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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAMILIES, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS
AND OTHER LEGISLATION (2006 BUDGET AND OTHER
MEASURES) BILL 2006**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Families, Community Services and Indigenous Affairs,
the Hon Mal Brough MP)**

**FAMILIES, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS
AND OTHER LEGISLATION (2006 BUDGET AND OTHER
MEASURES) BILL 2006**

OUTLINE AND FINANCIAL IMPACT STATEMENT

This bill gives effect to a number of measures announced as part of the 2006-07 Budget, introduces a new disaster recovery payment, gives effect to some measures announced in the 2005-2006 Budget and as part of the Welfare to Work Reforms and makes other amendments as outlined below.

Increase in family tax benefit Part A income free area

From 1 July 2006, the lower income free area for family tax benefit Part A will be further increased to \$40,000. This amount will then be indexed in accordance with movements in the Consumer Price Index on 1 July 2007 and each subsequent 1 July.

Financial impact (total resourcing)

2006-07	\$241.8m
2007-08	\$246.2m
2008-09	\$249.0m
2009-10	\$256.3m

Large family supplement

From 1 July 2006, families with 3 or more children will be eligible for an additional amount of family tax benefit Part A, known as the large family supplement. This extra payment is currently only available for families with 4 or more children.

Financial impact (total resourcing)

2006-07	\$113.7m
2007-08	\$125.4m
2008-09	\$128.2m
2009-10	\$129.4m

Extension of eligibility for utilities allowance

From 1 July 2006, eligibility for utilities allowance will be extended to persons who are under pension age and are receiving mature age allowance, widow allowance or partner allowance.

Financial impact (total resourcing)

2006-07	\$7.5m
2007-08	\$7.1m
2008-09	\$6.5m
2009-10	\$6.4m

Australian Government Disaster Recovery Payment

This Bill introduces a new payment into the social security law called the Australian Government Disaster Recovery Payment, which will provide an immediate, short-term payment to Australians affected by a major or widespread disaster. Adult Australian residents, who are affected by an eligible natural or non-natural disaster, whether within Australia or offshore, can claim the payment and receive financial assistance for themselves and their children, to aid with their recovery.

The Australian Government Disaster Recovery Payment is to be exempt from all Australian Government means testing arrangements and will be non-taxable.

The measure commences on 1 December 2006.

Financial impact (total resourcing)

2006-07	\$4.3m
2007-08	\$2.9m
2008-09	\$3.0m
2009-10	\$3.0m

Maintenance income credit balances

A maintenance income credit is introduced from 1 July 2006 to enable parents to access their unused maintenance income free area from previous years to offset late child support payments. When arrears of maintenance income are subsequently received, the maintenance income credit balance would be drawn upon to reduce the amount of arrears counted under the maintenance income test for family tax benefit Part A. The beneficial effect of the maintenance income credit for a given income year will apply on income reconciliation after the end of the income year.

Financial impact (total resourcing)

2005-06	\$4.8m
2006-07	\$16.5m
2007-08	\$15.6m
2008-09	\$16.0m

Extension of carer payment to carers of severely disabled children

From 1 July 2006, the qualification rules for carer payment will be extended to cover carers of children who are under 16 years of age with severe intellectual, psychiatric or behavioural disability who require constant care or supervision.

Financial impact (total resourcing)

2005-06	\$0.7m
2006-07	\$12.8m
2007-08	\$19.4m
2008-09	\$22.1m

Special disability trusts

This measure assists families who have the financial means to make private financial provision, through a special disability trust, for the future care and accommodation needs of their family members with severe disabilities.

The measure allows parents and immediate family members to establish a special disability trust for the current and future accommodation and care of the severely disabled person. All trust income and trust assets up to the value of \$500,000 will not affect the family member's social security payments or payments to a person under the *Veterans' Entitlements Act 1986* (the Veterans' Entitlements Act). In addition, as there are limits under the social security law and the Veterans' Entitlements Act to the assets a person can give away, gifts to the trust (to a total of \$500,000) from parents or immediate family members will not affect the donor's social security payment or payments to a person under the Veterans' Entitlements Act.

The measure commences on 20 September 2006.

Financial impact (total resourcing)

2005-06	\$1.0m
2006-07	\$26.9m
2007-08	\$76.7m
2008-09	\$113.5m

Australian Institute of Family Studies

Amendments are made to the *Family Law Act 1975* to implement changes to the governance arrangements of the Australian Institute of Family Studies in response to the recommendations of the Review of the Corporate Governance of Statutory Authorities and Office Holders conducted by Mr John Uhrig.

This measure has no financial implications.

Minor amendments to the family assistance law

Minor changes are made to the income test rules for family tax benefit Part B where a secondary earner returns to work for the first time since the birth of a child to ensure that certain technical aspects are consistent with intended policy outcomes. These changes commence on 1 July 2005 and first apply in relation to the 2005-06 income year on reconciliation after 1 July 2006.

The definition of 'income tax refund' is amended to include refundable tax offsets, with effect from 1 July 2002.

Technical amendments are made clarifying that there may be situations where a customer's rate of family tax benefit or the amount of a customer's child care benefit by fee reduction will need be worked out on the basis of an indexed estimate for the customer and a reasonable estimate of the partner's adjusted taxable income provided by the customer. These changes commence on 1 July 2006.

Technical amendments are made as a consequence of the recent family law reforms relating to shared parental responsibility.

These measures have no financial implications.

The bill also makes other minor technical amendments to the social security law. These amendments also have no financial implications.

**FAMILIES, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS
AND OTHER LEGISLATION (2006 BUDGET AND
OTHER MEASURES) BILL 2006**

NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, the *Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Act 2006*.

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.

- 'AGDRP' means Australian Government Disaster Recovery Payment.
- 'CCB' means child care benefit.
- 'Commonwealth Authorities and Companies Act' means the *Commonwealth Authorities and Companies Act 1997*.
- '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*.
- 'Family Law Act' means the *Family Law Act 1975*.
- 'Financial Management and Accountability Act' means the *Financial Management and Accountability Act 1997*.
- 'FTB' means family tax benefit.
- 'Institute' means the Australian Institute of Family Studies.
- 'Public Service Act' means the *Public Service Act 1999*.
- 'Social Security Act' means the *Social Security Act 1991*.
- 'Social Security Administration Act' means the *Social Security (Administration) Act 1999*.
- 'Uhrig Review' means the Review of Corporate Governance of Statutory Authorities and Office Holders by Mr John Uhrig AC.
- 'Veterans' Entitlements Act' means the *Veterans' Entitlements Act 1986*.

Schedule 1 – FTB Part A income free area

Summary

From 1 July 2006, the lower income free area for FTB Part A will be further increased to \$40,000. This amount will then be indexed in accordance with movements in the Consumer Price Index (CPI) on 1 July 2007 and each subsequent 1 July.

Background

An individual's annual rate of FTB is comprised of a Part A rate and a Part B rate. FTB Part A can be worked out using one of two methods. Method 1 is used where the individual's adjusted taxable income does not exceed the higher income free area or where either the individual or the individual's partner is receiving certain income support payments. Method 2 is used where the individual's adjusted taxable income exceeds the higher income free area and neither the individual nor the individual's partner is receiving certain income support payments.

The rate calculation process for deriving a method 1 rate is set out in the method statement in clause 3 of Schedule 1 to the Family Assistance Act. There are various components of rate that make up an individual's 'maximum rate'. An income test is then applied to determine whether the individual's maximum rate needs to be reduced because of income. The maintenance income test then applies to reduce the maximum rate further (if applicable) to the 'base rate'.

The income test is set out in the method statement in clause 18 of Schedule 1 to the Family Assistance Act. An individual's adjusted taxable income above the 'income free area' is used to work out the individual's 'income excess'. The income excess is then subject to a 20% taper to arrive at the individual's 'reduction for adjusted taxable income', which, in turn, reduces the individual's maximum rate.

Clause 19 of Schedule 1 defines an individual's income free area. The income free area is indexed every 1 July in accordance with movements in the CPI. The relevant indexation provisions are table item 13 in each of clauses 2 and 3 of Schedule 4 to the Family Assistance Act.

From 1 July 2005, the income free area is \$33,361. This is the amount a family can earn in 2005-06 before their FTB is reduced in accordance with the income test taper rules.

Amendments were made by Schedule 1 to the *Family Assistance, Social Security and Veterans' Affairs Legislation Amendment (2005 Budget and Other Measures) Act 2006* to increase the FTB Part A income free area to \$37,500 from 1 July 2006. This increase will now not happen.

Instead, the FTB Part A income free area will be increased to the higher amount of \$40,000 from 1 July 2006. This new higher amount of \$40,000 will then be subject to indexation in accordance with movements in the CPI on 1 July 2007 and each subsequent 1 July.

Explanation of the changes

Item 1 replaces the existing amount of the income free area in clause 19 of Schedule 1 to the Family Assistance Act with the amount of \$40,000. In accordance with **subitem 3(1)**, this new amount is applicable in relation to FTB for the 2006-07 income year and later income years.

Item 2 makes a technical amendment to the relevant indexation provision. In accordance with **subitem 3(2)**, this change applies in relation to FTB for the 2007-08 income year (acknowledging that the new amount of the income free area is first indexed on 1 July 2007) and later income years.

Item 4 is a transitional provision, ensuring that the income free area is not indexed on 1 July 2006 (because it is being replaced with a new and higher amount). Indexation will then occur on 1 July 2007 when the new amount of \$40,000 will be indexed in accordance with movements in the CPI and each subsequent 1 July.

Item 5 repeals Schedule 1 to the *Family Assistance, Social Security and Veterans' Affairs Legislation Amendment (2005 Budget and Other Measures) Act 2006* which would have increased the FTB Part A income free area to \$37,500 from 1 July 2006. Instead, this Schedule increases the income free area to the higher amount of \$40,000, from 1 July 2006.

Schedule 2 – Large family supplement

Summary

From 1 July 2006, families with 3 or more children will be eligible for an additional amount of FTB Part A, known as the large family supplement. This extra payment is currently only available for families with 4 or more children.

Background

An individual's annual rate of FTB is comprised of a Part A rate and a Part B rate. FTB Part A is made up of a number of components of rate, including the individual's large family supplement, if any.

An amount by way of a large family supplement is added in working out an individual's rate of FTB Part A if the individual has 4 or more children. It is paid for the fourth and subsequent children. The amount of the large family supplement is currently \$248.20 per annum, although this amount will be indexed in accordance with the CPI on 1 July 2006 (as it is on 1 July of each year).

Amendments are made to enable the large family supplement to be paid to families with 3 or more children, in respect of the third and subsequent children in the family.

Explanation of the changes

Clause 34 of Schedule 1 to the Family Assistance Act provides that an amount by way of large family supplement is to be added in working out an individual's maximum rate of FTB Part A (including the base rate) if the individual has 4 or more children.

The amount of the large family supplement is set out in the formula in clause 35 of Schedule 1. Under the formula, the amount is currently \$248.20 per annum and is paid in respect of the individual's fourth and subsequent children.

Item 1 replaces the existing reference to '4 or more' (children) in clause 34 with a reference to '3 or more' (children). This amendment ensures that a large family supplement is available in respect of the third FTB child and any subsequent children.

Item 2 replaces the existing reference to '3' in the formula with a reference to '2'. This amendment ensures that the amount of a large family supplement is available in respect of the third FTB child and any subsequent children.

These amendments commence from 1 July 2006.

Schedule 3 – Extension of eligibility for utilities allowance

Summary

This Schedule provides for the extension of eligibility for utilities allowance to persons who are under pension age and receiving mature age allowance, widow allowance or partner allowance. This amendment commences on 1 July 2006.

Background

Currently, a person must be of pension age in order to qualify for utilities allowance. Mature age, widow and partner allowees are required to meet a 'no recent work experience' qualification criteria to be eligible for payment. They have significant long term barriers to employment. Utilities allowance is aimed at assisting these people with meeting the costs of regular bills, such as gas, electricity and water.

Explanation of the changes

Section 1061T of the Social Security Act deals with qualification for utilities allowance. In part, it provides that a person must have reached pension age and be receiving an income support payment in order to qualify for the allowance. The amendment made by **item 1** extends qualification for utilities allowance to people who are not of pension age and who are receiving mature age allowance, widow allowance or partner allowance.

Schedule 4 – Australian Government Disaster Recovery Payment

Summary

Schedule 4 to the bill introduces into the Social Security Act a new payment called the Australian Government Disaster Recovery Payment (AGDRP), which will provide an immediate, short-term payment to Australians adversely affected by a major or widespread disaster. Adult Australian residents who are affected by an eligible natural or non-natural disaster, whether within Australia or offshore, can claim the payment and receive financial assistance for themselves and their children to aid with their recovery.

The AGDRP is to be exempt from all Australian Government means testing arrangements and will be tax exempt.

Background

This measure provides a streamlined and co-ordinated payment, AGDRP, that can be activated in the event of an emergency or disaster, so that Australians can receive assistance in a timely manner. The AGDRP provides a flexible disaster recovery assistance payment, which could be used for either offshore disasters, in situations similar to the 2002 and 2005 Bali bombings, the 2004 Asian Tsunami and the 2005 London bombings, or onshore disasters, similar to the 2005 Eyre Peninsula bushfires or Tropical Cyclone Larry earlier this year. Given the successful ex-gratia government assistance provided in response to these events, the AGDRP is intended to standardise the provision of Australian Government assistance. The AGDRP is largely aimed at providing the government with a flexible response option for Australians affected by onshore or offshore disaster events, complementing existing arrangements and providing choice in the way the government may wish to respond.

Explanation of the changes

Part 1 – Main amendments

Social Security Act 1991

Item 1 inserts the new definition of 'adversely affected' into subsection 23(1) of the Social Security Act. One of the eligibility criteria for receiving an AGDRP is that a person be 'adversely affected' by a 'major disaster'. 'Major disaster' is defined in new section 36 (see **item 4**). 'Adversely affected' is defined in new section 1061L (see **item 5**).

