suspend a person's social security payment if the person is not qualified for the payment or the payment is not payable. There are circumstances in which a failure to comply with the terms of an Employment Pathway Plan (previously an Activity Agreement) or the activity test (where applicable) may result in a job seeker losing qualification for a participation payment. The consequence of a loss of qualification is suspension or cancellation under section 80 of the Administration Act. Section 42Z explicitly maintains the existing position that section 80 of the Administration Act may apply where appropriate (for examples of the operation of section 80 in the context of activity test related qualification requirement, see *Secretary, Department of Education, Employment and Workplace Relations and Ford* [2008] AATA 232 and *Secretary, Department of Education, Employment and Workplace Relations and Linge* [2008] AATA 744).

## PART 2 – CONSEQUENTIAL AMENDMENTS

The introduction of Item 1 requires a number of consequential amendments to the social security law.

### *Social Security Act 1991*

#### Repeal of old compliance provisions

The compliance provisions for parenting payment, newstart allowance and special benefit are repealed by **Items 10, 23 and 28**. These compliance provisions are replaced in full by the compliance provisions introduced by Item 1.

**Items 6, 7 and 9** repeal the definitions of *newstart participation failure*, *parenting payment participation failure* and *special benefit participation failure* in subsection 23(1) of the Social Security Act. These definitions are redundant because of the repeal of the newstart allowance and parenting payment compliance provisions by Items 10 and 23.

#### Youth allowance (students)

The compliance provisions for youth allowance are amended by **Items 11-22**. Youth allowance for persons who are not full-time students or new apprentices will be a *participation payment* to which the new compliance provisions introduced by Item 1 will apply. Consequently, the existing youth allowance compliance provisions in Subdivisions D and E of Division 2 of Part 2.11 of the Social Security Act are amended in two ways:

- to restrict the operation of the provisions to persons who are full-time students; and
- to remove employment-related grounds for participation failures and *serious failures* from the provisions, made redundant by the exhaustive application of the new compliance provisions in Item 1 to youth allowance recipients who are not full-time students or new apprentices.

#### Compliance penalty periods

**Item 5** is a consequential amendment replacing the definition of *compliance penalty period* in subsection 23(1) of the Social Security Act. Compliance penalty periods are referred to at various points in the social security law and other legislation. Amongst other things, if a job seeker's payment is not payable only because of a compliance penalty period, the job seeker:

- retains qualification for pensioner concession card (section 1061ZEC of the Social Security Act); and
- retains qualification for a health care card (section 1061ZNA of the Social Security Act).

The previous definition of *compliance penalty period* in subsection 23(1) referred to any period in which parenting payment, youth allowance, austudy, newstart allowance

or special benefit was not payable to a person because of particular penalty periods relating to compliance failures. As a number of those penalty provisions are being repealed and replaced with the new compliance framework in Item 1, a consequential amendment to the definition of *compliance penalty period* is required.

The new definition of *compliance penalty period* encompasses any *serious failure period* under the new subsection 42P(1) of the Administration Act, any non-payment period under the new subsection 42S(1) of the Administration Act, as well as any penalty period imposed under the remaining austudy or youth allowance provisions of the Social Security Act. The new definition does not encompass penalty amounts for *no show no pay failures* or *reconnection failures* under Item 1 because the new section 42X provides for participation payments to remain payable even if a payment is reduced to nil due to the deduction of a penalty amount.

#### Other amendments

**Items 2 to 4** are consequential amendments to section 14A of the Social Security Act, to apply the definitions of *liquid assets* and *maximum reserve* in that provision to the tests set out in the new section 42Q and 42S relating to the ending of *serious failure periods* and *unemployment non-payment periods*.

**Item 8** is a consequential amendment to the definition of *participation failure instalment period* in subsection 23(1) of the Social Security Act. This term is not relevant to the new compliance provisions introduced by Item 1; it is only relevant to the remaining compliance provisions for austudy and youth allowance.

**Items 24-27** are consequential amendments to the special benefit qualification provisions (section 729 of the Social Security Act), to ensure that special benefit does not become payable to a job seeker whose participation payment is not payable because of a *serious failure period* or *unemployment non-payment period*.

