THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (2009 MEASURES) BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP)
OUTLINE

This bill will amend various pieces of portfolio legislation to provide for several non-Budget measures.

Scheduling of land

Several parcels of land in the West MacDonnell National Park, Loves Creek and Tennant Creek regions of the Northern Territory are added to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Act 1976*, enabling the land to be granted to relevant Aboriginal Land Trusts.

Income management regime

The income management provisions in the social security law are amended to:

- enable income management in Cape York of age pension and carer payment;
- close a loophole by allowing any residual amounts from a past period of income management, for a person who starts a new period of income management, to be paid into the Special Account for the person instead of being paid to the person; and
- allow the residual amount for a deceased customer to be paid to an appropriate person.

Social Security Appeals Tribunal

The bill makes amendments to improve the operation of the Social Security Appeals Tribunal (SSAT) across its social security, family assistance and child support jurisdictions. For example, the bill:

- makes changes to titles for Tribunal members, such as renaming the Executive Director to Principal Member;
- removes the requirement for the Principal Member to chair panels on which he or she sits by enabling the Principal Member to determine who will be the presiding member; and
- allows the SSAT to convene a pre-hearing conference for social security and family assistance law appeals – if parties reach agreement at the pre-hearing conference, the SSAT is empowered to make a decision in accordance with the agreement.
Disposal of assets

An amendment will clarify that a gift that has been returned does not have to be assessed as a deprived asset under the social security disposal of assets provisions.

Controlled private trusts

The bill will clarify, for the purposes of the means test treatment of private trusts, the requirements for an individual to pass the control test in relation to a controlled private trust.

Baby bonus

The bill introduces a new requirement for an individual to notify if a child for whom baby bonus is paid leaves the individual’s care within 26 weeks beginning on the day of the child’s birth or the day the child is entrusted to care.

Other amendments

The bill includes further amendments to portfolio legislation to address minor anomalies and technical errors.

Financial impact statement

The measures in the bill have nil or negligible financial impact.
NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, as the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Act 2009.

Clause 2 provides a table that sets out the commencement dates of the various sections in, and schedules to, the Act.

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

This explanatory memorandum uses the following abbreviations:

- ‘Family Assistance Act’ means the A New Tax System (Family Assistance) Act 1999;
- ‘Family Assistance Administration Act’ means the A New Tax System (Family Assistance) (Administration) Act 1999;
- ‘Social Security Act’ means the Social Security Act 1991; and
Schedule 1 – Scheduling of land

Summary

This schedule adds several parcels of land in the West MacDonnell National Park, Loves Creek and Tennant Creek regions of the Northern Territory to Schedule 1 to the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), enabling the land to be granted to relevant Aboriginal Land Trusts.

Background

The Northern Territory Government has reached agreement with the Central Land Council that three additional parcels of land should be given to relevant Land Trusts as Aboriginal land under the ALRA, pursuant to sections 10 and 12. Government policy is that land should be added to Schedule 1 to the ALRA where agreement to do so has been reached between the Northern Territory Government and the relevant Land Council. The three additional parcels to be granted are Alice Valley Extension (East), Loves Creek and Patta (near Tennant Creek).

The Loves Creek parcel of land is subject to a partially-heard land claim under the ALRA. The Central Land Council and the Northern Territory Government have agreed to resolve the claim by having the land included in Schedule 1 to the ALRA so that it can be granted to an Aboriginal Land Trust.

Patta (near Tennant Creek) is also the subject of an agreement between the Central Land Council and the Northern Territory Government. It has been agreed that the land will be granted under the ALRA as part of an agreement for settling broader native title claims.

The Alice Valley Extension (East) parcel of land will be leased by the Land Trust to the Territory as an extension of the West MacDonnell National Park.

The amendments made by this schedule commence on the day after Royal Assent.

Explanation of the changes

**Item 1** amends Part 4 of Schedule 1 to the ALRA by including Loves Creek in the Northern Territory as land to be granted as Aboriginal land.

**Item 1** also amends Part 4 of Schedule 1 to the ALRA by including various portions of land near Tennant Creek in the Northern Territory as land to be granted as Aboriginal land.

**Item 2** amends Part 5 of Schedule 1 to the ALRA by including Alice Valley Extension (East) as land to be granted as Aboriginal land.
Schedule 2 – Income management regime

Summary

This schedule amends the income management provisions in the social security law to:

- enable income management in Cape York of age pension and carer payment;
- close a loophole by allowing any residual balance from a past period of income management, for a person who starts a new period of income management, to be paid into the Special Account for the person instead of being paid to the person; and
- allow the residual amount for a deceased customer to be paid to an appropriate person.

Background

Income management in Cape York of age pension and carer payment

Currently, for the purposes of income management in Cape York, if a person or their partner is an eligible recipient of a category P or category R welfare payment, the person may be subject to income management, provided the Family Responsibilities Commission (the Commission) has issued a relevant notice and all the other conditions under section 123UF of the Social Security Administration Act have been met. However, only welfare payments paid to a customer that also fall within the definition of a category Q or category S welfare payment can be income managed as a result of an order by the Commission. Age pension and carer payment do not currently fall into either of these categories. This schedule makes amendments to enable income management in Cape York of those payments.

Treatment of residual balance when person again becomes subject to income management

If a person ceases to be subject to the income management regime, and is not likely to return to income management within a prescribed period, section 123WJ of the Social Security Administration Act governs the return of the credit balance of the person’s income management account to the person.

Where a person subsequently becomes subject to income management again, after the Secretary has determined that section 123WJ applies to the person, but before the residual balance has been paid in full to that person, there is currently no provision which allows the Secretary to stop paying residual amounts back to the person.
The intention is that, if a person once again becomes subject to the income management regime, no further payments should be made to the person under section 123WJ and the residual balance that remains at the time that the person becomes subject to the income management regime again, should be retained in the person’s income management account in such a way that it is able to be disbursed under Division 6 of Part 3B of the Social Security Administration Act. This schedule ensures this intention is achievable.

**Payment of residual amount after the person’s death**

Currently, if a person who is subject to the income management regime dies, subsection 123WL(3) of the Social Security Administration Act provides for the residual amount to be paid to the person’s legal personal representative. Often, customers subject to income management will not have a legal personal representative, even when they have more than $500 in assets.

Where the residual amount is equal to or less than $500, subsection 123WL(3) provides that, in the absence of a legal personal representative, the Secretary is able to pay the amount to any person carrying out an appropriate activity in relation to the estate or affairs of the deceased person. However, in situations where there is more than one person carrying out these activities, it has sometimes proven difficult to determine to whom the residual amount should be paid. The amendments provide a range of options to disburse the residual amount.

The amendments made by this schedule commence on the day after Royal Assent.

**Explanation of the changes**

**Income management in Cape York of age pension and carer payment**

**Item 1** amends the definition of a *category P welfare payment* in section 123TC of the Social Security Administration Act by removing the exclusion of age pension and carer payment. Category P and category R welfare payments are the payments that determine the eligibility of the person to be income managed, but it is only a category Q or category S welfare payment that becomes subject to income management. Because category P payments are a subset of category Q payments, this amendment enables people in receipt of age pension or carer payment in Cape York to have those payments income managed.

**Item 2** amends the definition of *category R welfare payment* in section 123TC of the Social Security Administration Act by removing age pension and carer payment as these references are now redundant, being included in the definition of a category P welfare payment.
Item 3 amends paragraphs 123UF(1)(b) and (2)(c) of the Social Security Administration Act to allow the Commission to issue a notice to the Secretary of Centrelink, requiring a person to be subject to income management under section 123UF, rather than at the subsection level. This will enable a person who has been ordered by the Commission to be subject to income management to transfer from a category R welfare payment to a category P welfare payment and remain on income management without the Commission having to issue a fresh notice.

Treatment of residual balance when person again becomes subject to income management

Item 4 inserts a new heading and a new subsection at the end of section 123WJ of the Social Security Administration Act. This amendment makes section 123WJ subject to the new section 123WJA.