Item 2 inserts a new acronym definition into subsection 23(1) being 'AGDRP', which represents the Australian Government Disaster Recovery Payment.

Item 3 defines both the term Australian Government Disaster Recovery Payment and the acronym AGDRP as the new payment being made under Part 2.24 of the Social Security Act.

Item 4 repeals and replaces section 36 of the Social Security Act. New section 36 allows the Minister to determine that a particular event is a major disaster for the purposes of allowing a person to claim AGDRP. In determining that an event is a major disaster, the Minister may take into account the number of individuals affected by, and the nature and extent of, the disaster. A disaster can be both a natural and non-natural disaster and may occur within or outside of Australia, or both. Where an event affects 2 locations, the Minister can make a single determination, if both locations are within Australia, or separate determinations for each location. A determination made under this provision is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* as the determination is administrative in character, not legislative.

Item 5 repeals Part 2.24 of the Social Security Act and replaces it with new Part 2.24. This replacement part provides the qualification rules for AGDRP and amount of this payment.

New section 1061K provides the qualification rules for AGDRP. Firstly, this payment is, generally, only payable to adults who have been adversely affected by a major disaster. An adult is a person who is at least 16 years of age, or who is receiving a social security payment. The adult must also be:

- an Australian resident; or
- receiving a social security payment, other than a payment of youth allowance not at the 'independent' rate ('independent' is defined at Part 3.5 of the Social Security Act); or
- an Australian citizen who is not currently a resident, but who is a member of a class of citizens determined by the Minister to be able to qualify for AGDRP in regard to a particular major disaster; or
- the holder of a visa that is in a class of visas determined by the Minister for the purposes of subparagraph 729(2)(f)(v) of the Social Security Act.

A determination that a particular class of non-resident Australian citizens can be paid AGDRP in regard to a particular major disaster is a legislative instrument, but the disallowance requirement in section 42 of the *Legislative Instruments Act 2003* does not apply to this determination. The determination is exempt from disallowance to ensure the Minister can respond quickly and with certainty to the needs of Australians who are affected by a major disaster. Such a determination will therefore enable assistance to be provided to people who are not classed as Australian residents, such as holders of spouse provisional visas and interdependency visas, but whom the government would like to assist.

New subsection 1061K(5) provides that a person can only receive one payment of AGDRP in respect of a particular major disaster. New section 1061L provides that the Minister may determine, in writing, the circumstances in which a person is adversely affected by a disaster and would thereby satisfy the 'adversely affected' qualification requirement in new paragraph 1061K(1)(c). The circumstances where the Minister may consider a person to be adversely affected may include, for example, where:

- a person was present at the location of the disaster, or at a place where medical, or similar, assistance was given to victims of the disaster (for example, a hospital or a morgue), and suffered either a serious physical injury or a serious psychological injury or psychological trauma;
- the disaster caused the death of an immediate family member;
- a person's principal home is rendered uninhabitable for a period of at least 2 weeks or destroyed; or
- if the disaster occurs outside of Australia, the person incurs necessary personal expenditure, which is not covered by insurance or other compensation. This may include the replacement of clothing or similar personal items.

This determination is a legislative instrument, but section 42 of the *Legislative Instruments Act 2003* does not apply to this determination, that is, it is not subject to disallowance. The reason for a determination made under section 1061L not being subject to disallowance is to ensure that the Minister can offer assistance to those people adversely affected by a disaster as quickly, responsively and efficiently as possible, without the uncertainty of disallowance.

New section 1061M provides that, for a disaster occurring in a location that is part of Australia, a person is able to claim an amount of AGDRP equal to the adult rate of AGDRP for the financial year during which the disaster was declared by the Minister, plus the child rate for that same financial year multiplied by the number of children in relation to whom the person is the principal carer. The child rate of AGDRP is not paid to an adult in regard to a child who is receiving the 'independent' rate of youth allowance.

The adult rate of AGDRP will initially be \$1,000 until the Minister makes a determination as to the rate in regard to a particular financial year. Where the Minister has not made a determination in relation to a particular financial year, the adult rate of AGDRP will be that rate most recently determined by the Minister or, where no determination has ever been made, \$1,000.

The child rate of AGDRP will initially be \$400 until the Minister makes a determination as to the rate in regard to a particular financial year. Where the Minister has not made a determination in relation to a particular financial year, the child rate of AGDRP will be that rate most recently determined by the Minister or, where no determination has ever been made, \$400.

New section 1061N provides that, for a disaster occurring outside of Australia, a person is able to claim an amount of AGDRP determined by the Minister under subsection 1061P(4), which cannot be greater than the adult rate, plus the amount determined by the Minister under subsection 1061P(5), which cannot be more than the child rate, multiplied by the number of children in relation to whom the person is the principal carer. Young people who are receiving the 'independent' rate of youth allowance will not be counted as a child of an adult for the purposes of determining the amount of AGDRP payable to the person, as they can claim AGDRP in their own right.

New section 1061P provides for the determination of various rates of AGDRP that will be payable to a person in respect of onshore and offshore disasters and at an adult rate and child rate. This determination is a legislative instrument, but section 42 of the *Legislative Instruments Act 2003* does not apply to this determination, that is, it is not subject to disallowance. The reason for determinations made under section 1061P not being subject to disallowance is to enable the rate of payments to be set and commence with certainty without waiting for the conclusion of a disallowance period in the event of a major disaster. This would then enable the Minister to make an urgent determination that would provide certainty for the making of payments.

Part 2 – Other amendments

Income Tax Assessment Act 1997

Item 6 inserts reference to the AGDRP into the table in section 52-10 of the *Income Tax Assessment Act 1997*, making it a social security payment that is exempt from income tax.

Item 7 repeals item 8.1 in the table in section 52-10 of the *Income Tax Assessment Act 1997*, being reference to the old disaster relief payment, which is now being replaced by AGDRP.

Item 8 inserts reference to the AGDRP into the table in section 52-40 of the *Income Tax Assessment Act 1997*. This table indicates where in the Social Security Act a reader may find the operative provisions about payments that are exempt from income tax. In this case, readers can find these provisions in regard to AGDRP at Part 2.24.

Item 9 repeals the reference to the now replaced disaster relief payment at item 8 of the table in section 52-40 of the *Income Tax Assessment Act 1997*. This old payment has now been replaced by AGDRP.

Social Security Act 1991

Item 10 inserts new paragraph 14A(1)(da) into the Social Security Act. This new provision provides that a payment of AGDRP will not be included when assessing a social security customer's liquid assets, which can have an effect on the customer's eligibility for certain social security payments. This provision is worded in such a way that, if it appears to the Secretary that the person has not spent their AGDRP some time after having received it, it is open to him or her to continue to exempt the amount as a liquid asset in regard to the person's social security payment for a reasonable period of time. Alternatively, if it appears that the person had spent the AGDRP immediately, it would probably not be reasonable for the Secretary to exempt the amount as a liquid asset for any further period of time.

Item 11 amends the definition of liquid assets in subsection 19B(1) of the Social Security Act and provides that an AGDRP payment will not be included in the liquid assets of a person when determining their eligibility for a social security payment under the financial hardship rules. As per **item 10**, above, this provision is worded in such a way that, if it appears to the Secretary that the person has not spent their AGDRP some time after having received it, it is open to him or her to continue to exempt the amount as a liquid asset in regard to the person's social security payment for a reasonable period of time. Alternatively, if it appears that the person had spent the AGDRP immediately, it would probably not be reasonable for the Secretary to exempt the amount as a liquid asset for any further period of time.

Item 12 repeals certain words in subsection 746(2) of the Social Security Act that are no longer necessary because of the repeal of the disaster relief payment and its replacement by AGDRP.

Item 13 repeals the note at the end of subsection 746(2) of the Social Security Act, which is no longer necessary because of the repeal of the disaster relief payment and its replacement by AGDRP.

Item 14 repeals certain words in subsection 771KE(2) of the Social Security Act that are no longer necessary because of the repeal of the disaster relief payment and its replacement by AGDRP.

Item 15 repeals the note at the end of subsection 771KE(2) of the Social Security Act, which is no longer necessary because of the repeal of the disaster relief payment and its replacement by AGDRP.

Item 16 amends section 1061JJ of the Social Security Act to make it now subsection 1061JJ(1) in preparation for the insertion of new subsection 1061JJ(2), at **item 18** below.

Item 17 amends section 1061JJ of the Social Security Act, to replace the reference to ‘a disaster relief payment’ to include now ‘an AGDRP or other disaster relief payment’. This provision affects a customer’s ability to claim crisis payment in respect of an extreme circumstance for which they are also able to receive AGDRP or another disaster relief payment.

Item 18 inserts new subsection 1061JJ(2) into the Social Security Act. This provision provides that, once the Minister has declared a major disaster for the purposes of AGDRP, a person will no longer be also able to claim crisis payment in respect of this same disaster. However, persons who have made a claim for crisis payment prior to the Minister making a declaration will have their claim determined.

Social Security (Administration) Act 1999

Item 19 replaces subsection 16(6) of the Social Security Administration Act with paragraphs 16(6)(a) and (b) and provides that the Secretary may approve a place outside of Australia for the purposes of a person lodging a claim for AGDRP in respect of a major disaster occurring outside Australia.

Item 20 inserts new Subdivision FA into Division 1 of Part 3 of the Social Security Administration Act. This adds new section 27A, which provides that a claim for AGDRP must be made within six months of the declaration of a major disaster. However, a claim will be accepted more than six months after the declaration where there are special circumstances that affected the person being able to lodge the claim within the prescribed time limit, and the claim is made within a reasonable period having regard to the circumstances affecting the person. Given the nature of the payment, being affected by the disaster that has been declared would be unlikely to be enough, by itself, to justify a late claim as these circumstances would, obviously, also apply to all other claimants.

Item 21 inserts new subsection 31(1) into the Social Security Administration Act, which provides that a person does not have to comply with the general rule that relates to social security payments, that a customer must be in Australia to make a claim, where the person’s claim relates to a disaster that occurred at a location outside of Australia.

Item 22 inserts new section 46A. Although AGDRP will generally be paid as a lump sum (see **item 23** below), this provision enables the Secretary to determine that, if it is appropriate to do so, the person’s payment can be paid in instalments.

Item 23 inserts new paragraph (aa) into the definition of ‘lump sum benefit’ in subsection 47(1) of the Social Security Administration Act, to include AGDRP. The effect is that an AGDRP is to be paid as a lump sum to the person, except when it is paid in instalments.

Item 24 repeals paragraph (c) of the definition of 'lump sum benefit' in subsection 47(1) of the Social Security Administration Act, removing the old disaster relief payment from the definition. This payment has now been replaced by AGDRP.

Item 25 replaces the reference to disaster relief payment in paragraph 13(a) of Schedule 2 to the Social Security Administration Act with a reference to AGDRP. This provision allows the limited backdating of an application for a social security payment, in certain circumstances, where the applicant has firstly applied for AGDRP.

Item 26 inserts new paragraph 13(ba) into Schedule 2 to the Social Security Administration Act. This new paragraph provides that for clause 13 of Schedule 2 to apply in relation to a customer, the customer must be in Australia when making his or her claim for a social security payment.

Item 27 substitutes a reference to disaster relief payment with a reference to the AGDRP. The effect of the provision remains otherwise unchanged; that is, if a person qualified for an AGDRP makes a claim for this payment and, within 14 days of making a claim for AGDRP, makes a claim for another social security payment, the person's start day in relation to the payment that is not AGDRP is the same day as when the person was qualified for AGDRP.

Schedule 5 – Maintenance income credit balances

Summary

A maintenance income credit (MIC) is introduced from 1 July 2006 to enable parents to access their unused maintenance income free area from previous years to offset late child support payments.

An individual who is entitled to maintenance income that is registered for collection by the Child Support Agency (CSA) and who does not receive the correct amount of maintenance when it is due, may be able to accrue a MIC balance. The individual must be eligible for FTB, or the partner of an individual who is eligible for FTB, for an accrual to occur. Accruals to a MIC balance represent the unused amount of the maintenance income free area (MIFA) under the maintenance income test for FTB Part A. When arrears of maintenance income are subsequently received, the MIC balance would be drawn upon to reduce the amount of arrears counted under the maintenance income test.

The measure commences on 1 July 2006. The MIC will first become available to FTB customers during the end of year reconciliation or lump sum payment of FTB for the 2006-07 income year, starting from July 2007. This would occur if the customer has a MIC balance at the end of 2005-06 and arrears are received during 2006-07.

The earliest date for accrual of a MIC balance is the later of 1 July 2000 or the day the individual or partner became eligible for FTB.

Background

Under the maintenance income test for FTB Part A, any child support received in the relevant income year above the MIFA reduces the customer's FTB Part A by 50 cents in the dollar until the 'base rate' for the individual is reached.

Under the current rules, any unused MIFA is not carried forward from one year to the next. This can disadvantage families who receive child support payments late (for example, as an arrears payment in the next income year) because these families cannot benefit from the MIFA that would have applied if they had received child support in the year when it was due. The introduction of a MIC addresses this issue.

Explanation of the changes

Part 1 – Amendments

Section 3 of the Family Assistance Act contains some general definitions for terms and concepts used in the family assistance law.

Item 1 introduces the concept of a 'maintenance income credit balance', which is defined in subsection 3(1) as having the meaning given by new clause 24A of Schedule 1 to the Family Assistance Act. This concept is relevant for the purposes of the new MIC provisions in Schedule 1.

Item 2 introduces the concept of a 'registered entitlement', which is defined in subsection 3(1) as an individual's entitlement to receive maintenance income from a particular payer, provided the payer's liability is an enforceable maintenance liability within the meaning of the *Child Support (Registration and Collection) Act 1988*, that is, a maintenance liability that is registered with the CSA and is enforceable.