**Items 29-33** include references to the new sections 42P and 42S of the Administration Act for the purposes of continuation of mobility allowance.

#### *Social Security (Administration) Act 1999*

**Items 34 and 35** are consequential amendments to paragraph 110A(b) of the Administration Act, ensuring that determinations to resume participation payments following *serious failure periods* or *unemployment non-payment periods* take effect from the end of the *serious failure period* (whether by expiration of because of the new section 42Q) or *unemployment non-payment period*.

**Item 36** is a consequential amendment to paragraph 118(12C)(b) of the Administration Act, providing that decisions made to suspend a job seeker's participation payment because of a *serious failure period* or *unemployment non-payment period* take effect from the commencement of the job seeker's *serious failure period* or *unemployment non-payment period*.

**Items 37 and 39** amend the payment pending review provisions in the Administration Act. The new section 42P provides for the start date of *serious failure periods*; however, under sections 131 and 145 (as amended), the Secretary has the ability to pay a job seeker pending review of a *serious failure or unemployment non-payment period*. The legislation was previously unclear as to the application of a non-payment period when a job seeker was paid pending review of a non-payment period and the non-payment period was then upheld. The new subsections 131(5A) and 145(4A) explicitly provide that a job seeker's *serious failure period, unemployment non-payment period*, or the balance thereof is to be served following the cessation of the job seeker's payment pending review declaration under subsection 131(5) or 145(5).

*Example: Andrew refuses an offer of suitable employment, and a serious failure period commences on 8 September 2009. Andrew seeks review of this serious failure period on 15 September 2009, and he is paid pending review from that date under section 131 of the Administration Act. On 3 December 2009, an authorised review officer affirms the serious failure period. Andrew must then serve the remaining seven weeks of his serious failure period from 3 December 2009, but he would not have to repay any of his payments from 15 September 2009 to 3 December 2009. Of course, Andrew's serious failure period may still be ended on any of the grounds in the new section 42Q of the Administration Act.*

**Item 38** provides that decisions to impose particular *serious failure requirements* are not reviewable by the Social Security Appeals Tribunal (and by extension, the Administrative Appeals Tribunal). If a job seeker lacks the capacity to undertake a *serious failure requirement*, that matter would be taken into account by tribunals in whether a *serious failure period* should end under the new paragraph 42Q(1)(b) of the Administration Act. However, it would not be appropriate for tribunals to make decisions about the particular *serious failure requirement* a job seeker should undertake, given that such decisions depend almost entirely on practical concerns only apparent to a decision maker at the time the decision is actually made (eg. the availability of particular programs and activities that may constitute a *serious failure requirement* for a job seeker).

**Item 40** amends section 192 of the Administration Act to ensure the Secretary has the power to require the production of any information or document relevant to the operation of the compliance provisions introduced by Part 2 of Schedule 1. There are a number of decisions made under those provisions that do not immediately relate to any of the matters currently in section 192 of the Administration Act. Accordingly, this amendment is intended to ensure decision makers can make those decisions with powers available to them to obtain relevant material.

**Items 41-52** add new definitions to the Dictionary to the Administration Act, for particular terms introduced to the Administration Act by the new compliance provisions in Part 2 of Schedule 1.

**Item 54** amends the start date rule in clause 5 of Schedule 2 to the Administration Act. The intention of the new subclause 5(1B) is to ensure that if a job seeker is subject to a *serious failure period* or *unemployment non-payment period*, their start

date for any social security payment that is not a *participation payment* (see Item 42) is not affected. In other words, if a person claims a non-activity tested social security payment during a *serious failure period*, their start date for that payment could be before the end of that *serious failure period*.

**Item 55** introduces a new clause 5A to Schedule 2 to preclude members of a couple from transferring from a participation payment to parenting payment (without participation requirements) in order to avoid the operation of *serious failure periods*.