Item 5 inserts a new provision which gives power to the Secretary to cease making payments out of a person’s residual balance once they become subject to income management again. This is to ensure that the remaining residual balance is treated as part of the person’s income management account and that it is disbursed, in accordance with, Division 6 of Part 3B of the Social Security Administration Act. This provision takes precedence over any determination made under subsection 123WJ(4).

Payment of residual amount after the person’s death

Item 6 repeals and replaces subsection 123WL(3) of the Social Security Administration Act as well as inserting new subsection 123WL(3A). These new provisions assist in disbursing money that remains in a person’s income management account after their death. Irrespective of the balance that remains in the deceased person’s income management account, the Secretary is able to pay the funds to any person carrying out an appropriate activity in relation to the estate or affairs of the deceased person.

The new provision provides a range of options to disburse the residual amount, including paying funds to the person carrying out the affairs of the deceased person or paying directly into the deceased person’s bank account (nominated for the purposes of subsection 55(2) of the Social Security Administration Act), as well as the option to pay the funds to the deceased person’s legal representative, where one exists. This provision is also broad enough to allow a direct payment to a funeral director to cover the deceased person’s funeral costs. The Secretary determines the amount that is to be paid and that amount will be paid as a lump sum on a day determined by the Secretary.
These provisions also allow for the deceased person’s income management account balance to be disbursed by way of a number of different payments, or even by more than one lump sum payment in relation to a particular paragraph. For example, if there were a number of people who were conducting appropriate activities under new paragraph 123WL(3)(b), then it may be that several payments could be made under that one paragraph. Or, where a person carried out several different appropriate activities, then it may be possible for more than one lump sum payment to be made to that person.

**Item 7** amends subsection 123WL(4) of the Social Security Administration Act so that the day determined by the Secretary under subsection 123WL(3) to pay out funds from the deceased person’s income management account, for any of the purposes listed in subsection 123WL(3), occurs within 12 months of the person’s death.

**Item 8** amends subsection 123WM(1) of the Social Security Administration Act to make it clear as to the manner in which funds are to be paid to a person for the purposes of paragraph 123WL(3)(a) or (b).

**Item 9** is an application provision, which states that the new section 123WJA of the Social Security Administration Act applies to people who cease to be subject to income management before, on or after the subsection commences and who subsequently become subject to income management regime again before, on or after that commencement.

Subitem 9(2) provides that, when determining the application of new section 123WJA to a person who ceased income management, but then came back onto income management prior to the commencement of this schedule, the time referred to in new paragraph 123WJA(1)(d) is the commencement of the schedule, rather than the date otherwise calculated under that paragraph. This means that, if a person ceased income management and then recommenced income management prior to the commencement of the schedule, and he or she had any remaining residual balance in their income management account on the day the schedule commences, then that remaining residual amount can become subject to the operation of new section 123WJ.

This measure applies prospectively taking past facts into account. The measure does not operate retrospectively.

**Item 10** is an application provision which states that the new subsections 123WL(3), 123WL(4) and 123WM(1) of the Social Security Administration Act apply in relation to customers who die on or after the subsection commences. It also applies to those customers who die prior to the date this subsection commences, where a determination has not been made by Secretary to pay the whole of the deceased person’s residual balance to their legal personal representative as one lump sum.
Schedule 3 – Social Security Appeals Tribunal

Summary

This schedule makes amendments to improve the operation of the Social Security Appeals Tribunal (SSAT) across its social security, family assistance and child support jurisdictions. For example, the bill:

- makes changes to titles for Tribunal members, such as renaming the Executive Director to Principal Member;
- removes the requirement for the Principal Member to chair panels on which he or she sits by enabling the Principal Member to determine who will be the presiding member; and
- allows the SSAT to convene a pre-hearing conference for social security and family assistance law appeals – if parties reach agreement at the pre-hearing conference, the SSAT is empowered to make a decision in accordance with the agreement.

Background

The SSAT is a statutory body established under the Social Security Administration Act. The SSAT conducts merits review of administrative decisions made under the social security law, the family assistance law, child support legislation and various other pieces of legislation. The Social Security Administration Act, the Family Assistance Administration Act and the Child Support Registration and Collection Act 1988 (Child Support Registration and Collection Act) set out the powers, functions and procedures of the SSAT.

Changes in titles of SSAT members

The Social Security Administration Act currently provides that the SSAT consists of an Executive Director, Directors and other Members. The titles commonly used in other similar Commonwealth tribunals are Principal Member, Senior Member and Member.

This measure would replace all references to Executive Director and Director in the Social Security Administration Act, Family Assistance Administration Act and Child Support Registration and Collection Act with the new titles of Principal Member and Senior Member to bring the SSAT into line with other Commonwealth tribunals.
**Power to obtain information or documents**

Currently, the Executive Director of the SSAT may request the Secretary to provide information or a document that the Secretary has in his or her possession or control. To obtain information or a document that is held by a person other than the Secretary, the Executive Director may obtain the information through the Secretary, by asking the Secretary to obtain such information or document from the third party.

This measure would empower the Principal Member to require a person directly, without going through the Secretary, to give information or a document that is relevant to a review.

**Pre-hearing conferences**

In reviews under the child support jurisdiction, the Executive Director may convene pre-hearing conferences, if he or she considers that it would assist in the conduct and consideration of the review to do so. Currently, in relation to reviews under the social security and family assistance laws, there is no provision to allow for a pre-hearing conference.

This measure would bring SSAT operations under the social security and family assistance jurisdictions more into line with the child support jurisdiction. It would allow the SSAT to convene a pre-hearing conference at any stage before the commencement of a hearing. Further, if parties reach agreement at the pre-hearing conference, the SSAT is empowered to make a decision in accordance with the terms of the agreement without holding a hearing.

**Presiding members**

Currently, if the Executive Director is on a panel of members, the Executive Director must preside at the hearing of the review. Similarly, if a Director is on the panel of members (and the Executive Director is not on the panel), the Director must preside at the hearing of the review. The Executive Director has the power to designate the presiding member only in cases where there is no Executive Director or Director sitting on a panel.

This measure would empower the Principal Member to designate any member of the panel to be the presiding member in multi-member panels. This would allow the Principal Member, or Senior Member, to sit on the panel without having to be the presiding member.

**Single member panels**

Currently, there is no specific provision in the social security law or family assistance law for single member panels. However, there is nothing within either the social security law or family assistance law to prevent the constitution of a single member panel. This measure makes various amendments to clarify that the SSAT may be constituted by a single-member for the purposes of the review of a decision.
Correction of errors in decisions or statements of reasons

In the child support jurisdiction, the Executive Director is empowered to make correction of obvious errors in decisions or statements of reasons, but there are not similar provisions in the social security law or family assistance law.

This measure would extend this power to the social security and family assistance jurisdictions, by enabling the Principal Member, or the presiding member to make corrections of obvious errors, in decisions or statements of reasons.

New position of Assistant Senior Member

This measure would create by statute a new position within the composition of the SSAT, of ‘Assistant Senior Member’. This new position has already been created administratively and is recognised in the latest determination by the Remuneration Tribunal.

Items 1 to 36, 40 to 115, 119 to 134 and 136 to 163 of this schedule commence 28 days after this Act receives the Royal Assent.

Items 37 to 39, 116 to 118, and 135 of this schedule commence on the later of 28 days after this Act receives the Royal Assent or immediately after the commencement of Schedule 1 to the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Miscellaneous Measures) Act 2009. However, if Schedule 1 to that Act does not commence then these items do not commence at all. At the time of introduction of this bill, that Act is still a bill before the Parliament. It contains amendments to provisions also amended by the items mentioned here.

Explanation of the changes

Part 1 – Main amendments

Family Assistance Administration Act

Items 1 to 5 amend the Family Assistance Administration Act to give effect to these measures.

Power to obtain information or documents

Item 1 inserts new sections 128A, 128B and 128C into the Family Assistance Administration Act.
New section 128A provides that, if the Principal Member believes on reasonable grounds that a person has information or a document that is relevant to a review, the Principal Member is empowered to require, by written notice, that person to give the information or document to the SSAT. The written notice must give the person at least 14 days to comply. Subsection 128A(4) makes failure to comply with the notice a criminal offence, punishable by imprisonment for six months.