While the maintenance income test applies to a maintenance liability that is privately collected, an individual who chooses private collection instead of CSA collection must privately collect 100 per cent of the liability to satisfy the reasonable maintenance action requirement. If the individual is unable to privately collect 100 per cent, the individual is required to swap to CSA collection. Therefore, the situation of underpayment should result in transferring to CSA collection, and the CSA is able to collect a period of unpaid private arrears. This would normally be limited to 3 months' arrears, but may be 9 months in special circumstances.

Item 3 inserts a new subdivision heading before clause 19A of Schedule 1. The effect is to divide Division 5 of Schedule 1 into two Subdivisions – one dealing with the maintenance income test and the other with maintenance income credit balances.

The maintenance income test is relevant in working out an individual's Part A rate of FTB in certain circumstances. The calculation process is set out in the method statement in clause 3 of Schedule 1 to the Family Assistance Act. The maintenance income test is the second means test that potentially applies to reduce an individual's maximum rate of FTB Part A.

The rules relating to the maintenance income test are detailed in Division 5 of Part 2 of Schedule 1 to the Family Assistance Act. An individual's reduction for maintenance income is worked out using the method statement in clause 20 of Schedule 1. The first step is to annualise the amount of maintenance income received by the individual in the relevant income year. The next step is to work out the individual's maintenance income free area (MIFA) using the table in clause 22 – the amount of the MIFA will depend on the individual's family situation and number of FTB children. The difference between the individual's annualised maintenance income and MIFA is the individual's maintenance income excess. The individual's income tested maximum rate is then reduced by half of the maintenance income excess (the 50% taper).

Item 6 amends step 1 of the method statement in clause 20 to ensure that, in working out an individual's annualised maintenance income, any arrears of maintenance income offset against an individual's MIC balance (and partner's balance if relevant) would be disregarded for the purposes of the maintenance income test.

Item 7 inserts a new subclause 20(2) into Schedule 1. This new provision ensures that arrears of maintenance payments can only be disregarded for the purposes of the maintenance income test under new paragraph (c) of step 1 when the individual satisfies the relevant FTB reconciliation conditions in section 32B of the Family Assistance Administration Act for each same-rate benefit period in the relevant income year. This means that any arrears of maintenance received during an income year would continue to be counted in determining the rate of FTB before the FTB reconciliation conditions are satisfied.

If the relevant reconciliation conditions are not satisfied in relation to a particular income year because, for example, tax returns are lodged more than 2 years after the end of the relevant income year, then an individual will not be able to access their MIC balance for that year. A similar condition must be satisfied before an amount can accrue to a MIC balance (under new subclause 24B(3) of Schedule 1).

Item 8 inserts a series of new provisions that set out the conditions for accrual to a MIC balance, the amount of the accrual and the circumstances in which a MIC balance is depleted. These new provisions are in new Subdivision B – Maintenance income credit balances.

New clause 24A – Maintenance income credit balances

New clause 24A defines the concept of a MIC balance and sets out some general rules relating to that concept.

As a general rule, a MIC balance may exist for each registered entitlement of an individual. It will therefore be possible for there to be more than one MIC balance in relation to an individual who is eligible for FTB. This may occur if the individual is partnered and both members of the couple are entitled to maintenance income. In that case, each member of the couple may have a MIC balance. It may also occur if an individual is entitled to maintenance income from more than one payer. In that case, the individual may have a MIC balance in relation to each payer.

A MIC balance, at any given time, would be the balance of accruals under clause 24B and depletions under clause 24E in relation to a particular registered entitlement (new subclause 24A(1) refers).

New subclause 24A(2) ensures that the MIC balance for a registered entitlement cannot exceed the total arrears owing from that registered entitlement for all income years during which the registered entitlement has existed. This is consistent with the rules for depleting a MIC balance under which the MIC balance would be depleted whenever arrears are received, even if the total maintenance income received is less than the MIFA. It will not be possible for a payee to have a MIC balance greater than the arrears owed (including where there are no longer any arrears owed).

Accrual to a MIC balance can only occur after the relevant FTB reconciliation conditions have been satisfied – the rules in new clause 24B make that clear. It is possible that an individual may satisfy the FTB reconciliation conditions for a particular income year at a time when they have not yet satisfied the FTB reconciliation conditions for an earlier year, and where the earlier year could result in an accrual for that year. This can occur where the tax returns are not lodged in sequence.

New subclause 24A(3) deals with this scenario and clarifies that the MIC balance can be recalculated taking into account any relevant accrual for the earlier income year before an accrual or depletion in respect of a later income year.

In this scenario, reconciliation for the particular year in relation to the MIC for 2006-07 or later would proceed on the following basis.

If arrears were received in the earlier income year, the arrears would deplete the MIC balance. If the amount of maintenance income received in the earlier income year is less than the ongoing amount that was due in that income year, and the amount received was less than the MIFA, there is a 'potential MIC accrual' that may arise if the reconciliation conditions are met.

If the earlier income year is 2005-06 or later, the time limit for the 'potential MIC accrual' to occur would be the normal two year limit in which to lodge tax returns (that is reflected in the FTB reconciliation conditions). For example, for 2005-06, the time limit to lodge a tax return is 30 June 2008. Therefore, reconciliation for 2006-07 may occur before the time limit expires for 2005-06. If so, the potential MIC accrual for the earlier year (2005-06) would not be taken into account at that stage.

For example, in October 2007, the reconciliation conditions for 2006-07 are satisfied, and 2004-05 is the last income year that has been reconciled. The MIC balance is \$2,000 at the end of 2004-05. It is known that there is a potential MIC accrual of \$1,500 for 2005-06. Also, arrears have been received in 2006-07. Therefore, reconciliation for 2006-07 would proceed on the basis that the MIC balance before depletion for 2006-07 is \$2,000 (not \$3,500). Subsequently, in December 2007, the reconciliation conditions for 2005-06 are satisfied. Therefore, an additional accrual of \$1,500 occurs for 2005-06, giving a MIC balance of \$3,500 instead of \$2,000 at the end of 2005-06.

Therefore, the reconciliation calculation for 2006-07 based on the original MIC balance of \$2,000 would be revisited, substituting a MIC balance before depletion for 2006-07 of \$3,500.

New subclause 24A(4) ensures the ongoing application of the rules relating to MIC balances, whether or not the individual or individual's partner continues to be eligible for FTB.

An individual who ceases to be eligible for FTB may have a MIC balance at that time. During the subsequent period of ineligibility for FTB, no MIC accrual can occur. However, MIC depletion can still occur due to receipt of maintenance arrears. If the individual later becomes eligible for FTB, the MIC balance at that time would take into account both the previous MIC balance, and any depletion that occurred while ineligible.

New clause 24B – Accruals to a maintenance income credit balance

New clause 24B sets out the conditions that need to be satisfied for there to be an accrual to a MIC balance for a registered entitlement of an individual for a day in an income year.

The relevant conditions are as follows.

First, the individual, the individual's partner or both must be eligible for FTB for the day. Members of a couple can both be eligible for FTB in a blended family situation or for a past period before a separation. Otherwise, only one member of a couple is generally eligible for FTB.

Second, the eligible person must have satisfied the relevant FTB reconciliation conditions in section 32B of the Family Assistance Administration Act for all the same-rate benefit periods that are included in the relevant income year.

Third, the eligible person's annualised amount of maintenance income for the day must be less than the person's MIFA for the day.

Finally, the maintenance income that the individual received in the relevant income year from the registered entitlement is less than the amount due in that year.

New clause 24C – Amount of accrual to a maintenance income credit balance

If all of the conditions above are met, then the individual can accrue an amount to their MIC balance in respect of the day for the registered entitlement. The amount of the accrual is worked out in accordance with the rules in new clause 24C.

In broad terms, the accrual amount will equal the amount of the MIFA that would have been used if the 'correct' amount of maintenance income had been received when it was due.

New clause 24C incorporates two method statements. The method statement at the end of subclause 24C(1) sets out the process for working out the amount of accrual for a day in an income year to a MIC balance for a registered entitlement of an individual who is an eligible person or the partner of an eligible person. This method statement applies in the more straightforward cases where the individual has the one registered entitlement (and therefore only one MIC balance) and the individual's partner, if any, does not have a registered entitlement.

The first step in the process of determining the accrual amount to the MIC balance for a registered entitlement of an individual is to work out the eligible person's global maintenance entitlement for the day.

The concept of 'global maintenance entitlement' is defined in new clause 24D. Under the new definition, an eligible person's global maintenance entitlement for a day is the sum of four specified components.

- The first component is the annualised amount of maintenance income due from each registered entitlement of the eligible person and each registered entitlement of their partner (if any) for the day. The formula in new subclause 24D(2) is used to arrive at an annualised amount of maintenance due from each registered entitlement.
- The second is any amount worked out under new subclause 24D(3), as described below.
- The third component is the annualised amount of any capitalised maintenance income of the eligible person and partner (if any) for the day. This amount is worked out using the existing rules in clause 24 of Schedule 1 to the Family Assistance Act.
- The fourth component is the annualised amount of maintenance income that is not maintenance income from a registered entitlement and is not capitalised maintenance income (that is, it is privately collected maintenance income).

New subclause 24D(3) is the annualised amount of arrears of maintenance income from a registered entitlement that is not disregarded under the maintenance income test due to a depletion from the MIC balance (that is, it is not disregarded under paragraph (c) of step 1 of the method statement in clause 20).

The second step in the process of determining the accrual amount is to identify the lower of the global maintenance entitlement and the MIFA that applied to the eligible person for the relevant day.

The annualised amount of maintenance income of the eligible person for the day is then subtracted from the lower amount identified in step 2 (step 3).

Step 4 requires the result to be divided by 365 (which effectively converts an annual amount into a daily one).

Where the second method statement does not apply, the amount worked out under step 4 will be the amount of accrual to the MIC balance of the individual for the day.

The following examples illustrate the accrual amount where the individual's MIFA was \$1,182.60 throughout the relevant income year (say, 2005-06) and the individual had one registered liability for the entire income year:

- if the individual was entitled to receive child support of \$3,000 in 2005-06 but received nil, the MIC accrual for 2005-06 would be \$1,182.60;
- if the individual was entitled to receive child support of \$3,000 in 2005-06 but received \$500, the MIC accrual for 2005-06 would be \$682.60;
- if the individual was entitled to receive child support of \$3,000 in 2005-06 but received \$2,000, the MIC accrual for 2005-06 would be nil;
- if the individual was entitled to receive child support of \$1,000 in 2005-06 but received nil, the MIC accrual for 2005-06 would be \$1,000;
- if the individual was entitled to receive child support of \$1,000 in 2005-06 but received \$500, the MIC accrual for 2005-06 would be \$500.

As an individual's circumstances can change throughout an income year, an individual's MIFA can vary throughout the year. Therefore, the accrual of a MIC amount would be on a daily basis. For example, if in 2005-06, an individual has one FTB child for the first 100 days and 2 FTB children for the remaining 265 days, the MIFA would initially be \$1,182.60, and then increase to \$1,576.80. If the individual was entitled to receive child support of \$3,000 in 2005-06 but received nil, the MIC daily accrual would be \$3.24 ($\$1,182.60/365$) for 100 days, and \$4.32 ($\$1,576.80/365$) for 265 days. This would be a total accrual of \$1,468.80 for 2005-06.

An individual may accrue to a MIC balance for only part of an income year. This would occur, for example, where the individual is only eligible for FTB, or entitled to receive child support, for part of the year. Another example is where the amount of maintenance income received is less than the MIFA for only part of the year.

In working out an accrual amount, any capitalised maintenance income would affect the size of the 'unused MIFA'. Capitalised maintenance income relates to non-periodic amounts or benefits that exceed \$1,500, such as a lump sum payment or a transfer of property. The capitalised maintenance income amount is apportioned and taken into account under the maintenance income test for the whole period in respect of which it is received. For example, a transfer of assets valued at \$20,000 and intended as maintenance for 5 years for one child would be apportioned as \$4,000 a year over that period. As this exceeds the MIFA for one child, there would be no accrual amount. The relevance of capitalised maintenance income is reflected in the concept of global maintenance entitlement (as defined in new clause 24D) and used in the method statement at the end of new subclause 24C(1).

In the more complex cases, where there are multiple registered entitlements that satisfy the requirement in new subclause 24B(5) (and therefore multiple MIC balances) for an individual and/or their partner, there are additional steps, set out in the second method statement at the end of new subclause 24C(2), that apply in working out the amount of an accrual to a relevant MIC balance. In these situations, the accrual amount worked out under the first method statement will be apportioned between the relevant balances on an equal basis. However, the apportioned amount for a particular maintenance liability cannot exceed the difference between the ongoing amount due and the amount received for the liability (the daily cap referred to in the second method statement). Any excess would be available for apportioning to the other relevant underpaid liabilities.

This apportionment regime is detailed in the second method statement.

The first step is to work out the daily cap for each relevant balance. The daily cap is the excess of the amount due in an income year for the registered entitlement over the amount received in the income year from the registered entitlement divided by 365 to get a daily amount.

The second step involves equally distributing the accrual amount in the first method statement (under step 4) between each relevant MIC balance, up to the daily cap. Any remaining amount is then distributed in a similar manner among the remaining MIC balances, again up to the daily cap for the relevant balance (in accordance with step 3). The process continues until either there is no remaining accrual amount or the daily cap for each balance is reached (step 4). The amount accrued to the relevant MIC balance then becomes the sum of the distributions made under the preceding steps of the second method statement.

New subclause 24C(3) clarifies that new clauses 24B and 24C only apply once for a day in relation to a relevant MIC balance.

New clause 24D – Global maintenance entitlement of an eligible person

This new clause is discussed in the context of new clause 24C where it is used.

New clause 24E – Depletions from a maintenance income credit balance

New subclause 24E(1) sets out when a depletion from a MIC balance for a registered entitlement occurs. This happens after the relevant income year has ended and provided the individual has received arrears of maintenance income in that year. An individual has received arrears of maintenance income in an income year for a particular registered entitlement if the amount received in the income year from the entitlement exceeds the ongoing amount that is due in that income year from that entitlement.