**Item 53** introduces a note to clause 5 to refer to the new clause 5A.

### **PART 3 – APPLICATION PROVISION**

**Item 55** sets out the application provisions for the new compliance framework. There are two essential elements to the application provisions:

- Failures committed under the previous legislation are saved (eg. non-payment periods under the previous legislation would continue beyond the commencement of the new provisions as if the new provisions were not in force).
- Any eight week non-payment period incurred by a job seeker prior to commencement for a reason other than unemployment due to misconduct or a voluntary act continues after commencement; however the rule in section 42Q relating to ending *serious failure periods* apply to those non-payment periods as if they were *serious failure periods*.

## SCHEDULE 2 – EMPLOYMENT PATHWAY PLANS

### EXPLANATION OF CHANGES

#### *Social Security Act 1991 and Social Security (Administration) Act 1999*

The items in Schedule 2 are generally designed to give effect to the replacing of Activity Agreements with Employment Pathway Plans. Employment Pathway Plans will be documents setting out things that a job seeker is required to do. Employment Pathway Plans will be developed between a delegate of the Secretary and a job seeker, and the requirements of a plan will be approved by the delegate. Subject to the changes explained below, there is intended to be no change in legislative provisions that were previously applicable to Activity Agreements.

The amendments in **Items 19, 69, 129 and 179** are designed to allow for terms to be included in Employment Pathway Plans that a job seeker does not have to comply with. These terms are defined by the new subsections 501(4B), 544B(1C), 606(1C) and 731M(2) of the Social Security Act to be *optional terms*. Because optional terms of an Employment Pathway Plan do not have to be complied with, the new compliance provisions introduced by Schedule 1 will not apply to those terms.

The amendments in **Items 33, 81, 147 and 195** amend provisions in the Social Security Act that ensure participants in approved programs of work cannot be employees for certain Commonwealth legislation. The amended provisions also apply to any job seeker participating in an activity under an Employment Pathway Plan (unless that activity is actually suitable paid work). These amendments are primarily designed to ensure that job seekers can undertake certain work experience activities and placements that are not approved programs of work (but are approved in the sense of being approved as activities in an Employment Pathway Plan), without being treated as employees.

## **SCHEDULE 3 – EXEMPTIONS IN RELATION TO YOUTH ALLOWANCE AND NEWSTART ALLOWANCE**

### **EXPLANATION OF CHANGES**

As part of the new employment services model commencing on 1 July 2009, the Personal Support Programme (PSP) will cease to exist as a separate identifiable program.

The Items in Schedule 3 of the Bill are generally designed to remove all references to the PSP from the social security law. Where participation in PSP has legislative consequences, the social security law will be amended to give the Secretary the power to make a legislative instrument setting out the activities that will attract those consequences.

#### *Social Security Act 1991*

**Item 1** repeals the definition of *PSP* from subsection 23(1) of the Social Security Act.

**Items 2 and 9** repeal subsections 541(1A) and 601(6A) of the Social Security Act, which provide that job seekers satisfy the activity test by participating in PSP. **Items 3 and 8** are consequential to these amendments.

**Items 4 and 7** amend the liquid assets test waiting period provisions for youth allowance and newstart allowance. Those provisions previously exempted persons from the liquid assets test waiting period who were undertaking formal vocational training in a labour market program, participating in the PSP, or undertaking an approved rehabilitation program, and who had been exempted from the waiting period by a decision maker. These references to specific programs are being removed, and replaced with a power for the Secretary to specify particular activities in a legislative instrument. It is intended that the Secretary would specify the same kinds of activities previously referred to in the legislation, so as not to disadvantage any job seeker.

**Items 5 and 13** amend the moving to an area of lower employment prospects non-payment period provisions for youth allowance and newstart allowance. Those provisions previously exempted persons from the non-payment period who were undertaking formal vocational training in a labour market program, participating in the PSP, or undertaking an approved rehabilitation program, and who had been exempted from the waiting period by a decision maker. These references to specific programs are being removed, and replaced with a power for the Secretary to specify particular activities in a legislative instrument. It is intended that the Secretary would specify the same kinds of activities previously referred to in the legislation, so as not to disadvantage any job seeker.