This item does not commence until 28 days after the amending Act receives Royal Assent. Accordingly, there is sufficient time for individuals to become aware of the new offence created by this provision before it comes into effect.

New subsection 128A(5) requires the Principal Member, when sending a notice to a person, requiring them to provide information or a document, to notify the person of the effect of the offence provisions in subsection 128A(4) and in sections 137.1 and 137.2 of the Criminal Code.

New section 128B makes it clear that any of the members making up the panel for the purposes of the review, or a member of the staff of the SSAT, may inspect a document produced in accordance with section 128A and may make and retain copies of the whole or a part of the document.

New section 128C provides that any of the members making up the panel for the purposes of the review, or a member of the staff of the SSAT, may retain a document produced for as long as necessary. However, provision is made for the SSAT to supply a certified copy to the person otherwise entitled to possession of the document. Until a certified copy is supplied, the SSAT must provide the person with reasonable access to the document, to allow the person to inspect and make copies of the document. Subsection 128C(3) provides that the certified copy provided by the SSAT is to be accepted in all courts and tribunals as evidence as if it were the original document.

Pre-hearing conferences

Item 2 inserts new Subdivision BC into Division 3 of Part 5 of the Family Assistance Administration Act, which comprises new sections 129A and 129B.

New section 129A empowers the Principal Member to convene a conference before the hearing of the review if they consider that it would assist in the conduct and consideration of that review. At the pre-hearing conference, the Principal Member may fix a day, or days, for the hearing, give directions about the time within which submissions are to be made, give directions about the time within which evidence is to be brought, and give directions about what evidence is to be brought before the tribunal.
Further, the Principal Member may make an order directing a party who is present at a conference not to disclose information obtained at the conference. This is in line with existing section 133, which provides for orders to be made restricting disclosure of information obtained in the course of the hearing.

Section 129A(5) provides that a breach of the non-disclosure order made under subsection 129A(4) will be a criminal offence, punishable by imprisonment for two years, in line with existing non-disclosure provisions in the Child Support Registration and Collection Act. This item does not commence until 28 days after the Act receives Royal Assent. Accordingly, there is sufficient time for individuals to become aware of the new offence created by this provision before it comes into effect.

New section 129B provides that, if:

- parties to a review reach agreement about all or part of the review; and
- before the hearing commences, they lodge written and signed terms of agreement; and
- the SSAT has the power to make a decision in line with the agreement;

then the SSAT can make a decision in accordance with the terms of agreement without the need to hold a hearing.

If the terms of the agreement relate to only part of the matter to be reviewed, then the SSAT can make those terms part of their decision and not deal with those aspects of the review in the balance of the hearing.

**Presiding members**

**Item 3** repeals current section 137 and substitutes a new section 137, which provides that, if the SSAT is constituted by two or more members, the Principal Member must designate one of those members as the member who is to preside at the hearing of the review.

Without specifically providing for what is to occur in the case of one member panels, it is intended that, where the SSAT is constituted by only one member, that member would be the presiding member.

**Single member panels**

**Item 4** inserts subsection 138(1A) before subsection 138(1). Currently, section 138 sets out how differences of opinion between members of the panel are to be settled. New subsection 138(1A) provides that section 138 is to apply only if the SSAT is constituted by two or more members.
The amendments in items 3 and 4 make it explicit that these provisions only apply in the case of multi-member panels. This is to avoid any possible interpretation that the legislation presumes there must always be two or more members on a panel.

**Correction of errors in decisions or statements of reasons**

**Item 5** inserts Subdivision F into Division 3 of Part 5, which creates new section 141B. Subsection 141B(1) provides that, if the presiding member at a review, or the Principal Member, is satisfied that there is an obvious error in the text or written statement of reasons for an SSAT decision, either the presiding member or the Principal Member may alter the text of the decision or statement of reasons. Subsection 141B(2) provides that the altered text of a decision, or statement, is taken to be the decision or the statement of reasons of the SSAT.

Subsection 141B(3) provides examples of what might constitute obvious errors in the text of a decision or statement of reasons, such as obvious clerical or typographical errors, or inconsistency between the decision and the statement. These examples are not intended to be exhaustive.

**Social Security Administration Act**

**Power to obtain information or documents**

**Item 6** inserts new sections 165A, 165B and 165C into the Social Security Administration Act, which empowers the Principal Member to require a person to give information or document to the SSAT. New sections 165A to 165C mirror new sections 128A to 128C, inserted by **item 1** of this schedule into the Family Assistant Administration Act, and the effect of these provisions are explained above.

**Pre-hearing conferences**

**Item 7** inserts new Subdivision BC into Division 4 of Part 4, which is made up of new sections 166A and 166B. New section 166A and section 166B mirror new section 129A and section 129B, inserted by **item 2** of this schedule into the Family Assistance Administration Act, and the effect of these provisions is explained above.

**Presiding members**

**Item 8** repeals section 173 and substitutes a new section 173, which provides that, if the SSAT is constituted by two or more members, the Principal Member must designate one of those members as the member who is to preside at the hearing of the review.

Without specifically providing for what is to occur for one member panels, it is intended that, in cases where the SSAT is constituted by only one member, that member would be the presiding member.
Single member panels

Item 9 inserts subsection 174(1A) before subsection 174(1). Currently, section 174 sets out how differences of opinion between members of the panel are to be settled. New subsection 174(1A) provides that section 174 would apply only if the SSAT is constituted by two or more members.

The amendments in items 8 and 9 make it explicit that the provisions apply only in the case of multi-member panels. This is to avoid any possible interpretation that the legislation presumes that there must always be two or more members on a panel.

Correction of errors in decisions or statements of reasons

Item 10 inserts new Subdivision F at the end of Division 4 of Part 4, which consists of new section 177A. New section 177A mirrors new section 141B, inserted by item 5 of this schedule into the Family Assistance Administration Act, and the effect of that provision is explained above.

Single member panels

Items 11 to 13 amend subclauses 10(1) to (3) of Schedule 3, which provides for the constitution of the SSAT for each hearing. The amendments replace references to ‘members who are’, to ‘member who is, or members who are’, to recognise the possibility that the SSAT may be constituted by a single member for the purposes of a particular review.

Item 14 repeals subclause 12(1) of Schedule 3 and substitutes new subclauses 12(1), 12(1A) and 12(1B). These new subclauses set out what is to occur when a hearing of a review has been commenced or completed and a member of the panel hearing a review ceases to be a member, or is otherwise unable to continue to hear the review.

Where the review was being heard by a single member panel and the Principal Member reconstitutes the panel under existing clause 10, the Principal Member can direct that the reconstituted panel either complete the hearing and the determination, or make the determination if the hearing has been completed. Alternatively, the Principal Member can direct the new panel to rehear the review. The directions that the Principal Member makes will depend on the circumstances of the particular matter and the availability of appropriate material to enable the reconstituted panel to complete the hearing or make a determination.

If the unavailable member was one of a multi-member panel, the Principal Member does not have to reconstitute the panel. If no direction is made under clause 10 for a new panel, then the remaining member or members must complete the hearing and/or determination.
If the Principal Member does reconstitute the panel, then the review must be reheard by the reconstituted panel. This provision ensures that all members of the panel have the same benefit of hearing the parties and asking any necessary questions.

**Items 3, 4, 8, 9, 11, 12, 13 and 14** are intended to make it clear that the SSAT may be constituted by a single member for the purposes of a review.

**Protection of SSAT members**

**Item 15** inserts subclause 21(1A) after subclause 21(1) of Schedule 3, to provide that a person who is or has been a member of the SSAT must not be required to give evidence to a court in relation to any SSAT review of a decision. The subclause contains an expansion of the definition of *court*, to include a tribunal, authority or person having the power to require the production of documents or the answering of questions. This provision is similar to the protection given to members of the Administrative Appeals Tribunal and ensures the confidentiality of reviews at the SSAT level.

**Application**

**Subitem 16(1)** provides that the amendments made by **items 1 to 4 and 6 to 9** apply in relation to applications for review that are made on or after the commencement of those items, which will occur 28 days after the Act receives the Royal Assent.