For example, the amount due from a registered entitlement in 2006-07 is \$4,000, and there is an unpaid liability for amounts due in a previous income year(s) of \$2,000. If the payee receives \$5,000 in 2006-07, the individual has received arrears, and the arrears amount for MIC purposes in 2006-07 is \$1,000.

The MIC balance for a liability would be depleted when arrears are received. This is reflected in new subclause 24E(2), which states that the amount of the depletion from the MIC balance for a particular registered entitlement is the lower of:

- the excess of the maintenance income that the individual received in the income year from the registered entitlement over the amount due in that year from the entitlement (that is, the arrears amount); and
- the amount of the MIC balance.

For example, if the MIC balance at the end of 2005-06 is \$2,500, and arrears of \$1,500 are received in 2006-07, the MIC balance at the end of 2006-07 would be \$1,000, and nil arrears would be counted in working out an individual's annualised maintenance income under the maintenance income test when payment of FTB is reconciled for the 2006-07 income year. If arrears of \$1,500 are received in 2007-08, the MIC balance at the end of 2007-08 would be nil, and only \$500 arrears would be counted under the maintenance income test when payment of FTB is reconciled for 2007-08.

In working out the maintenance income received or due in an income year for the purposes of determining whether there is to be a depletion from a MIC balance and the amount of the depletion, new subclause 24E(3) ensures that any maintenance income for a child whose FTB child rate (before any sharing of FTB) does not exceed the base FTB child rate is disregarded. For example, the FTB child rate for an FTB child aged 16 to 24 does not exceed the base FTB child rate.

This is consistent with the calculation of annualised maintenance income for FTB purposes more generally.

Therefore, if an individual has two children aged 12 and 16, and receives maintenance for both children, only the amount for the child aged 12 will be counted in calculating maintenance income for FTB purposes. For example, if the individual receives \$3,000 for the two children, only \$1,500 would be counted.

In relation to depletion from a MIC balance due to receiving arrears in an income year, the amount of the depletion will also exclude any arrears that are not counted in calculating maintenance income for FTB purposes.

For example, a total of \$5,000, including arrears of \$2,000, for two children aged 12 and 16 is received in 2006-07. As the amount for the child aged 16 is disregarded, the amount for the child aged 12 would be \$2,500, including arrears of \$1,000. Therefore, if the MIC balance at the end of 2005-06 is \$1,800, the MIC balance at the end of 2006-07 would be \$800 (\$1,800 – \$1,000), and nil arrears would be counted under the maintenance income test during the reconciled determination of FTB for 2006-07.

Example of the application of the MIC rules to a sole parent receiving child support from one payer for children aged under 16

At 1 July 2006, Sally is a sole parent FTB instalment customer on income support with two children aged 10 and 13 years, and she is eligible for maximum rent assistance. Her FTB commenced on 1 July 2000 for the two children, and she separated during 2001-02. At 1 July 2006, Sally's FTB has been reconciled for each year up to and including 2004-05. Her child support assessment commenced in 2001-02 at \$3,000 per annum, and has continued at that amount throughout. Sally has been on CSA collection the whole time. Her former partner, Peter, was initially making payments on time, but stopped making any payment from March 2003.

For Sally, 2002-03 is the first year that might involve a MIC accrual, as this was the first year that she did not receive the correct amount. She was due \$3,000 in 2002-03, but received \$2,000. Her MIFA was \$1,460 throughout 2002-03. The MIC daily accrual for all of 2002-03 is nil, as the maintenance income she received was not less than her MIFA for any day in 2002-03.

In 2003-04, Sally was due \$3,000, but received nil. Her MIFA was \$1,503.80 throughout 2003-04. The MIC daily accrual would be \$4.12 (\$1,503.80/365) for 366 days. This would be a total accrual of \$1,507.92 for 2003-04.

In 2004-05, Sally was due \$3,000, but received nil. Her MIFA was \$1,533 throughout 2004-05. The MIC daily accrual would be \$4.20 (\$1,533/365) for 365 days. This would be a total accrual of \$1,533 for 2004-05. Therefore, at 1 July 2006, Sally's MIC balance is \$3,040.92, based on accrual to the end of 2004-05.

In October 2006, Sally's FTB for 2005-06 is reconciled. In 2005-06, Sally was due \$3,000, but received nil. Her MIFA was \$1,576.80 throughout 2005-06. The MIC daily accrual would be \$4.32 ($\$1,576.80/365$) for 365 days. This would be a total accrual of \$1,576.80 for 2005-06. Therefore, after the reconciliation in October 2006, Sally's MIC balance is \$4,617.72, based on accrual to the end of 2005-06.

In 2006-07, Sally receives a total of \$6,000 child support, including \$3,000 arrears from previous financial years paid in December 2006. The arrears received during the year are counted in determining her rate of FTB for the remainder of the year, before reconciliation.

In November 2007, Sally's FTB for 2006-07 is reconciled. As the MIC balance at the end of 2005-06 was \$4,617.72, and arrears of \$3,000 was received in 2006-07, the MIC balance at the end of 2006-07 becomes \$1,617.72 due to depletion for 2006-07 of \$3,000. Also, nil arrears would be counted under the MIT during the reconciled determination of FTB for 2006-07.

In 2007-08, Sally again receives a total of \$6,000 child support, including \$3,000 arrears from previous financial years paid in December 2007. The arrears received during the year are counted in determining her rate of FTB for the remainder of the year, before reconciliation.

In November 2008, Sally's FTB for 2007-08 is reconciled. As the MIC balance at the end of 2006-07 was \$1,617.72, and arrears of \$3,000 was received in 2007-08, the MIC balance at the end of 2007-08 becomes nil due to depletion for 2007-08 of \$3,000. Also, only \$1,382.28 arrears (not \$3,000 arrears) would be counted under the MIT during the reconciled determination of FTB for 2007-08.

Part 2 – Application and transitional provisions

The amendments commence on 1 July 2006 in accordance with the table in clause 2 of this Bill.

Item 9 sets out the application rules for the MIC amendments.

Paragraph (c) of step 1 of the method statement in subclause 20(1) of Schedule 1 to the Family Assistance Act applies to FTB for the 2006-07 income year and later income years (**subitem 9(1)** refers). This application rule, combined with new subclause 20(2) of Schedule 1 (as inserted by **item 7**), ensures that arrears of maintenance income are disregarded under the maintenance income test for FTB Part A in relation to the 2006-2007 income year and later income years after reconciliation for the relevant year occurs. This means that families will first benefit from the MIC from July 2007 for the 2006-07 income year.

The rules relating to accruals to, and depletions from, a MIC balance (which are set out in Subdivision B of Division 5 of Part 2 of Schedule 1 to the Family Assistance Act) apply to the 2000-01 income year and later income years. This backdating has a beneficial effect. It will enable an individual to have a MIC balance greater than zero at the end of 2005-06, rather than having a nil MIC balance at the start of 2006-07.

Item 10 sets out some relevant transitional rules.

One of the conditions for accruing to a MIC balance is that an eligible person satisfies the FTB reconciliation conditions in relation to the relevant income year (new subclause 24B(3) as inserted by **item 8** refers). The FTB reconciliation conditions were first made explicit in the family assistance law for the 2003-04 income year, with the start of the FTB Part A supplement. **Subitem 10(1)** ensures that, for the earlier income years 2000-01, 2001-02 or 2002-03, a similar result is achieved by providing that accrual of an amount to a MIC balance would be subject to the person not having a 'non-lodger debt' for the particular year as at 1 July 2006. The concept of a non-lodger debt is then defined in **subitem 10(2)** by reference to relevant provisions in sections 28 and 71 of the Family Assistance Administration Act. A 'non-lodger debt' arises where the customer or the customer's partner is required to lodge a tax return for the particular year but has not done so by the end of the next income year.

Schedule 6 – Extension of carer payment for carers of severely disabled children

Summary

From 1 July 2006, the qualification rules for carer payment (CP) will be extended to cover carers of children who are under 16 years of age with severe intellectual, psychiatric or behavioural disability and who require constant care or supervision.

Background

CP provides income support to people who, because of the demands of their caring role, are unable to support themselves through substantial workforce participation. CP is subject to income and assets tests and is paid at the same rate as other social security pensions.

On 1 July 1998, CP was introduced for carers of children under 16 years of age with a profound disability and for carers of two or more disabled children who together require a level of care that is at least equivalent to the level of care required by a profoundly disabled child. The relevant qualification rules are in paragraphs 198(2)(b) and (c) and subsection 198(8) of the Social Security Act. Subsections 197(2) and (2A) then define when a child is a 'profoundly disabled child'. Under this definition, a child must have a severe disability or medical condition and, as a consequence, require continuous personal care for a minimum of 6 months (unless the child's condition is terminal). In addition, the child's disability or condition must meet at least 3 of 7 specified criteria. There are separate conditions that are relevant for children with a terminal illness who receive active treatment.

The definition of profoundly disabled child is stringent and focuses on the high level of care required to maintain comfort, sustain life or attend to a bodily function that the child cannot manage. The criteria are not targeted at particular medical conditions and it is recognised that, under the current rules, CP is generally not available to carers of children with psychiatric conditions or to those with moderate to severe physical or intellectual disability.

This measure expands the definition of profoundly disabled child in section 197 of the Social Security Act so that it includes behavioural characteristics of a child who requires constant care or supervision because of unsafe behaviour due to severe intellectual, psychiatric or behavioural disability (rather than focusing on specific disability types).

A Reference Group comprising representatives from peak bodies, professional associations and educational institutions met in November 2005 to assist in the process of formulating appropriate criteria for this new group of children. The criteria set out in the new expanded definition of profoundly disabled child draw heavily on criteria developed by the Reference Group.

Explanation of the changes

Under the qualification rules for CP in section 198 of the Social Security Act, CP is available to a person who is personally providing constant care for a profoundly disabled child under 16 years of age. Section 197 then defines the meaning of profoundly disabled child.

Item 2 inserts a new subsection 197(2AA) into the Social Security Act, which specifies an additional set of circumstances in which a child would be considered a profoundly disabled child for the purposes of qualification for CP. The existing definition of profoundly disabled child in subsection 197(2) remains unchanged.

A child is a profoundly disabled child under the new definition in subsection 197(2AA) if **all** of the specified requirements set out below are satisfied.

The **first requirement** is that the child must have a severe intellectual, psychiatric or behavioural disability or a severe intellectual, psychiatric or behavioural medical condition.

The **second requirement** is that, because of that disability or condition, the child needs continuous personal care (which can include supervision) for:

- 6 months or more; or
- if the child's condition is terminal and the child's life expectancy is less than 6 months - the remainder of the child's life.

A similar requirement applies under the existing definition of profoundly disabled child – see paragraph 197(2)(b) of the Social Security Act.

The **third requirement** is that the child must be aged 6 or more and under 16 years of age.

The **fourth requirement** sets out the relevant behavioural characteristics that the child must display in order to come within the new definition of profoundly disabled child. The child, because of the disability or medical condition, must have behaviours that meet one or more of the following descriptions:

- The child repeatedly engages in dangerous behaviour that poses a significant immediate or long term risk to the child's own health or safety (including self-harming behaviours or absconding or behaviours of a similar extreme nature) that, without carer intervention, would result in the child suffering injury that is maintained or lasting or death.

- The child repeatedly engages in aggressive or violent behaviour that poses a significant risk to the health or safety of others or that results in significant property damage (including arson or repeated destruction of multiple household items or behaviours of a similar extreme nature) and, due to these behaviours, the child is regularly or permanently excluded from community programs, activities, services or facilities (such as a special education school or class or mainstream class, play group, pre-school, a local swimming pool or shopping center.)
- The child repeatedly engages in severe sexually deviant or sexually inappropriate behaviour and, due to this behaviour, the child is regularly or permanently excluded from community programs, activities, services or facilities.

A **further requirement** that relates to the carer rather than the child is inserted into section 198 as new subsection 198(10). **Item 4** makes the relevant amendment. This requirement is that the provision of continuous personal care by the carer (which is a new requirement under paragraph 197(2AA)(b)) severely restricts the carer's capacity to undertake paid employment.

Item 1 makes a consequential amendment to the existing definition of profoundly disabled child in subsection 197(1) so that that definition also refers to the new criteria.

A profoundly disabled child is also a 'care receiver' as defined in subsection 197(1) by reference to subsection 198(2). This definition will flow through to the new category without the need for amendment.

There are numerous references to a care receiver, a profoundly disabled child and combinations of both in Part 2.5 of the Social Security Act. With the exception of the rule in subsection 198(8), all of the rules that currently apply in relation to a profoundly disabled child (care receiver), would also apply in relation to the new category of child with a severe intellectual, psychiatric or behavioural disability. Amendments are not required to achieve this outcome.

The exception is subsection 198(8) of the Social Security Act, which enables a person to qualify for CP in respect of 2 or more disabled children, provided the children require a level of care that is at least equivalent to the level of care required by a profoundly disabled child. The scope of this provision will not change with the introduction of a new category of profoundly disabled child. **Item 3** makes an amendment to this effect by ensuring that the reference in subsection 198(8) to the level of care required by a profoundly disabled child remains a reference to the concept of profoundly disabled child as defined in subsection 197(2) or (2A).

Schedule 7 – Special disability trusts

Part 1 – Social Security Act 1991

Summary

This measure assists families to make private financial provision, through a special disability trust, for the future care and accommodation needs of their children and certain close relatives with severe disabilities. This measure provides certainty for families who are concerned that their disabled family member may not have the financial support to take care of their accommodation or care needs when the family is no longer able to care for them.

The special disability trust must be established solely in order to provide for the current and future care and accommodation needs of the beneficiary. The assessable assets of the trust are to be exempt from the means test up to the specified limit, which will be initially set at \$500,000 and increased annually on 1 July in line with the ABS Consumer Price Index (CPI). The current private trusts and companies rules do not apply in relation to those exempt assets. Under the assets test, where the assessable assets of the trust are in excess of the limit, the balance is to be assessed as the beneficiary's assets. Under the income test, the income derived by the trust and income received from that trust by the beneficiary are exempt from the income test.