**Items 6 and 12** amend the seasonal work preclusion period provisions for youth allowance and newstart allowance. Those provisions previously exempted persons from the seasonal work preclusion period who were undertaking formal vocational training in a labour market program, participating in the PSP, or undertaking an approved rehabilitation program, and who had been exempted from the waiting period

by a decision maker. These references to specific programs are being removed, and replaced with a power for the Secretary to specify particular activities in a legislative instrument. It is intended that the Secretary would specify the same kinds of activities previously referred to in the legislation, so as not to disadvantage any job seeker.

**Item 11** amends the ordinary waiting period provisions for newstart allowance. Subsection 620(2) of the Social Security Act previously exempted persons from the ordinary waiting period who were undertaking formal vocational training in a labour market program, participating in the PSP, or undertaking an approved rehabilitation program, and who had been exempted from the waiting period by a decision maker. These references to specific programs are being removed, and replaced with a power for the Secretary to specify particular activities in a legislative instrument. It is intended that the Secretary would specify the same kinds of activities previously referred to in the legislation, so as not to disadvantage any job seeker.

## SCHEDULE 4 – OTHER AMENDMENTS

### EXPLANATION OF CHANGES

#### *Social Security Act 1991*

##### Activity test

**Items 2-5, 8 and 9** repeal provisions that automatically deemed any job seeker who complied with the terms of an Activity Agreement to satisfy the activity test. These provisions will be replaced with provisions that do not automatically deem job seekers to satisfy the activity test by complying with their Employment Pathway Plans. Instead, the Secretary will have the ability to specify (by legislative instrument) classes of persons. If a job seeker falls within a specified class and complies with the terms of their Employment Pathway Plan, they will be deemed to satisfy the activity test. Additionally, if a job seeker falls outside a specified class, there will be a residual discretion to determine that the job seeker should be deemed to satisfy the activity test. It is intended that the specification of classes and the residual discretion would be exercised in cases where it is inappropriate for job seekers to be expected to be actively seeking and willing to undertake work in addition to complying with the terms of their Employment Pathway Plans. This Bill does not affect any of the existing provisions exempting certain persons from the activity test (eg. on the grounds of temporary incapacity or special circumstances).

##### Amendments to section 1210

**Item 10** corrects an incorrect cross-reference in subparagraph 1210(1)(b)(ii) of the Social Security Act. The provision now refers to rate reductions because of section 1173, rather than section 1168, of the Social Security Act. Section 1173 is the operative provision for reductions in a person's rate of payment because of the receipt of compensation, not section 1168.

Item 10 also amends the heading to section 1210 to remove the words 'for income tax purposes'. There is no qualification in the body of section 1210 that would limit the rules in section 1210 to being for the purposes of assessing income tax. As the calculation of penalty amounts for the new compliance framework introduced by Schedule 1 will depend on the ordering rules for the application of the income test in section 1210, to dissect rent assistance, pharmaceutical allowance and youth disability supplement from a job seeker's rate while also applying the income test. Accordingly, amending the heading to section 1210 makes it clear that the ordering rule for the application of the income test in that section can apply for purposes other than income tax assessment, including the calculation of penalty amounts for *no show no pay failures* or *reconnection failures*.

New provisions relating to requirements

**Item 11** introduces new sections 63 and 64 in the Administration Act in place of the existing sections 63 and 64. The previous sections 63 and 64 were confusing in that there was substantial overlap between the two provisions, and inconsistencies in the drafting. The new section 63 provides the Secretary with the *power* to make requirements. The new section 64 deals with the general *consequences* of failing to comply with those requirements (unless there are consequences elsewhere in the social security law, such as in the new compliance provisions introduced in Schedule 1). There is minimal change in policy in the new provisions.

Subsections 63(1) and (2) apply to all social security payments and concession cards. If a person is receiving or holding any social security payment or concession card, claims any social security or concession card, or contacts the Department in advance of a claim for newstart allowance or youth allowance (job seeker), the Secretary may require the person to do any of the four things set out in subsection 63(2).