**Subitem 16(2)** provides that the amendments made by **items 5 and 10** apply in relation to decisions made on or after the commencement of those items, which will occur 28 days after the Act receives the Royal Assent.

**Subitem 16(3)** provides that the amendment made by **item 14** applies in relation to hearings that commence on or after the commencement of that item, which will occur 28 days after the Act receives the Royal Assent.

**Saving – directions for constituting the SSAT**

**Item 17** provides that the amendments made by **items 11, 12 and 13** do not affect the validity of a direction given under subclause 10(1) of Schedule 3 to the Social Security Administration Act before the commencement of those items.

**Part 2 – Other Amendments**

Part 2 of this schedule contains amendments to the Family Assistance Administration Act, the Child Support Registration and Collection Act and the Social Security Administration Act, to put into effect changes to titles of Executive Members and Directors, and the new position of Assistant Senior Members.
Changes in titles of SSAT members

Items 18 to 130 and items 132 to 156 make amendments to the nomenclature used in the legislation to reflect changes to the titles of SSAT members. References to the Executive Director in the Family Assistance Administration Act, Child Support Registration and Collection Act and the Social Security Administration Act are all replaced with the new title of ‘Principal Member’. References to Directors are replaced with the new title of ‘Senior Member’ in the Family Assistance Administration Act, Child Support Registration and Collection Act and the Social Security Administration Act. These changes in nomenclature bring the titles used for SSAT members into line with the titles used in other Commonwealth tribunals such as the Administrative Appeals Tribunal.

New position of Assistant Senior Member

Item 131 inserts paragraph 1(ba) into Schedule 3 to the Social Security Administration Act to provide that the SSAT also consists of such number of Assistant Senior Members as are appointed in accordance with that Act.

Part 3 – Transitional provisions

Item 157 provides for definitions of the terms to be used in this part of the amending schedule.

Existing members of the SSAT

Item 158 ensures that the changes in this bill will not impact on the continued appointment of those individuals currently holding the offices of Executive Director, Director or Assistant Director.

Subitem 158(1) provides that a person holding office as the Executive Director of the SSAT is to be taken to have been appointed as Principal Member on the commencement day (that is, 28 days after this Act receives Royal Assent), for the balance of the person’s term of appointment, and on the same terms and conditions.

Subitem 158(3) provides that a person holding office of Director of the SSAT is to be taken to have been appointed as a Senior Member on the commencement day, for the balance of the person’s term of appointment, and on the same terms and conditions.

Subitem 158(5) provides that, if a person was appointed as a member of the SSAT and was described in the instrument of appointment as an Assistant Director of the SSAT, then the person is taken to have been appointed as an Assistant Senior Member on the day this part of the amending schedule commences, for the balance of the person’s term of appointment, and on the same terms and conditions.
Subitems 158(2), 158(4) and 158(6) make it clear that there is nothing preventing amendments being made to the terms and conditions of appointment of the Principal Member, Senior Members and Assistant Senior Members on or after the commencement of this Act.

Operation of laws

Item 159 inserts a transitional provision. Subitems 159(1) and 159(2) provide that, if a thing was done by the Executive Director or a Director before the commencement day, the thing is taken to be done by the Principal Member or Senior Member, as appropriate, for the purposes of the operation of any law of the Commonwealth on or after the commencement day.

Subitem 159(3) provides that the Minister may, by writing, determine that subitems 159(1) or 159(2) do not apply in relation to a specified thing done.

Subitem 159(4) provides definitions of doing for the purposes of this item, which includes the making of an instrument.

Subitem 159(5) provides that a determination made under subitem 159(3) is not a legislative instrument. This provision is included to assist readers, as the determination is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. In other words, this provision is merely declaratory of the law.

References in instruments

Item 160 inserts transitional provisions relating to instruments. Subitem 160(1) provides that, where an instrument was in force prior to commencement of this schedule and the instrument refers to the Executive Director, the instrument has effect from the commencement of this schedule as if the reference were a reference to the Principal Member. In a similar way, subitem 160(2) provides that a reference to a Director in an instrument is taken to be a reference to a Senior Member after the commencement of this schedule.

Subitem 160(3) provides that the Minister may determine, in writing, that subitems 160(1) and 160(2) do not apply to a specified reference.

Subitem 160(4) provides that a determination made under subitem 160(3) is not a legislative instrument. This provision is included to assist readers, as the determination is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. In other words, this provision is merely declaratory of the law.
Substitution of Principal Member or Senior Member as a party to a legal proceeding

Subitem 161(1) provides that, if the Executive Director was a party to any proceedings pending in a court or tribunal before the commencement day, the Principal Member is substituted for the Executive Director, from the commencement day, as a party to the proceedings. Likewise, subitem 161(2) provides that, if a person was a party to any proceedings, in their capacity as a Director, pending in a court or tribunal before the commencement day, the person in the capacity as a Senior Member is substituted for the Director, from the commencement day, as a party to the proceedings.

Reviews by SSAT

Item 162 provides that, if, before the commencement day, a person who was the Executive Director or a Director was one of the members who constituted the SSAT for the purposes of the review of a decision, and the SSAT had not yet made its decision on the review, then, from the commencement day, that person is taken to be one of the members who constitute the SSAT for the purposes of the review in the capacity as the Principal Member or a Senior Member as the case may be.

Regulations

Subitem 163(1) provides that the Governor-General may make regulations prescribing matters required or permitted by this part of the amending schedule to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the part. Subitem 163(2) provides that the Governor-General may make regulations prescribing matters of a transitional nature relating to amendments made by Part 2 of the amending schedule.
Schedule 4 – Disposal of assets

Summary

This schedule will clarify that a gift that has been returned does not have to be assessed as a deprived asset under the social security disposal of assets provisions.

Background

Division 2 of Part 3.12 of the Social Security Act provides special rules for the disposal of assets by a social security recipient under certain circumstances.

Where a person disposes of one or more assets, with a total value in a single year of more than $10,000, or $30,000 over a five-year period, the value of the disposed asset is assessed as a deprived asset for means test purposes. The deprived asset is deemed to earn income and the value of the deprived asset is included in the person’s assets, for assets test purposes, for five years from the date of the disposal.

In circumstances where a disposed asset was subsequently returned to the person, or the person later received adequate consideration for the asset, it may be a harsh outcome for the person if the deprived asset were to continue to be assessed in relation to the earlier disposal. This is because the deprived asset would continue to be assessed for five years from the date of the disposal, together with the returned asset or the value of the consideration received being assessed from the date the person received or reacquired it.

This schedule makes amendments to make it clear that, where the disposed asset, or consideration for the value of the asset, is returned to the person, deprivation should not apply. In addition, where a person partially reacquires an asset that was previously disposed of by the person, deprivation should not apply in relation to the portion of the asset that has been reacquired.

The amendments made by this schedule commence on the day after Royal Assent.

Explanation of the changes

Amendments of the Social Security Act

Items 1, 2 and 5 to 10 make consequential amendments to various provisions of the social security law to take account of the fact that, where a person has previously disposed of an asset for less than its full value, and this disposal has been held against the person for the purposes of the social security assets test, by virtue of any of sections 1126AA, 1126AB, 1126AC and 1126AD, then it is possible that, subsequently, the assets test treatment of this original disposal may have been affected by the operation of new section 1126E.
**Item 3** adds a note at the end of each of subsections 1126AA(2), 1126AB(2), 1126AC(2), 1126AD(2), 1126C(2) and 1126D(2), directing the reader to section 1126E, which modifies the disposal of assets provisions in Division 2 of Part 3.12 of the Social Security Act.

**Item 4** inserts new section 1126E into Division 2 of Part 3.12 of the Social Security Act. New Section 1126E provides rules for modifying the disposal of assets provisions in Division 2 in respect of certain assets that have previously been assessed as deprived assets.