In addition, the measure enables contributions of up to \$500,000 to be made to the special disability trust in certain circumstances without the normal social security asset disposal rules applying.

Background

Under the Social Security Act, there are limits to the assets a person can hold without those assets affecting their entitlement to social security payments. Further, a person who gives away an asset is treated, for a 5-year period, as if the person still owned the asset when assessing entitlement to social security payments. The operation of these rules has made it difficult for immediate family members of a severely disabled person to set up a trust to ensure the disabled family member's continued care without their social security payments being affected.

This measure is part of a package by the Government aimed at assisting families with a severely disabled family member.

Explanation of the changes

Social Security Act 1991

Item 1 inserts into subsection 23(1) a definition of 'immediate family member'. This definition covers natural parents, adoptive or step-parents, persons who are legal guardians of the person, or were when he or she was under 18 years of age, grandparents and siblings.

Item 2 inserts into subsection 23(1) a definition of 'principal beneficiary'. The term 'principal beneficiary' has the meaning given by subsection 1209M(1).

Item 3 inserts into subsection 23(1) a definition of 'sibling'. This term is defined to include half-, adoptive and step-brothers and sisters of a person.

Item 4 inserts into subsection 23(1) a definition of 'special disability trust'. The term 'special disability trust' has the meaning given by new section 1209L.

Item 5 repeals the note following subsection 1123(1) and substitutes two new notes. The first note is identical to the repealed note, apart from being now called 'Note 1'. The second note states that under Division 4, Part 2.24 certain transfers of assets to special disability trusts are not taken to be a disposal of an asset (subject to a limit on the aggregate value of the transfers).

Item 6 inserts after section 1124 a note which states that if subsection 1209ZA(2) applies in relation to the transfer of an asset to a special disability trust, that subsection has the effect of reducing the amount of the disposal.

Item 7 inserts into section 1190 a new item 35 into the table after item 34 and **item 8** inserts into section 1191 a new item 25 into the table after item 24. The inclusion of these items ensures that the value of the assets test exemption limit of the special disability trust will be indexed in accordance with the CPI.

The following example shows how indexation of the assets test exemption limit might affect a special disability trust. (Note: the CPI figure used is a sample only, and is not the actual CPI for 1 July 2007.)

20 September 2006

Assets test exemption limit is
\$500,000

1 January 2007

Parents gift \$500,000 to the special
disability trust, and this money is
invested. No assets are assessable.

1 July 2007	CPI is 2%, meaning that assets test exemption limit is raised to \$510,000.
1 Jan 2008	Return on investments in the special disability trust for the 2007 calendar year is \$8,000 and the total assets are \$508,000. As this amount is less than the assets test exemption limit, no assets are assessed.

Item 9 inserts after subsection 1192(5) a new subsection 1192(5A), which specifies that the first indexation of item 25 (inserted by **item 8** above) will take place on 1 July 2007.

Item 10 inserts after subsection 1207X(2) a new subsection 1207X(2A), which provides that the only attributable stakeholder of a special disability trust is the principal beneficiary of the trust.

Item 11 inserts after subsection 1207Y(1) a note that provides that attribution of the income of a special disability trust is dealt with in accordance with section 1209V.

Item 12 inserts after subsection 1208E(1) a note that provides that attribution of the assets of a special disability trust is dealt with in accordance with section 1209Y.

Item 13 inserts after Part 3.18 a new Part 3.18A, titled 'Private financial provision for certain people with disabilities'.

Division 1 – Special disability trust

Section 1209L sets out what is a special disability trust. Provided that a trust complies with the various requirements set out in Division 1 of Part 3.18, then it is a special disability trust.

Section 1209M sets out the requirements for who can be the sole beneficiary of a special disability trust. Subsection 1209M(1) provides that the trust must have only one beneficiary, referred to as the principal beneficiary, apart from any residuary beneficiary. If a family has more than one severely disabled family member, separate complying special disability trusts may be set up for each severely disabled person to enable the family members who transfer assets to the trust to obtain the beneficial means test concession treatment for each family member.

Subsection 1209M(2) provides the impairment or disability conditions that the principal beneficiary, who has reached 16 years of age, must have in order to be the principal beneficiary for the purposes of this Part. The purpose of subsection 1209M(2) is to ensure that this Part only applies in relation to people who have severe disabilities and who are not able to work in an open, competitive workplace because of their disability. For example, a blind person, who may qualify for disability support pension, or have a carer, would not meet subsection 1209M(2) if he or she were able to work at or above the minimum wage.

Paragraph 1209M(2)(a) provides that the principal beneficiary must either have an impairment, including permanent blindness, that would qualify the person for disability support pension under Part 2.3 of the Social Security Act, or be receiving the invalidity service pension or income support supplement, given on the basis of invalidity, under the Veterans' Entitlement Act.

Paragraph 1209M(2)(b) provides that a person must meet the requirements set out in either subparagraph 1209M(2)(b)(i) or subparagraph 1209M(2)(b)(ii) in order to be the principal beneficiary. Subparagraph 1209M(2)(b)(i) provides that the principal beneficiary must have a disability that would qualify a sole carer, if the beneficiary had one, to carer payment or carer allowance. Alternatively, subparagraph 1209M(2)(b)(ii) sets out the sort of supported care accommodation in which the person must live in order to be considered the principal beneficiary.

Paragraph 1209M(2)(c) provides that, in order to be considered the principal beneficiary, the person must have a disability as a result of which he or she is not working and must have no likelihood of working at or above the relevant minimum wage.

Subsection 1209M(3) provides that the Secretary may, by legislative instrument, nominate a particular agreement made between the Commonwealth, States and Territories in relation to supported care accommodation, for the purposes of subparagraph 1209M(2)(b)(ii).

Subsection 1209M(4) provides that a person under 16 years of age, who is a profoundly disabled child within the meaning of section 197 of the Social Security Act, can be the principal beneficiary of a special disability trust.

Subsection 1209M(5) provides that a trust stops being a special disability trust when the principal beneficiary dies.

Subsection 1209M(6) provides that a trust is not a special disability trust for a particular principal beneficiary if, at the time of its creation, there is already another special disability trust, under the Social Security Act or the Veterans' Entitlement Act, in existence for that principal beneficiary.

Section 1209N sets out the purpose requirements of a special disability trust. Subsection 1209N(1) provides that the sole purpose, during the beneficiary's lifetime, must be to meet the beneficiary's reasonable care and accommodation needs. This might include such things as purchasing a property, or a right or interest in a property, for the person.

Subsection 1209N(2) provides that the trust may have purposes, ancillary to meeting the beneficiary's reasonable care and accommodation needs, that are necessary or desirable to facilitate that purpose. This might, for example, allow money to be spent on such things as investing money gifted to the trust, or paying for a professional trustee to administer the trust.

Subsection 1209N(3) provides that the reasonable care and accommodation needs of a beneficiary of a special disability trust must be decided in accordance with any guidelines under subsection 1209N(4). Subsection 1209N(4) gives the Secretary a discretionary power to make guidelines for deciding what are, and what are not, reasonable care and accommodation needs. If no guidelines exist under subsection 1209N(4), then the principal beneficiary's 'reasonable care and accommodation needs' will be determined in accordance with the policy of the relevant department.

Section 1209P sets out the requirements of the trust deed. Subsection 1209P(1) provides that, if there is a determination under subsection 1209P(2), then subject to subsection 1209P(3), a trust deed must comply with a determination under subsection 1209P(2).

Subsection 1209P(2) provides that the Secretary may determine one or more of the following:

- the form of the trust deed required for a special disability trust;
- the provisions which must be included in the trust deed; and
- the form of those provisions, or provisions which cannot be included in the trust deed.

It is anticipated that a determination made by the Secretary will require the trust deed to contain provisions in relation to matters such as financial management and administration. If the Secretary does not make a legislative instrument under subsection 1209P(2), then the requirements of the trust deed will be interpreted in accordance with the policy of the relevant department.

Subsection 1209P(3) provides that a person must not contravene a provision of the trust deed that is required by this section 1209P to be included in the deed.

Section 1209Q sets out the requirements for trustees. The aim of this section is to protect the interests of the principal beneficiary, who may be a vulnerable person by reason of their disability.

Subsection 1209Q(1) sets out various requirements, namely that a trustee is an Australian resident, has not been convicted of any of the offences specified in this subsection, and has not been disqualified from managing corporations under the *Corporations Act 2001*.

Subsection 1209Q(2) provides that, if the trustee is a corporation, then the requirements in subsection 1209Q(1) apply in relation to each of the directors.

Section 1209R sets out the requirements for trust property of a special disability trust. Subsection 1209R(1) provides that the trust's assets must not, apart from one exception, include any assets transferred by the beneficiary or the beneficiary's partner. The only exception is if the transferred asset is all or part of a bequest, or a superannuation death benefit, and the transferor received the bequest less than three years before transferring the asset to the trust. This is consistent with the intent of the measure, which is to allow parents and immediate family members to make private financial provision for their severely disabled family member.

Subsection 1209R(2) provides that the trust's assets must not include any compensation received by or on behalf of the beneficiary. The term 'compensation' is defined in section 17 of the Social Security Act. If compensation money is put in a special disability trust, it will not be able to receive the beneficial treatment set out in this Part. Other monies held by the beneficiary, such as compensation, will continue to be treated in accordance with the rules set out in the social security law, including the rules in Part 3.14, which deal with the treatment of compensation payments.

Subsection 1209R(3) provides that the trust must not be used to pay an immediate family member or child of the beneficiary for the provision of care services to the beneficiary or for the repair or maintenance of the principal beneficiary's accommodation.

Subsection 1209R(4) provides that the trustees must not use the trust to purchase or lease property from an immediate family member or child of the beneficiary, even if the property is to be used for the accommodation of the beneficiary. The terms 'child' and 'property' are defined by subsection 1209R(5). 'Property' includes the right to accommodation for life in a residence and a life interest in a residence. This definition is intended to cover property such as granny flats or other accommodation that is part of another home.

Section 1209S sets out the reporting requirements imposed on the trustees of a special disability trust. Subsection 1209S(1) provides that the trustees of the trust must, on or before 31 March each year, give the Secretary written financial statements about the trust in relation to the financial year ending on 30 June of the previous year.

Subsection 1209S(2) sets out that these financial statements must be prepared by a person qualified as provided by a determination under subsection 1209S(4) or, if a determination has not been made, a person approved by the Secretary.

Subsection 1209S(3) provides that, if a determination is made under subsection 1209S(4) that requires financial statements to include information of a stated kind, the financial statements must include that information.

Subsection 1209S(4) gives to the Secretary the power to make a determination for the purposes of subsection 1209S(2).

Section 1209T sets out the audit requirements for a special disability trust. Subsection 1209T(1) provides that, if the trustees receive a request for an audit from a person specified in subsection 1209T(3), the trustees must, within a reasonable time, cause an independent audit to be carried out, or, if an audit had already been carried out, give a copy of that audit to the person making the request. The purpose of paragraph 1209T(1)(b) is to reduce the burden on trustees if there are frequent requests for audits, while maintaining adequate accountability.

Subsection 1209T(2) sets out the audit period. The audit must be in relation to the financial year ending on the previous 30 June, or, if a determination made under subsection 1209T(7) provides for a different period, that period.

Subsection 1209T(3) sets out the people who may request, in writing, that the trustees of the trust provide them with an audit. It provides that a request may be made by the beneficiary, the beneficiary's immediate family members, the beneficiary's legally appointed guardian or financial administrator, someone who has been acting as the beneficiary's guardian on a long-term basis, or the Secretary.

Subsection 1209T(4) provides that, if an audit report is given to the trustees for the purpose of subsection 1209T(1), then the trustees must, within a reasonable time, give a copy to the person requesting the audit, the legally-appointed guardian or financial administrator (unless they requested the audit) and the Secretary (unless he or she requested the audit).

Subsection 1209T(5) sets out who is qualified to prepare an audit. The people who are qualified are those who are set out in a determination made under subsection 1209T(7) (if such a determination has been made), or people approved by the Secretary for this purpose.

Subsection 1209T(6) provides that, if a determination is made under subsection 1209T(7) requiring audits to include certain information, then the audit must include that information.

Subsection 1209T(7) provides that the Secretary may make a determination for the purposes of section 1209T.

Section 1209U deals with a waiver of contravention of this Division. Under the *Acts Interpretation Act 1901*, a contravention includes a failure to comply.

Subsection 1209U(1) provides, in relation to a trust that would be a special disability trust apart from a failure to comply with a requirement of this Division, that the trust is not prevented from being a special disability trust if the Secretary gives the trustees a written waiver notice, which may require them to comply with certain conditions.

Subsection 1209U(2) provides the period during which a waiver notice has effect.

Subsection 1209U(3) provides that, if guidelines are made under subsection 1209ZB(4), then a decision to give a waiver notice must be in accordance with the guidelines.

Subsection 1209U(4) gives the Secretary the power to make, by legislative instrument, guidelines in relation to waiver notices. It is proposed that the guidelines will deal comprehensively with all factors required to be taken into account in making a waiver decision. However, in the absence of an enforceable legislative instrument made under subsection 1209U(4), waiver decisions will be made in accordance with the policy of the relevant department.

Division 2 - Attribution of income of special disability trusts

Section 1209V deals with the attribution of income of special disability trusts. Subsection 1209V(1) provides that, for the purposes of the Social Security Act, an amount of income derived by a special disability trust, such as from interest accrued on the investment of trust property, is not taken to be income received by any individual. In particular, it is not taken to be the income of the beneficiary, nor any immediate family member who has made a gift to the trust, and will not affect assessment of their income for social security purposes. This treatment is different from the normal social security rules in relation to income of a trust, which enable income derived from a trust to be attributed to the person in control of the trust or the beneficiary.

Subsection 1209V(2) provides that section 1209V has effect despite Division 7 of Part 3.18, which deal with attribution of income of controlled private companies and controlled private trusts, and any other provisions of the Social Security Act.