Subsections 63(3) and (4) apply to the specific social security payments set out in paragraph 63(3)(1)(a). These are the same social security payments to which the previous section 64 of the Administration Act applied. For recipients or claimants of these payments (including persons who contact the Department in advance of a claim for newstart allowance or youth allowance), the Secretary may issue a requirement to complete a questionnaire or attend a medical, psychiatric or psychological examination. The new paragraph 63(4)(b) provides clarification that the medical, psychiatric or psychological examination may be at a stipulated place (i.e. a person may be able to attend a specific appointment arranged by Centrelink or a delegated provider).

Subsection 63(5) allows notice of requirements under subsections 63(2) or (4) to be given in any manner, including by post. Accordingly, requirements under subsections 63(2) or (4) may be notified orally.

Subsection 63(6) is a new provision. Paragraph 63(2)(c) allows the Secretary to require persons to attend a particular place for a particular purpose. Subsection 63(6) ensures that notices of these requirements are not invalid merely because they do not describe the particular purpose for which attendance is not required. This ensures changes in the purpose of attendance at a notified activity do not affect the validity of the underlying requirement to attend.

Subsection 63(7) provides that the consequences set out in section 64 for failing to comply with a requirement made under section 63 do not apply if the notice of the requirement did not inform the recipient of those consequences (i.e. non-payability). Previously, sections 63 and 64 imposed positive obligations on notices to inform persons of the consequences of failing to comply. This is no longer workable as notices that do not inform persons that failure to comply with a requirement may result in non-payability may give rise to *connection failures* (see the new section 42K in Schedule 1). Because *connection failures* have no immediate consequences, there is

no sense in requiring notices of requirements that may give rise to *connection failures* to set out the consequences of non-compliance.

Subsection 64(1) sets out the consequences for a recipient of a social security payment who fails to comply with a requirement made under section 63. The consequence is non-payability (i.e. the suspension or cancellation of payment). The fundamental requirements for non-payability to arise where a person fails to comply with a requirement are that the requirement was *reasonable*, the recipient did not have a *reasonable excuse* for failing to comply with the requirement, and that the Secretary is satisfied it is *reasonable* for non-payability to apply to the person. Additionally, subsection 63(7) requires that the notice of the requirement informed the person of the effect of subsection 64(1) for subsection 64(1) to apply.

As youth allowance and austudy participation failures for students are retained, subsections 64(2) and (3) ensure notices under section 63 to students advising that a failure to comply with the requirement may constitute a participation failure are not dealt with under subsection 64(1).

Subsection 64(4) is a new provision explicitly providing that a period of non-payment under subsection 64(1) may end at a time determined by the Secretary to be *reasonable*. Ordinarily, it would be expected that a period of non-payability would end when the person ultimately complies with the original requirement or another requirement made in its place. This provision ensures that the legislation does not provide for indefinite periods of non-payability (unless a person does not comply with a requirement at all so it is reasonable for the non-payment to continue).

Subsection 64(5) provides similar consequences for concession card holders to the rules in subsections 64(1) and (4).

**Item 12** saves the previous sections 63 and 64 for notices given prior to 1 July 2009. If a notice is given prior to 1 July 2009, even for a requirement to be satisfied after 1 July 2009, the previous sections 63 and 64 continue to apply to that requirement as if they had not been amended. **Items 1, 6 and 7** are consequential to the amendments to sections 63 and 64.

#### Payment pending review

**Items 13 and 14** amend the payment pending review provisions in sections 131 and 145 of the Administration Act. Currently, subparagraphs 131(5)(b)(ii) and 145(4)(b)(ii) stipulate that a payment pending review declaration ceases to have effect if a decision is made on review upholding an adverse decision. This leaves little time for a payment pending review declaration to cease to have effect. For example, a person who is unsuccessful on a review application before an authorised review officer or the Social Security Appeals Tribunal would face the immediate implementation of an adverse decision, without being afforded the opportunity to consider further appeal options. These amendments afford decision makers the discretion to cease a payment pending review declaration at any time within 13 weeks of an adverse decision being made on review.