Subsection 1126E(1) applies in relation to an asset that has been disposed of (the relevant disposal) by a person under Division 2 of Part 3.12 of the Social Security Act if, because of this disposal, the amount (the current amount) of the disposal (including an amount assessed under the new section) is included in the value of the assets of a person (the affected person). For the relevant purposes, during the five-year period referred to in subsection 1126AA(2), 1126AB(2), 1126AC(2), 1126AD(2), 1126C(2) or 1126D(2), one of the following events must occur:

- the person referred to in subsection 1126AA(1) or 1126AB(1) reacquires the asset or receives consideration for the asset for the purpose of section 1126AA or 1126AB;

- the person referred to in paragraph 1126AC(1)(a) or 1126AD(1)(a), or the person’s partner, individually or jointly with the partner reacquires the asset or receives consideration for the asset for the purpose of section 1126AC or 1126AD;

- the relevant person referred to in subsection 1126C(1) or 1126D(1) reacquires the asset or receives consideration for the asset for the purpose of section 1126C or 1126D.

The Secretary must be notified, in writing, of the event during that five-year period.

Subsection 1126E(2) provides that the Secretary may, having regard to the event, determine in writing that:

- from the start of the day on which the person notified the Secretary, section 1126AA, 1126AB, 1126AC, 1126AD, 1126C or 1126D ceases to apply in respect of the relevant disposal; or
• from the start of the day on which the person notified the Secretary, the current amount is no longer to be included in the value of the affected person’s assets and, until the end of the five-year deprivation period, the balance of the amount of the relevant disposal (that is, the amount of the relevant disposal less the consideration received or the value of the portion of the asset reacquired) is to be included in the value of the affected person’s assets. Paragraph 1126E(2)(b) provides for those situations where a person receives partial consideration for the value of the disposed asset, so that the deprivation provisions in Division 2 of Part 3.12 of the Social Security Act cease to apply for the portion of the asset reacquired.

Subsection 1126E(3) provides that the Secretary must give the affected person written notice of the determination.

Subsection 1126E(4) provides that a determination under subsection 1126E(2) is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. In other words, this provision is merely declaratory of the law.

Item 11 deals with the application of new section 1126E and provides that section 1126E applies where consideration is received or a portion of the disposed asset reacquired on or after the commencement of the amendment (whether the original disposal referred to in paragraph 1126E(1)(a) occurred before, on or after that commencement, noting that the retrospective element in this application provision is beneficial to customers).
Schedule 5 – Controlled private trusts

Summary
This schedule will clarify, for the purposes of the means test treatment of private trusts, the requirements for an individual to pass the control test in relation to a controlled private trust.

Background
Currently, under the trusts and companies rules in Part 3.18 of the Social Security Act and Part IIIIB of the Veterans’ Entitlements Act 1986 (Veterans’ Entitlements Act), paragraph 1207V(2)(d) of the Social Security Act and paragraph 52ZZH(2)(d) of the Veterans’ Entitlements Act provide that an individual passes the control test if the aggregate of the beneficial interests in the corpus or income of the trust held by the individual (whether directly or indirectly), together with the beneficial interests in the corpus or income of the trust held by associates of the individual (whether directly or indirectly), is 50 per cent or more.

In the decision of the Federal Court, Elliot v Secretary, Department of Education, Employment and Workplace Relations [2008] FCA 1293, the Federal Court found that the beneficiary could not be said to have ‘beneficial interests’ in the corpus or income of the trust under paragraph 1207V(2)(d) of the Social Security Act (the equivalent of paragraph 52ZZH(2)(d) of the Veterans’ Entitlements Act). As this has the capacity to adversely affect the operation of the trusts and companies rules, the Department of Families, Housing, Community Services and Indigenous Affairs appealed the decision to the Full Court of the Federal Court.

The Full Federal Court upheld the Federal Court’s decision in Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Elliott [2009] FCAFC 37 (24 March 2009). The decision placed a significant emphasis on the fact that, where a trust is discretionary and non-exhaustive, it is not possible to measure the collective interests of all existing members of the class (as the power to accumulate might be exercised by the trustee), and that paragraph 1207V(2)(d) effectively requires a measurement to be made of these collective interests.

It was always the intention of the trusts and companies rules that the beneficiaries of a discretionary trust would pass the control test where a group of beneficiaries, who are also ‘associates’, hold 50 per cent or more of the interest in the corpus or income of the trust. For instance, in the Elliott case, the trust was set up under a will by Mr Elliott’s father for the benefit of Mr Elliott and his wife or any grandchildren and their descendants (the Elliotts have a daughter).
Although there are three (or more) possible beneficiaries, where, say, two of those beneficiaries are associates and have an aggregate of 50 per cent interest in the trust, though this may not be as strong as a ‘beneficial interest’, the intention has always been that those beneficiaries would pass the control test, even where, as in the Elliott case, the trustees appear to have had an absolute discretion whether or not to make a distribution of any kind.

This schedule also clarifies that similar situations as that in Cocks; Secretary, Department of Family and Community Services [2002] AATA 1179 (1 November 2002), where a discretionary trust has been set up to look after a particular person, but also provides an interest to a number of other beneficiaries who do not receive a distribution of any kind, the person would be considered to pass the control test. That is, in determining whether an individual or associate has a 50 per cent interest in the income or corpus of a trust, the person’s interest at the time the calculation is being done is the relevant interest.

These amendments clarify that, where a social security customer or veterans’ affairs pensioner is the beneficiary of a discretionary trust, and the trustee of that trust has a duty to provide for the maintenance of that customer or pensioner, even if the customer or pensioner receives a social security payment or veterans’ affairs pension, then the trust should be assessed as being a controlled private trust in respect of that beneficiary. It should not be relevant that there are other future beneficiaries of the trust, when those parties are not currently receiving any benefits from the trust.

The amendments made by this schedule commence on the day after Royal Assent.

**Explanation of the changes**

**Amendments of the Social Security Act**

**Item 1** inserts new paragraph 1207V(2)(ca) into subsection 1207V(2) of the Social Security Act. Paragraph 1207V(2)(ca) provides that an individual passes the control test in relation to a trust if the individual could reasonably expect that, if the individual could not meet his or her reasonable living expenses (within the meaning of ‘reasonable costs of living’ in subsection 19C(5) of the Social Security Act), the trustee would make an application to the individual of the corpus or income of the trust. This provision is intended to cover circumstances in which an individual could reasonably expect to receive an application of the corpus or income of the trust made by a single trustee (where there is only one trustee) or all of the trustees (where there are multiple trustees).
It is intended that paragraph 1207V(2)(ca) cover all trusts where the trustee has the capacity to, and would be expected to, make a payment to the relevant individual if that individual were in need. It is also intended to capture situations where the terms of a trust were such that an individual knowing the terms of the trust would reasonably have the relevant expectation, but where the individual did not actually know about those terms.

**Item 2** inserts new paragraph 1207V(2)(da) into subsection 1207V(2) of the Social Security Act. Paragraph 1207V(2)(da) provides that an individual passes the control test in relation to a trust if the aggregate of the individual, or individual and associates together, total 50 per cent or more of the beneficiaries who are eligible to receive an application of the corpus or income of the trust. The purpose of this provision is to ensure that an individual will meet the control test where there is no beneficial interest that can be quantified (for example, because the trustee is not required to make applications of corpus or income), but the individual and his or her associates together total more than 50 per cent of the eligible beneficiaries at any particular point in time.

**Item 3** inserts new subsections 1207V(2A) to 1207V(2E) into section 1207V of the Social Security Act, which are intended to clarify what is meant by an individual being eligible to receive an application of the corpus or income of the trust for the purposes of new paragraph 1072V(2)(da).

New subsection 1207V(2A) provides that, if the trustee of the trust has a discretion to make an application of the corpus or income of the trust to the entity then, for the purposes of paragraph 1207V(2)(da), an entity is eligible to receive an application of the corpus or income of the trust.