Section 1209X deals with income amounts received by the principal beneficiary of a special disability trust. It provides that any such income amount is not income of the principal beneficiary for the purposes of the Social Security Act, provided that consideration for the income amount was provided by a distribution from the trust. For example, if a distribution from the trust was used to pay for rental accommodation for the principal beneficiary, then, even though the beneficiary receives an amount that would ordinarily be treated as income (as he or she has received valuable consideration through the provision of the accommodation), this trust distribution is not considered to be income of the principal beneficiary for social security purposes.

Division 3 – Attribution of assets of special disability trusts

Section 1209Y deals with the attribution of assets of special disability trusts. Subsection 1209Y(1) provides that, for the purposes of the Social Security Act, the assets of a special disability trust are not to be included in the assets of the principal beneficiary of the trust.

However, subsection 1209Y(2) provides that section 1209Y does not apply to the value of assets that exceed the trust's asset value limit.

Subsection 1209Y(3) provides that the asset value limit of a special disability trust is \$500,000. Under **items 8 and 9** above, this amount will be indexed in accordance with the CPI.

Subsection 1209Y(4) provides that the value of any right or interest of the trust in the beneficiary's principal home is disregarded for the purposes of working out the value of assets owned by the trust. This is consistent with normal social security rules, under which a person's principal home is exempt from the assets test.

Subsection 1209Y(5) provides that section 1209Y has effect despite Division 8 of Part 3.18, which deals with attribution of assets of controlled private companies and controlled private trusts, and any other provisions of the Social Security Act.

Division 4 – Transfer to special disability trust

Section 1209Z deals with the effect of transfers made to special disability trusts. Subsection 1209Z(1) provides that, if certain conditions are met, a transfer of assets to a special disability trust is not taken to be a disposal of an asset. These conditions are:

- paragraph 1209Z(1)(a): the asset is transferred by an immediate family member of the beneficiary;

- paragraph 1209Z(1)(b): the person who transferred the asset, or his or her partner, is of age pension age and receiving a social security pension; or is receiving a service pension and has reached pension age within the meaning of the Veterans' Entitlement Act; or is receiving income support supplement and has reached qualifying age within the meaning of subsection 45A(2) of the Veterans' Entitlement Act;
- paragraphs 1209Z(1)(c) and (d): the transfer is without consideration and unconditional;
- paragraph 1209Z(1)(e): the value of the transferred asset is less than \$500,000; and
- paragraph 1209Z(1)(f): adding the value of that transferred asset to the value of the transferred assets that have received the concession treatment dealt with by this Part, in regard to the same principal beneficiary does not exceed \$500,000.

Subsection 1209Z(2) provides that section 1209Z has effect subject to sections 1209ZA and 1209ZD.

Subsection 1209Z(3) defines the term 'other special disability trust'. It also defines the term 'value' and provides that the value of an asset transferred to a special disability trust means the market value of the asset at the time of the transfer. This definition is the same as the definition of 'value' set out in subsection 1209ZA(4).

Section 1209ZA deals with how a transfer is treated when more than \$500,000 worth of assets has been transferred to a special disability trust.

Subsection 1209ZA(1) provides that, even if a transfer to a special disability trust would receive the concessions set out in this Part, but for the fact that the transfer exceeds \$500,000, that transfer is still considered to be a disposal of an asset, but only to the extent of the excess.

For example, a father who is eligible for the concession under this Part transfers \$600,000 to his son's special disability trust and there have been no other transfers. He would be held to have disposed of an asset valued at \$100,000.

Subsection 1209ZA(2) applies to the situation where section 1209Z would apply to the transfer of an asset, but for the fact that the sum of the value of all exempt transfers exceeds \$500,000. In that case, the amount of the gift that brings the total amount of transfers to the special disability trust up to \$500,000 receives, for social security purposes, the concessional treatment set out in this Part. For example, a father, who is eligible for the concessions under this Part, transferred \$300,000 to his son's special disability trust. Later, the son's grandfather, who is also eligible for concessions under this Part, transferred \$300,000 to the special disability trust. The grandfather receives the concessional treatment in relation to \$200,000 of the \$300,000 he transferred to his grandson's special disability trust. Additionally he would be held to have disposed of an asset valued at \$100,000.

Subsection 1209ZA(3) provides that section 1209ZA has effect subject to section 1209ZD.

Subsection 1209ZA(4) defines the term 'other special disability trust'. It also defines the term 'value'. This definition is the same as the definition of 'value' set out in subsection 1209Z(3).

Section 1209ZB deals with when transfers are made to the special disability trust by the principal beneficiary's immediate family members who have not reached pension age.

Subsection 1209ZB(1) provides that, if an immediate family member transfers assets to the special disability trust and, at the time of the transfer, neither that person, nor his or her partner:

- had reached age pension age and was receiving a social security pension; or
- was receiving a service pension and had reached pension age within the meaning of the Veterans' Entitlement Act; or
- was receiving income support supplement and had reached qualifying age within the meaning of subsection 45A(2) of the Veterans' Entitlement Act;

then he or she is taken to transfer to the trust at the time when he or she, or his or her partner, reaches age pension age. In accordance with the intention of this measure, this enables immediate family members to transfer assets to the special disability trust, in order to plan for the principal beneficiary's welfare, and take advantage of the beneficial treatment under this Part at some later date. This includes situations, for example, where, at the time of transfer, a person was of age pension age but was not then receiving a social security pension (for example, the person is participating in the pension bonus scheme).

Subsection 1209ZB(2) provides a special rule for the order in which transfers to a special disability trust will be taken to have been made. If the result of subsection 1209ZB(1) is that transfers are taken to have been made on the same day, the transfers are taken to have been made in the order in which they would have been taken to have been made but for this Division.

In general, the effect of the gifting rules in Division 4 of this Part is that the first \$500,000 of gifts, made by immediate family members who are eligible for the concession to the special disability trust, receives the concessional treatment. This allows the special disability trust to hold assets in excess of the \$500,000 and allows immediate family members to have access to the full \$500,000 concession amount, but only on a 'first come, first served' basis. For example:

- If an immediate family member who is over age pension age and is receiving a social security pension, gifts \$200,000 to the special disability trust, then someone else (a person who is not receiving a social security pension) gifts \$300,000 to the trust, an immediate family member (including the person making the first gift) can make further gifts of up to \$300,000 and still receive the beneficial treatment under this Part.
- A parent aged 62 gifts \$500,000 to a special disability trust. This parent is receiving a social security pension, for example, carer payment, but is not able to receive beneficial treatment under this Part at that time, as he or she is not currently of age pension age. Another parent already in receipt of age pension gifts \$500,000. The beneficial treatment under this Part would apply to the second gift of \$500,000 from the parent in receipt of age pension. The parent aged 62 would not receive any concession for their gift if they claim payment at age pension age.

Section 1209ZC provides that, where the principal beneficiary of the trust, or his or her partner, unconditionally transfers an asset to their special disability trust and receives, or is entitled to, no consideration for the transfer then this transfer will not be taken to be a disposal of an asset for the purposes of section 1123 of the Social Security Act.

Section 1209ZD deals with what happens when special disability trusts cease to exist, or cease to be special disability trusts. This may occur, for example, in accordance with section 1209P, if the trust deed does not comply with the requirements of this Part, such as when compensation money is transferred to the special disability trust in contravention of section 1209R.

Subsection 1209ZD(1) provides that, if a person had transferred an asset to a special disability trust during the period of five years before the cessation of the trust, and sections 1209Z, 1209ZA or 1209ZC applied to the transfer, then the transfer is taken to be a disposal of an asset that occurred at the time of the transfer.

Subsection 1209ZD(2) sets out a formula for determining the amount of the disposal, including, for example, situations where the value of the special disability trust's assets is insufficient to refund the full value of transfers to everyone who transferred assets to the trust. It includes definitions of a number of terms used in the formula. For example, a grandfather who is receiving age pension has transferred \$300,000 to his grandson's special disability trust, and has received concessionary treatment under section 1209Z. When the grandfather transferred the asset, the trust already had assets of \$300,000. At the time when the trust ceases to be a special disability trust under subsection 1209ZD(2), the value of the assets of the trust is \$550,000. Because the value of the asset the grandfather transferred is less than \$500,000, there is no subsection 1209ZA(2) amount. According to the formula in subsection 1209ZD(1), the amount of the disposal is:

$$\begin{array}{rcl} \$300,000 & \times & \frac{\$550,000}{\$600,000} \\ & & = \$275,000 \end{array}$$

The disposal of \$275,000 will be taken into account in determining the grandfather's rate of payment from the date of cessation of the special disability trust, until five years from the date of the transfer by the grandfather.

Subsection 1209ZD(3) deals with working out the value of a trust asset at the time of its transfer, when a special disability trust ceases to exist, or ceases to be a special disability trust because the principal beneficiary dies. In that case, the value of the asset that is held as a deprivation against the person who transferred the asset is the value of so much (if any) of the asset that is not returned to the transferor. For example, in the situation above, \$275,000 of the grandfather's \$300,000 is returned to him, which is the proportional amount. If \$250,000 is returned to the grandfather after the special disability trust ceases to exist, then \$50,000 is the asset value. The amount of the disposal is:

$$\begin{array}{rcl} \$50,000 & \times & \frac{\$550,000}{\$600,000} \\ & & = \$45,833 \end{array}$$

The disposal of \$45,833 will be taken into account in determining the grandfather's rate of payment from the date of cessation of the special disability trust, until five years from the date of the transfer by the grandfather.

Subsection 1209ZD(4) provides that section 1209ZD does not affect the application of sections 1209Z, 1209ZA or 1209ZC to the transfer prior to the trust ceasing to be a special disability trust.

Section 1209ZE provides that this Division (other than section 1209ZB) has effect despite Division 2 of Part 3.12 and any other provisions of the Social Security Act. Division 2 of Part 3.12 deals with disposal of assets and provides that if a person disposes of assets for less than their full value, then a person will be treated, for social security law purposes, as if they still hold an asset equal to the value of the asset disposed of, less any consideration received. The effect of section 1209ZE is that the ordinary disposal of assets rules will not apply in relation to a person if the person transfers an asset to a special disability trust and is eligible for the beneficial treatment under this Part.

Item 14 sets out transitional arrangements for trusts created before 20 September 2006. The intention of this provision is to provide an opportunity for such trusts to be modified to comply with the requirements of a special disability trust in Part 3.18A.

Subitem (1) gives the Secretary the power, in relation to trusts created before 20 September 2006, to exempt certain trusts from the requirements of Division 1 of Part 3.18A of the Social Security Act. The effect of such an exemption is that the trust is not prevented from being a special disability trust. In order to exempt a trust from a particular requirement, the Secretary must give the trustees a written notice of the exemption, and, if the notice requires the trustees to comply with any matter, compliance must occur before the time stated in the notice, which can be no later than 30 June 2007.

Subitem (2) provides that a period referred to in an exemption notice for the purposes of paragraph (b) or sub-item (1) must end at or before 30 June 2007.

Subitem (3) sets out that an exemption notice has effect from the start of 20 September 2006, or the time stated in the notice, which is after that day, until the end of 30 June 2007, or the time stated in the notice which is before that day.

Subitem (4) provides that if guidelines are made under subsection (4) in relation to exemption notices, then any exemption notices made must be in accordance with those guidelines.

Subitem (5) gives the Secretary power to make guidelines for deciding a number of matters relating to the giving of exemption notices. It is proposed that the guidelines will deal comprehensively with all relevant matters relating to the giving of exemption notices under **item 14**. However, in the absence of an enforceable legislative instrument made under **subitem (4)**, exemption notices will be made in accordance with the policy of the relevant department.

Part 2 – Veterans' Entitlements Act 1986

Summary

This measure is aimed at assisting families who have the financial means to do so, to make private financial provisions, through a special disability trust, for the future care and accommodation needs of their sons and daughters with severe disabilities. This measure provides certainty for families who are concerned that their son or daughter may not have the financial support to take care of their accommodation or living needs when the family is no longer able to care for them.

The special disability trust must be established in order to provide for the current and future care and accommodation needs of the beneficiary. The assessable assets of the trust are to be exempt up to the limit, which will be set at \$500,000 and increased annually on 1 July in line with the ABS Consumer Price Index (CPI). Under the assets test, where the assessable assets of the trust are in excess of the limit, the balance is to be assessed as the beneficiary's assets. Under the income test, the income and distributions of the trust are to be exempt, irrespective of the total amount of assessable assets held within the trust. The current private trusts and companies rules do not apply.

There is no limit on the amount of contributions (apart from compensation money received by the beneficiary) that can be made to the special disability trust. However, this measure also enables each trust to receive up to \$500,000 without any of the gifts being assessed under the disposal rules of the Veterans' Entitlements Act to the donor. The donor is eligible for this so long as the donor or his or her partner, is at, or over pension age or qualifying age, is receiving a service pension or income support supplement, and is an immediate family member of the severely disabled person.

Background

Under the Veterans' Entitlements Act, there are limits to the assets a person can hold without those assets affecting their entitlement to payments under the Veterans' Entitlements Act. Assets in excess of the limit may reduce the amount of the payments or preclude a person from payments altogether. Further, a person who gives away an asset is treated, for a 5 year period, as if the person still owned the asset when assessing entitlement to payments under the Veterans' Entitlements Act. The operation of these provisions made it difficult for immediate family members of a severely disabled person, who receive payments under the Veterans' Entitlements Act, to set up a trust to ensure the continued care of their severely disabled relative without it affecting their payments under the Veterans' Entitlements Act.

This measure is part of a package by the Government aimed at assisting families with a severely disabled son or daughter. Other measures in the package include counselling to assist families and the provision of financial information kits.

Explanation of the changes

Veterans' Entitlements Act 1986

Items 15 to 18 insert new references into the section 5 index of definitions. References to the new definitions of 'immediate family member', 'principal beneficiary', 'sibling' and 'special disability trust' that are being inserted into subsection 5Q(1) have been added to the index.