New subsection 1207V(2B) provides that, when an assessment is being made as to whether an individual meets the requirements of subparagraph (2)(da)(i), for the purposes of applying new paragraph (2)(da), the decision-maker should look only at whether the individual in question was eligible to receive an application of the corpus or income of the trust at a particular time in the current year (only up to and including that particular time) and the preceding financial year. The purpose of this subsection is to ensure that a person is not so eligible at a point in time if a trustee will only be able to exercise a discretion to make an application of the corpus or income of the trust to the person from a particular point in time in the future (for example, where a person becomes eligible to receive an application of the corpus or income when another beneficiary dies or when that person is born).
New subsection 1207V(2C) provides that, when an assessment is being made as to whether an entity is an associate of an individual, for the purposes of new subparagraph (2)(da)(ii), then the decision-maker should look only at whether the entity in question was eligible to receive an application of the corpus or income of the trust at a particular time in the current year (only up to and including that particular time) and the preceding financial year and was an associate of the individual in these same periods. The purpose of new subsection 1207V(2B) is to ensure that a person is not so eligible at a point in time if a trustee will only be able to exercise a discretion to make an application of the corpus or income of the trust to the person from a particular point in time in the future (for example, where a person becomes eligible to receive an application of the corpus or income when another beneficiary dies or when that person is born).

New subsection 1207(2D) provides that, when an assessment is being made under new paragraph (2)(da) and part of this process requires an assessment as to the number of entities that were eligible to receive an application of the trust’s corpus or income at any point in time, then the decision-maker should take into account only these entities who were eligible for such an application at any point in time during the current year (only up to and including that particular time) or preceding financial year. This means that a future beneficiary, who was not entitled to receive an application in the two financial years in question, should not be taken into account for the purposes of making the determination required by new paragraph 2(da).

This subsection also covers those entities who are, according to the trust deed, eligible to receive the corpus or income of the trust in stages. For example, beneficiary A is entitled to receive an application of the corpus or income of the trust in January, beneficiary B in February and beneficiary C in March, etc. In these circumstances, beneficiaries A, B and C would all be assessed as being eligible to receive an application of the corpus or income of the trust during the current year (only up to and including that particular time) and preceding financial year.

New subsection 1207V(2E) provides that none of the paragraphs in subsection 1207V(2) limits the interpretation of the other paragraphs in that subsection.

**Amendments of the Veterans’ Entitlements Act**

**Item 4** inserts new paragraph 52ZZH(2)(ca) into subsection 52ZZH(2) of the Veterans’ Entitlements Act. Paragraph 52ZZH(2)(ca) provides that an individual passes the control test in relation to a trust if the individual could reasonably expect that, if the individual could not meet his or her reasonable living expenses, the trustee would make an application to the individual of the corpus or income of the trust. This provision is intended to cover circumstances in which an individual could reasonably expect to receive an application of the corpus or income of the trust made by a single trustee (where there is only one trustee) or all of the trustees (where there are multiple trustees).
It is intended that paragraph 52ZZH(2)(ca) cover all trusts where the trustee has the capacity to, and would be expected to, make a payment to the relevant individual if that individual were in need. It is also intended to capture situations where the terms of a trust were such that an individual knowing the terms of the trust would reasonably have the relevant expectation, but where the individual did not actually know about those terms.

**Item 5** inserts new paragraph 52ZZH(2)(da) into subsection 52ZZH(2) of the Veterans’ Entitlements Act. Paragraph 52ZZH(2)(da) provides that an individual passes the control test in relation to a trust if the aggregate of the individual, or individual and associates together, total 50 per cent or more of the beneficiaries who are eligible to receive an application of the corpus or income of the trust. The purpose of this provision is to ensure that an individual will meet the control test where there is no beneficial interest that can be quantified (for example, because the trustee is not required to make applications of the corpus or income), but the individual and his or her associates together total more than 50 per cent of the eligible beneficiaries at any particular point in time.

**Item 6** inserts new subsections 52ZZH(2A) to 52ZZH(2E) into section 52ZZH of the Veterans’ Entitlements Act, which are intended to clarify what is meant by an individual being eligible to receive an application of the corpus or income of the trust for the purposes of new paragraph 52ZZH(2)(da).

New subsection 52ZZH(2A) provides that, if the trustee of the trust has a discretion to make an application of the corpus or income of the trust to the entity then, for the purposes of paragraph 52ZZH(2)(da), an entity is eligible to receive an application of the corpus or income of the trust.

New subsection 52ZZH(2B) provides that, when an assessment is being made as to whether an individual meets the requirements of subparagraph (2)(da)(i), for the purposes of applying new paragraph (2)(da), the decision-maker should look only at whether the individual in question was eligible to receive an application of the corpus or income of the trust at a particular time in the current tax year (only up to and including that particular time) and the preceding tax year. The purpose of this subsection is to ensure that a person is not so eligible at a point in time if a trustee will only be able to exercise a discretion to make an application of the corpus or income of the trust to the person from a particular point in time in the future (for example, where a person becomes eligible to receive an application of corpus or income when another beneficiary dies or when that person is born).
New subsection 52ZZH(2C) provides that, when an assessment is being made as to whether an entity is an associate of an individual, for the purposes of new subparagraph (2)(da)(ii), then the decision-maker should look only at whether the entity in question was eligible to receive an application of the corpus or income of the trust at a particular time in the current tax year (only up to and including that particular time) and the preceding tax year and was an associate of the individual in these same periods. The purpose of new subsection 52ZZH(2B) is to ensure that a person is not so eligible at a point in time if a trustee will only be able to exercise a discretion to make an application of the corpus or income of the trust to the person from a particular point in time in the future (for example, where a person becomes eligible to receive an application of the corpus or income when another beneficiary dies or when that person is born).

New subsection 52ZZH(2D) provides that, when an assessment is being made under new paragraph (2)(da) and part of this process requires an assessment as to the number of entities that were eligible to receive an application of the trust’s corpus or income at any point in time, then the decision-maker should take into account only these entities who were eligible for such an application at any point in time during the current tax year (only up to and including that particular time) or preceding tax year. This means that a future beneficiary, who was not entitled to receive an application in the two tax years in question, should not be taken into account for the purposes of making the determination required by new paragraph 2(da).

This subsection also covers those entities who are, according to the trust deed, eligible to receive the corpus or income of the trust in stages. For example, beneficiary A is entitled to receive an application of the corpus or income of the trust in January, beneficiary B in February and beneficiary C in March, etc. In these circumstances, beneficiaries A, B and C would all be assessed as being eligible to receive an application of the corpus or income of the trust during the current tax year (only up to and including that particular time) and preceding tax year.

New subsection 52ZZH(2E) provides that none of the paragraphs in subsection 52ZZH(2) limits the interpretation of the other paragraphs in that subsection.
Schedule 6 – Baby bonus

Summary

This schedule introduces a new requirement for an individual to notify if a child for whom baby bonus is paid leaves the individual’s care within 26 weeks beginning on the day of the child’s birth or the day the child is entrusted to care.

Background

Baby bonus is a per-child payment that recognises the extra costs associated with a newborn child, an adopted child or a child entrusted to the care of an individual. Baby bonus is generally paid in 13 equal fortnightly instalments.

Under this schedule, an individual who is granted payment of baby bonus for a child will be required to notify the Secretary if the child leaves the individual’s care within 26 weeks of the child’s birth or being entrusted to care, with the result that the child is no longer an FTB child of the individual.

This new notification requirement will apply to parents of the child as well as individuals into whose care a child is entrusted.

The notification requirement will assist the Secretary to review the amount of baby bonus payable to an individual where there is a change of care that results in another individual also being eligible for baby bonus for the same child. The individual’s payment will be reassessed when a decision is made that another individual is also eligible for baby bonus for the child under subsection 37(3) of the Family Assistance Act. The Secretary will determine each individual’s percentage of baby bonus. If an individual is timely in complying with the requirement to notify a change in care, this will help to reduce the risk of being overpaid.

The amendments made by this schedule commence on 1 July 2010 or the day after Royal Assent, whichever is the later.

Explanation of the changes

Amendment of the Family Assistance Administration Act

Item 1 inserts a new section 47B, which sets out a new notification requirement for baby bonus.

New subsection 47B(1) sets out the circumstances where an individual is subject to the new notification requirement. This is where:

- an individual who is a parent or has been entrusted with the care of a child claims baby bonus;
• there is a change in care within 26 weeks of the child’s birth or being entrusted to care, which has the effect that the child is no longer an FTB child of the individual; and

• the individual is determined to be entitled to baby bonus, and is notified of his or her entitlement either before or after the change in care.