Item 19 inserts into subsection 5Q(1) a definition of 'immediate family member'. This definition includes natural parents, including an adoptive or step parent, a person who was a legal guardian of the person when he or she was under 18 years of age, grandparents and siblings.

Item 20 inserts into subsection 5Q(1) a definition of 'principal beneficiary'. The term 'principal beneficiary' has the meaning given by section 52ZZZWA(1).

Item 21 inserts in subsection 5Q(1) a definition of 'sibling'. This includes half, adoptive and step brothers and sisters of a person. The definition is not to apply for the purposes of sections 123 to 123E of the Veterans' Entitlements Act. Those sections are applicable in the circumstances where the beneficiary of a payment under the Veterans' Entitlements Act has died. A Note to the definition refers the reader to subsection 123(1) for the definition of 'sibling' that is used in those sections.

Item 22 inserts into subsection 5Q(1) a definition of 'special disability trust'. The term 'special disability trust' has the meaning given by new section 52ZZZW.

Items 23 and 24 amend section 52E. Item 23 repeals the redundant reference to subsection (1) and item 24 repeals the note following subsection 52E(1) and substitutes two new notes. The first note is identical to the repealed note, apart from being now called 'Note 1'. The second note states that under Subdivision B of Division 11A, Part IIIB certain transfers of assets to special disability trusts are not taken to be a disposal of an asset (subject to a limit on the aggregate value of the transfers).

Item 25 inserts after section 52F a note that states that if subsection 52ZZZWM(2) applies in relation to the transfer of an asset to a special disability trust, that has the effect of reducing the amount of the disposal or disposition.

Item 26 inserts after subsection 52ZZJ(2) a new subsection 52ZZJ(2A), which provides that the only attributable stakeholder of a special disability trust is the principal beneficiary of the trust.

Item 27 inserts after subsection 52ZZK(1) a note that states that attribution of the income of a special disability trust is dealt with in accordance with section 52ZZZW.

Item 28 inserts after subsection 52ZZR(1) a note that states that attribution of the assets of a special disability trust is dealt with in accordance with section 52ZZZW.

Item 29 inserts after Division 11A of Part IIIB a new Division 11B, titled 'Private financial provision for certain people with disabilities'.

Subdivision A – Special disability trusts

New section 52ZZW sets out what is a special disability trust. So long as a trust complies with the various requirements set out in Subdivision A of Division 11B then it is a special disability trust.

New section 52ZZWA sets out the requirements for who can be the sole beneficiary of a special disability trust. Subsection 52ZZWA(1) provides that the trust must have only one beneficiary, known as the principal beneficiary. Residuary beneficiaries are allowed. If parents have more than one severely disabled son or daughter, a complying special disability trust may be set up for each son or daughter and obtain the beneficial concession treatment towards \$500,000 in relation to each trust.

Paragraph 52ZZWA(2)(a) provides the impairment or disability conditions that the principal beneficiary, who has reached 16 years of age, must have in order to be the principal beneficiary for the purposes of this Division. This definition matches the criteria for entitlement of several social security and Veterans' Entitlements Act payments. Specifically, this definition matches the criteria for invalidity service pension or invalidity income support supplement under the Veterans' Entitlements Act or disability support pension under Part 2.3 of the Social Security Act.

Paragraph 52ZZWA(2)(b) sets out further alternative requirements in order for a person to be considered the principal beneficiary. Subparagraph 52ZZWA(2)(b)(i) provides that the principal beneficiary must have a disability that would qualify a sole carer, if the beneficiary had one, to carer payment or carer allowance under the Social Security Act. Alternatively, subparagraph 52ZZWA(2)(b)(ii) sets out the sort of accommodation in which the person must live in order to be considered the principal beneficiary.

Paragraph 52ZZWA(2)(c) provides that in order to be considered the principal beneficiary, the person must not be able to work. The purpose of this paragraph is to ensure that this Division only applies in relation to people who have the most severe disabilities and who are not able to work in an open, competitive workplace. For example, a blind person, who may qualify for disability support pension, or have a carer, would not be eligible if he or she had no other disability preventing him or her from working.

Subsection 52ZZZWA(3) provides that the Commission may, by legislative instrument, nominate a particular agreement made between the Commonwealth, States and Territories in relation to care, for the purposes of subparagraph 52ZZZWA(2)(b)(ii).

Subsection 52ZZZWA(4) provides that a person under 16 years of age can be the sole beneficiary of a special disability trust if he or she is a profoundly disabled child within the meaning of section 197 of the Social Security Act.

Subsection 52ZZZWA(5) provides that a trust stops being a special disability trust when the principal beneficiary dies. When the beneficiary dies, the special disability trust may be rolled over to another form of trust for the benefit of the residual beneficiary. This new form of trust will not be eligible for the favourable treatment, for the purposes of the Veterans' Entitlements Act, that is set out in this Division.

Subsection 52ZZZWA(6) provides that a trust is not a special disability trust for a particular principal beneficiary if there is already another special disability trust in existence for that principal beneficiary.

New section 52ZZZWB sets out the purpose requirements of a special disability trust. Subsection 52ZZZWB(1) provides that the sole purpose, during the beneficiary's lifetime, must be to meet the beneficiary's reasonable care and accommodation needs. This might include such things as purchasing a property for the person, or a right or interest in a property. However, it is not permissible for the trust to pay a parent or immediate family member for care provided by that parent or family member.

Subsection 52ZZZWB(2) provides that the trust may have purposes ancillary to meeting the beneficiary's reasonable care and accommodation needs that are necessary or desirable to facilitate that purpose. This allows money to be spent on such things as investing money gifted to the trust, or paying for a professional trustee to administer the trust.

Subsection 52ZZZWB(3) provides that the reasonable care and accommodation needs of a beneficiary of a special disability trust must be decided in accordance with any guidelines under subsection 52ZZZWB(4). Subsection 52ZZZWB(4) gives the Repatriation Commission (the Commission) a discretionary power to make such guidelines.

If no guidelines exist under subsection 52ZZZWB(4), then the principal beneficiary's 'reasonable care and accommodation needs' will be interpreted in accordance with the policy of the Department of Veterans' Affairs (the Department).

New section 52ZZZWC sets out the requirements of the trust deed. Subsection 52ZZZWC(1) provides that, if there is a determination under subsection 52ZZZWC(2), then subject to subsection 52ZZZWC(3), a trust deed must comply with a determination under subsection (2).

Subsection 52ZZZWC(2) provides that the Commission may either determine the form of the trust deed required for a special disability trust; the provisions which must be included in the trust deed, and the form of those provisions; or provisions which cannot be included in the trust deed. It is anticipated that any determination made by the Commission will cover such matters as financial management and administration, amongst other things. If the Commission does not make a legislative instrument under subsection 52ZZZWC(2), then the requirements of the trust deed will be interpreted in accordance with the policy of the Department.

Subsection 52ZZZWC(3) provides that a person must not contravene a provision of the trust deed that is required by this section 52ZZZWC to be included in the deed.

New section 52ZZZWD sets out the requirements for trustees. The aim of this section is to protect the interests of the principal beneficiary who is a vulnerable person by reason of their disability. These strict requirements on who may be a trustee of a special disability trust ensure that there is either one arms-length professional trustee as the trustee of the trust or, alternatively, two or more trustees where this is not the case. A professional trustee would either be a trustee company, a public trustee, or another sort of professional acting as trustee, such as a solicitor or accountant, who is not a 'parent or immediate family member'.

Subsection 52ZZZWD(1) sets out various requirements, including that a trustee must be an Australian resident, has not been convicted of any offences under certain Acts, including the Veterans' Entitlements Act, the Social Security Act and the Social security Administration Act.

Subsection 52ZZZWD(2) provides that if the trustee is a corporation, then the requirements in subsection 52ZZZWD(1) apply in relation to each of the directors.

New section 52ZZZWE sets out the requirements for trust property. Subsection 52ZZZWE(1) provides that the trust's assets must not, apart from one exception, include any assets transferred by the beneficiary or the beneficiary's partner. The only exception is if the transferred asset is all or part of a bequest, or a superannuation death benefit, and the transferor received the bequest less than three years before transferring the asset to the trust. This is consistent with the intent of the measure, which is to allow parents and immediate family members to make private financial provision for their severely disabled family member.

The assets of a special disability trust are kept separate from other assets because assets of a special disability trust would be assessable assets but for this Division. Other monies held by the beneficiary, such as compensation, will continue to be treated in accordance with the rules set out in the Veterans' Entitlements Act.

Subsection 52ZZZWE(2) provides that the assets of the trust must not include any compensation that has been received by or on behalf of the principal beneficiary. If compensation money is put in a special disability trust, then the trust will lose its beneficial concessional treatment for the purposes of the Veterans' Entitlements Act.

Subsection 52ZZZWE(3) provides that the trust must not be used to pay an immediate family member or child of the beneficiary for the provision of care services to the beneficiary or for the maintenance of the beneficiary's accommodation.

Subsection 52ZZZWE(4) provides that the trustees must not, on behalf of the trust, purchase or lease property from an immediate family member or child of the beneficiary, even if the property is to be used for the accommodation of the beneficiary. The terms 'child' and 'property' are defined in subsection 52ZZZWE(5). 'Property' includes the right to accommodation for life in a residence and a life interest in a residence and is intended to cover such things as granny flats or other accommodation that is part of another home.

New section 52ZZZWF sets out the reporting requirements on the trustees of a trust. Subsection 52ZZZWF(1) provides that the trustees of the trust must, on or before 31 March each year, provide to the Commission written financial statements about the trust in relation to the financial year ending on 30 June of the previous year.

Subsection 52ZZZWF(2) sets out that these financial statements must be prepared by a person qualified as provided by a determination under subsection 52ZZZWF(4), and include the information required by a determination under subsection 52ZZZWF(4).

Subsection 52ZZZWF(3) provides that if a determination is made under subsection 52ZZZWF(4) that requires financial statements to include information of a stated kind, the financial statements must include that information.

Subsection 52ZZZWF(4) gives to the Commission the power to make a determination for the purposes of subsection 52ZZZWF(2).

New section 52ZZZWG sets out the audit requirements on a special disability trust. Subsection 52ZZZWG(1) provides that if the trustees receive a request for an audit under subsection 52ZZZWG(3), the trustees must within a reasonable time, cause an independent audit to be carried out, or if an audit had already been carried out, give a copy of that audit to the person making the request. The purpose of this is to reduce the burden on trustees by people making frequent requests for audits.

Subsection 52ZZZWG(2) sets out the audit period. The audit must be in relation to the financial year ending on the previous 30 June, or if a determination made under subsection 52ZZZWG(7) provides for a different period, that period.

Subsection 52ZZZWG(3) sets out the people who may request, in writing, that the trustees of the trust provide them with an audit. It includes the beneficiary, the beneficiary's immediate family members, the beneficiary's legally appointed guardian, or someone who has been acting as the beneficiary's guardian on a long-term basis, including as a financial administrator, or the Commission.

Subsection 52ZZZWG(4) provides that if an audit report is given to the trustees for the purpose of subsection 52ZZZWG(1), then the trustees must give a copy to the person requesting the audit, the person mentioned in paragraph 52ZZZWG(3)(c) and the Commission, unless either of those latter two people requested the audit.

Subsection 52ZZZWG(5) sets out who is qualified to prepare an audit. The people who are qualified are those who are set out in a determination made under subsection 52ZZZWG(7), or people approved by the Commission for this purpose.

Subsection 52ZZZWG(6) provides that if a determination is made under subsection 52ZZZWG(7) requiring audits to include certain information, then the audit must include that information.

Subsection 52ZZZWG(7) provides that the Commission may make a determination for the purposes of section 52ZZZWG.

New section 52ZZZWH deals with waiver of contravention with this Subdivision. Section 52ZZZWH allows all of the following outcomes:

- unqualified waiver, for example, for minor contraventions (see paragraph 52ZZZWH(2)(a) with no end time stated under paragraph 52ZZZWH(2)(b));
- waiver subject to 'rectification' or other conditions (see paragraph 52ZZZWH(1)(b) or paragraph 52ZZZWH(2)(b)); and
- delayed start of waiver to allow for a period of 'suspension' of status as a special disability trust (see paragraph 52ZZZWH(2)(a)(ii)).

Subsection 52ZZZWH(1) provides, in relation to a trust that would be a special disability trust apart from a failure to comply with a requirement of this Subdivision, that trust is not prevented from being a special disability trust if the Commission gives the trustees a written waiver notice requiring them to comply with certain conditions. This means that subsection 52ZZZWH(1) limits the application of the waiver provisions to trusts that have already, by operation of this Subdivision, and not by any waiver granted by the Commission, 'qualified' as special disability trusts.

Subsection 52ZZZWH(2) provides the period during which a waiver notice has effect.

Subsection 52ZZZWH(3) provides that if guidelines are made under subsection 52ZZZWH(4), then a waiver notice must be made in accordance with the guidelines.

Subsection 52ZZZWH(4) gives the Commission the power to make, by legislative instrument, guidelines in relation to waiver notices.

Subdivision B - Attribution of income of special disability trusts

New section 52ZZZWI deals with the attribution of income of special disability trusts. Subsection 52ZZZWI(1) provides that for the purposes of the Veterans' Entitlements Act, an amount of income derived by a special disability trust is not taken to be income received by any individual. That is, it is not the income of the beneficiary or any immediate family member who has made a gift to the trust, and will not affect assessment of their income for the purposes of the Veterans' Entitlements Act. This is different to the normal rules applied under the Veterans' Entitlements Act in relation to the income of a trust, which is usually attributed to the person in control of the trust or the beneficiary.

Subsection 52ZZZWI(2) provides that section 52ZZZWI has effect despite Subdivision G of Division 11A of Part IIIB, which deal with attribution of income of controlled private companies and controlled private trusts, and any other provisions of the Veterans' Entitlements Act.