Under subparagraph 47B(2)(b)(i), if that change in care occurs before the claimant is notified of his or her entitlement to baby bonus, then the individual is required to notify the Secretary of the change in care as soon as practicable after receiving the entitlement notice. Under subparagraph 47B(2)(b)(ii), if that change in care occurs after notification of entitlement, then the individual is required to notify the Secretary of the change in care as soon as practicable after that change in care.

New section 47C is also inserted by item 1. This section provides that the manner of notification must be approved by the Secretary, with the requirement that the Secretary notify, by written notice, the individual of the approved manner of notification. The individual is required to notify the Secretary of the change in care in the manner set out in the written notice given under new section 47C (new paragraph 47B(2)(a) refers).

The amendment made by item 1 (the new notification requirement) applies in relation to claims made on or after commencement of the new requirement (item 2 refers).
Schedule 7 – Other amendments

Summary

This schedule makes further amendments to portfolio legislation to address minor anomalies and technical errors.

Consequential amendments are made to maintenance income definitions in the Family Assistance Act flowing from the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 (Same-Sex Act).

Consequential amendments are made to the concept of receiving in the Family Assistance Act to take account of the family tax benefit (FTB) Part B income test.

A minor amendment is made to the Family Assistance Administration Act to streamline the process for claiming FTB for a past period.

This schedule also makes a number of minor and technical amendments to the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act), to notes at the end of the method statements at the beginning of Pension Rate Calculators A, C and D of the Social Security Act to rectify some outdated references, and to repeal some redundant, or no longer required, provisions in the social security law.

Background

Amendments of the Family Assistance Act

The Same-Sex Act amended various Commonwealth laws to address discrimination against same-sex couples and their children. Part 2 of Schedule 6 amended provisions in the Family Assistance Act and the Family Assistance Administration Act from 1 July 2009.

The terms relationship child and relationship parent were introduced and then incorporated, as appropriate, into specific family assistance provisions. These terms are defined in subsection 3(1) of the Family Assistance Act by reference to the Social Security Act. Under subsection 5(25) of the Social Security Act, if someone is a child of a person because he or she is a child of the person within the meaning of the Family Law Act 1975 and he or she is not a biological or adopted child of the person, then the child is the relationship child of the person and the person is the relationship parent of the child.

However, there are also a number of maintenance-related definitions in the Family Assistance Act that currently refer to a parent or a natural or adopted child but not a relationship child or relationship parent. Amendments are made to address this anomaly.
The definitions of *maintenance income* and *disability expenses* are also amended to remove erroneous references to maintenance income received from a partner. The intended policy is for these definitions to refer to maintenance income received from a *former partner*, and the reference to a current partner is not intended.

The other amendments to the Family Assistance Act made by this schedule relate to the concept of *receiving* and the application of the FTB Part B income test in clause 28B of Schedule 1 to the Family Assistance Act.

Clause 28B provides that an individual's FTB Part B rate is nil where the primary earner in a couple, or a sole parent, has adjusted taxable income of more than $150,000. However, this rule does not apply where the individual or their partner is receiving a social security pension, a social security benefit, a service pension or an income support supplement. A similar exemption applies in relation to the FTB Part A income test for Methods 1 and 3 (as set out in clauses 1 and 38L of Schedule 1).

The concept of receiving is defined in subsection 3(1) of the Family Assistance Act. Generally, a person is receiving a social security payment from the earliest to the latest day on which the payment is payable. However, for the purposes of clauses 1 and 38L (and other specified provisions), there is an extended meaning such that a person can still be receiving a social security pension or a social security benefit where employment income precludes payment, where a compliance penalty period applies and where payment has been suspended because the person has not complied with a schooling requirement under Part 3C of the Social Security Administration Act. Amendments are made so that the extended meaning also applies in relation to the FTB Part B income test.

These amendments commence on the day after Royal Assent.

**Amendment of the Family Assistance Administration Act**

This schedule makes a minor amendment to section 10 of the Family Assistance Administration Act to streamline the process for claiming FTB for a past period.

New section 32AE of the Family Assistance Administration Act will commence on 1 July 2010 (item 6 of Schedule 2 to the *Family Assistance Amendment (Further 2008 Budget Measures) Act 2009* refers). This section will apply where a claimant has three subsection 28(2) variations and they and/or their partner have not lodged income tax returns for the relevant years. Where this occurs, the claimant and partner (while partnered with the claimant) will not be entitled to receive FTB based on an estimate of income. For those years when the claimant is not entitled to be paid based on an estimate of income, they can be paid FTB based on actual income if they make a past period claim following the end of the income year.
Section 10 of the Family Assistance Administration Act provides for restrictions on claims for FTB for a past period. Subsection 10(4) provides that a claim for a past period is not effective unless the claim is accompanied by a claim for payment of FTB by instalment where a claimant and/or their partner received a social security benefit, social security pension, service pension or income support supplement (income support payments) during the past period and, at the time the past period claim is made, they are receiving an income support payment, they are eligible for FTB and they are not prevented by section 9 of the Family Assistance Administration Act from making an effective claim for payment of FTB by instalment.

This may result in an administrative anomaly for claimants who are income support payment recipients and are not entitled to FTB based on an estimate because of the application of section 32AE. These claimants are required under subsection 10(4) to make an instalment claim with their past period claim for FTB in order to be paid for the past period, despite the fact that the instalment claim cannot be granted. An amendment is made to section 10 that addresses this anomaly.

This amendment commences on 1 July 2010 (when section 32AE also commences) or the day after Royal Assent, whichever is the later.

**Amendments of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)**

Some of the amendments in this schedule are minor corrections to the CATSI Act. These amendments are mainly technical and correct faulty cross-references, numbering and grammatical errors, and similar problems. The remaining amendments to the CATSI Act address minor anomalies, as described below.

These amendments commence on the day after Royal Assent. There are express application provisions for three items to ensure there is no retrospective effect caused by these items.

**Amendments of the social security law**

The other amendments in this schedule are technical amendments to the social security law to repeal redundant, or no longer required, provisions and references, and to correct certain cross-references. For example, minor amendments to notes at the end of the method statements at the beginning of Pension Rate Calculators A, C and D are needed to simplify the reference to section 1210 and to remove unnecessary references to how remote area allowance is added in the rate calculation process.

These amendments commence on the day after Royal Assent.
Explanation of the changes

Amendments of the Family Assistance Act

The concept of maintenance income, as defined in subsection 3(1) of the Family Assistance Act, includes child maintenance and direct child maintenance that is received from a parent of the child or the partner or former partner of a parent of the child, but does not include disability expenses maintenance. In this context, ‘parent’ takes on its ordinary meaning, which would not include a relationship parent as defined in the Social Security Act.

Items 1 and 3 insert references to relationship parent into paragraphs (a) and (c) of the definition of maintenance income so that any child maintenance or direct child maintenance received from a relationship parent or a former partner of a relationship parent of the child is also maintenance income.

As a matter of policy, the maintenance income test is not intended to refer to child maintenance or partner maintenance received from their partner or to direct child maintenance received by an FTB child from the partner of the individual. The intended policy is for these definitions to refer to maintenance income received from a former partner, and the reference to a current partner is not intended. The amendments made by items 1 to 3 also remove relevant references to partner in the definition of maintenance income to reflect this.

The concept of disability expenses maintenance is defined in subsection 19(3) of the Family Assistance Act. The concept covers payments or benefits provided for expenses directly arising from a disability or learning difficulty. Paragraph (d) of the definition refers to a payment or benefit received from a parent of the child or the partner or former partner of a parent of the child. Payments or benefits received from a relationship parent or the former partner of a relationship parent are not currently included in that definition. Item 6 reworks paragraph 19(3)(d) so that it applies to relationship parents in the same way as parents. Further, the definition will no longer refer to payments or benefits received from the partner of a parent, consistent with the policy described above.

Deductible child maintenance expenditure reduces the amount of an individual’s adjusted taxable income. Under subclause 8(2) of Schedule 3, an individual incurs child maintenance expenditure where, among other things, a payer provides a payment or benefits in respect of the payer’s natural or adopted child. Item 7 broadens this provision so that it also includes a payment or benefits in respect of the payer’s relationship child.

The FTB Part B income test in clause 28B of Schedule 1 does not apply to an individual where the individual or their partner is receiving a social security pension, a social security benefit, a service pension or an income support supplement.
Items 4 and 5 amend the concept of receiving, as it applies in relation to the FTB Part B income test. A reference to clause 28B is inserted into paragraph (b) of the definition of receiving in subsection 3(1) and also into paragraph 3AA(1)(b). The effect is that an individual will be taken to be receiving a social security pension or benefit from the first to the last day on which it is payable and also where employment income precludes payment, where a compliance penalty period applies and where payment has been suspended because the person has not complied with a schooling requirement under Part 3C of the Social Security Administration Act.

Amendment of the Family Assistance Administration Act

Item 8 inserts a new subsection 10(5) into the Family Assistance Administration Act. New subsection 10(5) provides that an instalment claim, as currently required under paragraph 10(4)(f) of that Act, will not be required if, at the time that a claimant makes a claim for a past period, they are not entitled to be paid FTB based on an estimate of income because of the application of subsection 32AE(2) or (3) of that Act.

Amendments of the CATSI Act

Item 9 corrects four cross-references in subsection 1-10(1) of the CATSI Act. The cross-references become sections 516-1, 521-1, 526-35 and 526-40 of the CATSI Act, instead of subsections within those sections.

Item 10 corrects an error in paragraph 42-10(1)(a) of the CATSI Act by substituting ‘the person’s’ for ‘his or her’. Aboriginal and Torres Strait Islander corporations may have corporate members. The amended paragraph confirms that a corporate member may specify its consent in the application for registration and become a member on registration of the corporation.

Items 11 and 12 correct a cross-reference in the table in section 57-5 of the CATSI Act, which lists the internal governance rules in the Act. The provision reference for item 9 (Resolution of disputes) in the table is corrected to ‘subsection 66-1(3A)’. This item also becomes item 1A in the table to maintain item order by provision reference.

Item 13 corrects an error in paragraph 138-1(1)(b) of the CATSI Act by substituting ‘the person’s’ for ‘his or her’. Aboriginal and Torres Strait Islander corporations may have corporate members. The amended paragraph confirms that a body corporate may become a member of an Aboriginal and Torres Strait Islander corporation if the body corporate agrees to become a member of the corporation after the corporation’s registration and the name of the body corporate is entered in the corporation’s register of members.
Item 14 corrects an error in subsection 138-1(2) of the CATSI Act by substituting ‘the person’s’ for ‘his or her’. Aboriginal and Torres Strait Islander corporations may have corporate members. The amended subsection confirms that a body corporate becomes a member of an Aboriginal and Torres Strait Islander corporation when its name is entered on the corporation’s register of members.

Item 15 corrects an error in paragraph 150-20(1)(b) of the CATSI Act by substituting ‘the person’s’ for ‘his or her’. Aboriginal and Torres Strait Islander corporations may have corporate members. The amended paragraph confirms that the membership of a corporate member may be cancelled if the body corporate member has not paid its membership fees (if any).

Item 16 inserts subsection 150-35(5) which makes the offence in the previous subsection an offence of strict liability. It is appropriate for this offence to be made an offence of strict liability. It is a minor offence which does not involve dishonesty or serious imputation affecting a person’s reputation. It may be difficult for the prosecution to prove fault by the directors in question. It provides a stronger incentive for the directors to inform a person that their membership has been cancelled for misbehaviour.

It also brings this offence into line with similar offences in subsections 150-25(5) and 150-30(5) of the CATSI Act, where failure by the directors to notify a person of the cancellation of their membership as soon as practicable after the removal resolution has been passed are offences of strict liability.

The application provision in subitem 26(1) provides for this amendment to apply to membership cancellations occurring on or after the commencement of item 16.

Item 17 corrects ‘contact officer’ to ‘contact person’ in paragraph 201-25(1)(d) of the CATSI Act. Aboriginal and Torres Strait Islander corporations registered as small or medium size corporations must have a contact person.

Item 18 corrects the cross-reference in subsection 220-10(7) of the CATSI Act to ‘subsection (3), (4) or (5)’ by substituting ‘subsection (3), (5) or (6)’.

Item 19 corrects the reference in section 262-1 of the CATSI Act to ‘section 558G’ of the Corporations Act 2001 to ‘section 588G’ of that Act.

Item 20 inserts the missing word ‘Islander’ in subsection 279-1(1) of the CATSI Act after the words ‘managing Aboriginal and Torres Strait’.

Item 21 corrects ‘1 June’ to ‘1 July’ in subparagraphs 333-5(4A)(a)(i) and (ii) of the CATSI Act. Subsection 333-5(4A) makes provision for the first financial year for an existing body corporate registering under the Act. For reporting purposes, the first financial year should commence on 1 July for these corporations. This will be consistent with the financial year reporting scheme under the Act.
The application provision in **subitem 26(2)** provides for this amendment to apply to registrations of existing bodies corporate occurring on or after the commencement of **item 21**.

**Item 22** removes the second occurring ‘or’, which is extraneous, in paragraph 456-10(1)(a) of the CATSI Act.

**Item 23** corrects ‘general return’ to ‘general report’ in two places in paragraph 546-5(1)(a) of the CATSI Act. Aboriginal and Torres Strait Islander corporations prepare and lodge a general report each year.

**Item 24** inserts ‘, the Australian Capital Territory’ after ‘of a State’ in subsection 589-5(8) of the CATSI Act. The same limits made in subsection 589-5(8) to the jurisdiction of the courts of a State or the Northern Territory concerning the CATSI Act should apply to the courts of the Australian Capital Territory.

**Item 25** substitutes ‘this Act’ for the reference to ‘section 658-10’ in section 604-20 of the CATSI Act. All consultants engaged under the Act (not just those engaged under section 658-10) will have an obligation to protect ‘protected information’ from unauthorised use or disclosure by them.

As contravention of section 604-20 of the CATSI Act is an offence punishable by imprisonment of up to two years, the application provision in **subitem 26(3)** ensures that **item 25** does not have retrospective effect. **Item 25** applies to uses and disclosures of protected information on or after its commencement (whether the persons were engaged as consultants before, on or after that commencement).

**Item 26** expressly provides when the amendments made by **items 16, 21 and 25** will take effect. This ensures that these amendments do not have retrospective effect and no person’s rights are adversely affected by retrospection.

**Amendments of the Social Security Act**

**Item 27** repeals subsection 94(4A) and subsection 94(4B). These subsections currently provide for making, and complying with, guidelines about certain matters under section 94 (qualification for disability support pension). The subsections are now repealed in light of the **Job Capacity Assessment Review 2008**, which recommended that no guidelines be put in place. No guidelines have ever been made, nor are proposed, under these subsections. Accordingly, the two subsections are no longer required and are repealed to avoid confusion.

**Items 28, 30 and 32** repeal Note 2 from each of the method statements at the beginning of Pension Rate Calculators A, C and D and add a new Note 2. The new note simplifies the signposting of section 1210 by stating that section 1210 deals with the application of income and assets test reductions.
Items 29, 31 and 33 repeal notes from the method statements at the beginning of Pension Rate Calculators A, C and D that dealt with how remote area allowance is to be added in the rate calculation process. These notes are unnecessary because the final steps in each of those Pension Rate Calculators state clearly how remote area allowance is to be treated in the rate calculation process.

Amendments of the Social Security Administration Act

Items 34 and 35 repeal, respectively, the redundant paragraphs 129(4)(b) and 144(l). Both of those paragraphs had formerly operated solely for the purposes of subsection 129(2) (relating to giving notice to another party of an application for internal review of a decision under subsection 91A(3) of the Child Support (Assessment) Act 1989). However, subsection 129(2) was repealed in 2000 when the subject area for review moved from the social security law to the new family assistance law. Accordingly, paragraphs 129(4)(b) and 144(l) were redundant and are now repealed.