New section 52ZZZWJ deals with income amounts from special disability trusts. For example, if a distribution from the trust was used to pay for rental accommodation for the principal beneficiary, then consideration was provided for that trust distribution. Consequently, that trust distribution is not considered to be income of the principal beneficiary for the purposes of the Veterans' Entitlements Act. Such things that are purchased must be for the principal beneficiary's 'reasonable care and accommodation needs'.

Subdivision C – Attribution of assets of special disability trusts

New section 52ZZZWK deals with attribution of assets of special disability trusts. Subsection 52ZZZWK(1) provides that for the purposes of the Veterans' Entitlements Act, the assets of a special disability trust are not to be included in the assets of the principal beneficiary of the trust.

However, subsection 52ZZZWK(2) provides that section 52ZZZWK does not apply to the value of assets which exceed the trust's asset value limit.

Subsection 52ZZZWK(3) provides that the asset value limit of a special disability trust is \$500,000. In accordance with new item 8A of section 59B, set out in **item 31** above, this amount will be indexed in accordance with CPI.

Subsection 52ZZZWK(4) provides that the value of any right or interest of the trust in the beneficiary's principal home is disregarded. This is in accordance with the normal rules applied under the Veterans' Entitlements Act, under which a person's principal home is exempt from the assets test.

Subsection 52ZZZWK(5) provides that section 52ZZZWK has effect despite Subdivision H of Division 11A of Part IIIB, which deals with attribution of assets of controlled private companies and controlled private trusts, and any other provisions of the Veterans' Entitlements Act.

Subdivision D – Transfers to special disability trusts

New section 52ZZZWL deals with the effect of transfers made to special disability trusts. Subsection 52ZZZWL(1) sets out the conditions that must be met in order for a transfer of an asset to a special disability trust not to be taken to be a disposal of an asset. These conditions are:

- paragraph 52ZZZWL(1)(a): the asset is transferred by an immediate family member of the beneficiary;
- paragraph 52ZZZWL(1)(b): the person who transferred the asset, or his or her partner, is of age pension age (within the meaning of the Social Security Act) and receiving a social security pension; or is receiving a service pension and has reached pension age; or is receiving income support supplement and has reached qualifying age within the meaning of subsection 45A(2);
- paragraphs 52ZZZWL(1)(c) and (d): the transfer must be without consideration and unconditional;
- paragraph 52ZZZWL(1)(e): the value of the transferred asset must be less than \$500,000; and
- paragraph 52ZZZWL(1)(f): adding the value of that transferred asset to the value of the transferred assets which have received the concession treatment dealt with by this Division, does not exceed \$500,000.

Subsection 52ZZZW(2) provides that section 52ZZZW has effect subject to sections 52ZZZW and 52ZZZW.

Subsection 52ZZZW(3) defines the terms 'other special disability trust' and 'value' for the purposes of section 52ZZZW. The term 'other special disability trust' will include a special disability trust as defined by the Social Security Act. The 'value' of an asset transferred to a special disability trust means the market value of the asset at the time of the transfer. This definition is the same as the definition of 'value' set out in subsection 52ZZZW(4).

New section 52ZZZW deals with how a transfer is treated when more than \$500,000 worth of assets have been transferred to a special disability trust. Subsection 52ZZZW(1) provides that even if a transfer to a special disability trust would receive the concessions set out in this Division, but for the fact that \$500,000 had already been transferred to the special disability trust, that transfer is still considered to be a disposal of an asset. As a result, that disposal will be held against the person for the purposes of the Veterans' Entitlements Act.

However, if less than \$500,000 had previously been transferred to the special disability trust, the amount of the disposal of the asset is only so much of the value of that asset which means the total value of the special disability trust's assets are greater than \$500,000.

For example, a father, who is eligible for the concessions under this Division, transferred \$300,000 to his son's special disability trust. Later, the son's grandfather, who is also eligible for concessions under this Division, transferred \$300,000 to the special disability trust. The grandfather would be held to have disposed of an asset worth \$100,000.

Subsection 52ZZZW(2) applies to the situation where section 52ZZZW would have applied to the transfer of an asset, but for the fact that the sum of the value of all exempt transfers exceeds \$500,000. In that case, the amount of the gift that brings the total amount of transfers to the special disability trust up to \$500,000 receives, for the purposes of the Veterans' Entitlements Act, the concessions set out in this Division. In the example set out above, the grandfather receives the concessions on \$200,000 of the \$300,000 he transferred to his grandson's special disability trust.

Once \$500,000 worth of assets have been transferred to the special disability trust, it is possible to use the normal gifting rules to make gifts to the special disability trust.

Subsection 52ZZZW(3) provides that section 52ZZZW has effect subject to section 52ZZZW.

Subsection 52ZZZW defines the terms 'other special disability trust' and 'value'. The definitions are the same as the definitions of 'other special disability trust' and 'value' set out in subsection 52ZZZW(3).

New section 52ZZZZWN deals with the circumstances when gifts are made to the special disability trust by the principal beneficiary's immediate family members who are not of pension age or qualifying age. Subsection 52ZZZZWN(1) provides that if an immediate family member transfers assets to the special disability trust, and at the time of the transfer, neither that person, nor his or her partner, had reached pension age or qualifying age, then he or she is taken to transfer the assets to the trust at the time when he or she, or his or her partner, reaches pension age or qualifying age. In accordance with the intention of this measure, this enables immediate family members to transfer assets to the special disability trust, in order to plan for the principal beneficiary's welfare, and take advantage of the beneficial treatment under this Division at some later date.

Subsection 52ZZZZWN(2) provides for the order in which transfers to a special disability trust will be taken to have been made. If transfers were made by immediate family members on the same day, then the order is determined by normal rules, and not by any special rules set out in this Subdivision.

The effect of sections 52ZZZZWM and 52ZZZZWN is that the first \$500,000 of gifts, made by immediate family who are eligible for the concession, to the special disability trust, receives the gifting concession. This allows the special disability trust to hold assets in excess of the \$500,000 and allows immediate family members to have access to the full \$500,000 concession amount. For example:

- If an immediate family member gifts \$200,000 to the special disability trust and is eligible for, and claims, the gifting concession, then someone else gifts \$300,000, but does not claim the gifting concession, a parent or immediate family member can make further gifts up to \$300,000 and still receive the concession.
- A parent aged 58 gifts \$500,000 to a special disability trust. This parent is not able to receive the gifting concession, as he or she is not eligible for service pension. Another parent already in receipt of service pension wants to gift \$500,000. The concession would apply to the second gift of \$500,000 from the parent in receipt of service pension. The parent aged 58 would not receive any concession for their gift when they claim payment at veteran pension age.

Section 52ZZZZWO provides that where the principal beneficiary of the trust, or his or her partner, unconditionally transfers an asset to their special disability trust and receives, or is entitled to, no consideration for the transfer then this transfer will not be taken to be a disposal of an asset for the purposes of section 52E of the Veterans' Entitlements Act.

New section 52ZZZWP deals with what happens when special disability trusts cease. This may occur, for example, in accordance with section 52ZZZWC, if the trust deed does not comply with the requirements of this Division, or compensation money is transferred to the special disability trust in contravention of section 52ZZZWE. The situation where a trust ceases to be a special disability trust because of the death of the principal beneficiary is dealt with in subsection 52ZZZWP(3) below. Paragraphs 52ZZZWP(1)(b) and (c) provide that if a person had transferred an asset to the special disability trust during the period of five years before the cessation of the trust, and sections 52ZZZWL, 52ZZZWM or 52ZZZWO applied to the transfer, then the transfer is taken to be a disposal of an asset that occurred at the time of the transfer.

Subsection 52ZZZWP(2) sets out a formula for determining the amount of the disposal. This is to deal with the situation where the value of the special disability trust's assets is insufficient to refund the full value of transfers to everyone who transferred assets to the trust. It includes definitions of a number of terms used in the formula. For example, a grandfather has transferred \$300,000 to his grandson's special disability trust. In total, \$600,000 in assets has been transferred. At the time when the trust ceases to be a special disability trust under subsection 52ZZZWP(2), \$50,000 has been spent on the grandson's care. Because the value of the asset the grandfather transferred is less than \$500,000, there is no subsection 52ZZZWM(2) amount. According to the formula in subsection 52ZZZWP(2):

$$\begin{array}{rcl} \$300,000 & \times & \frac{\$550,000}{\$600,000} \\ & & = \$275,000 \end{array}$$

Subsection 52ZZZWP(3) deals with the situation when a special disability trust ceases to exist, or ceases to be a special disability trust, because the principal beneficiary dies, in accordance with subsection 52ZZZWA(5). In that case, the value of the asset that is held as a deprived asset against the person who transferred the asset is the value of the amount of the asset which is not returned to the transferor. The effect of subsection 52ZZZWP(3) is thus opposite to the effect of subsection 52ZZZWP(1), where the value of the asset which is returned to the transferor is held to be the amount of the deprivation. For example, in the previous example, \$275,000 of the grandfather's \$300,000 is returned to him. He is taken, therefore, to have disposed of \$25,000.

Subsection 52ZZZWP(4) provides that this section 52ZZZWP does not affect the application of sections 52ZZZWL, 52ZZZWM or 52ZZZWO to the transfer prior to the trust ceasing to be a special disability trust.

New section 52ZZZWQ provides that this Subdivision (other than section 52ZZZWN) has effect despite Subdivision B of Division 11 of Part IIIB and any other provisions of the Veterans' Entitlements Act. Subdivision B of Division 11 of Part IIIB deals with disposal of assets and provides that if a person disposes of assets for less than their full value, then a person will be

treated, for the purposes of the Veterans' Entitlements Act, as if they still hold an asset equal to the value of the asset disposed of, less any consideration received. Section 52ZZZWQ provides, therefore, that the disposal of assets rules will not be held against a person if they transfer an asset to a special disability trust.

Item 30 inserts into section 59A a new item 13A into the table after item 13. This item sets out how special disability trusts will be described in the legislation, both in full and in abbreviated form, and the sections which refer to special disability trusts.

Item 31 inserts into section 59B a new item 8A into the table after item 8. Section 59B deals with how amounts under Division 18 of Part IIIB are indexed in accordance with the CPI. The inclusion of this item ensures that the value of the assets test exemption limit of the special disability trust will be indexed in accordance with CPI.

This item sets out the indexation day, reference quarter, base quarter and rounding based for special disability trusts. The following example shows how indexation of the assets test exemption limit might affect a special disability trust (Note: the CPI figure used is a sample only, and is not the actual CPI for 1 July 2007).

20 September 2006	Assets test exemption limit is \$500,000
1 January 2007	Parents gift \$500,000 to the special disability trust, and this money is invested. No assets are assessable.
1 July 2007	CPI is 2%, meaning that assets test exemption limit is raised to \$510,000.
1 Jan 2008	Return on investments is \$8,000, meaning that total assets are \$508,000. As this amount is less than the assets test exemption limit, no assets are assessed.

Item 32 inserts after subsection 59C(2) a new subsection 59C(2A), which confirms that the first indexation of item 8A (inserted by **item 31** above) will take place on 1 July 2007.

Item 33 sets out transitional arrangements for trusts created before 20 September 2006.

Subitem (1) gives the Commission the power, in relation to trusts created before 20 September 2006, to exempt certain trusts from the requirements of Subdivision A of Division 11B of Part IIIB of the Veterans' Entitlements Act, the provisions of which are set out in this Schedule. The effect of this exemption is that the trust is not prevented from being a special disability trust. In order to exempt a trust from a certain requirement, the Commission must give the trustees a written notice of the exemption, and, if the notice requires the trustees to comply with any matter, that compliance must occur before the time stated in the notice, which would be 30 June 2007, at the latest.

Subitem (2) provides that a period referred to in an exemption notice for the purposes of paragraph (b) or sub-item (1) must end at or before 30 June 2007.

Subitem (3) sets out that an exemption notice has effect from the start of 20 September 2006, or the time stated in the notice, which is after that day, until the end of 30 June 2007, or the time stated in the notice which is before that day.

Subitem (4) provides that if guidelines are made under **subitem (4)** in relation to exemption notices, then any exemption notices made must be in accordance with those guidelines.

Subitem (5) gives the Commission power to make guidelines for deciding what is substantial compliance.

Schedule 8 – Australian Institute of Family Studies

Summary

The amendments made in this Schedule are part of the Government's response to the Uhrig Review, which examined and reported on improving the structures and the governance practices of such entities. The Government assessed the Institute's governance arrangements against the principles and recommendations of the Uhrig Review, identifying that an executive management structure and operation under the Financial Management and Accountability Act would be consistent with the findings. The Institute is already a statutory agency for the purposes of the Public Service Act, so no changes to that arrangement are contemplated.

The effect of these amendments will be to provide a transition for the Institute so that it will no longer be subject to the Commonwealth Authorities and Companies Act. Instead it will become a prescribed agency under the Financial Management and Accountability Act.

The functions of the Institute will not be affected by these amendments, but responsibility for these functions will be given to the Director. Transitional arrangements to ensure that these governance changes do not disrupt these functions are included.

The amendments commence on 1 July 2006.

Background

The Institute is established under Part XIVA of the Family Law Act and is currently subject to certain requirements under the Commonwealth Authorities and Companies Act.

Section 114M of the Family Law Act provides that the staff of the Institute including the Director constitute a Statutory Agency for the purposes of the Public Service Act and that the Director is the Head of that Statutory Agency. No changes to these arrangements are being made.

The necessary amendments to the Family Law Act will ensure that the governance arrangements of the Institute are those that apply to prescribed agencies under the Financial Management and Accountability Act. Separate arrangements are being made to ensure that the Institute, and the Director as Chief Executive of the Institute, are appropriately prescribed for the purposes of the Financial Management and Accountability Act.

Explanation of the changes

Part 1—Amendments

Part 1 of the schedule makes amendments to Part XIVA of the Family Law Act to ensure that the governance arrangements of the Institute conform to the executive management governance arrangements envisaged in the Uhrig Review. The most significant amendment is the dissolution of the Board of Management of the Institute and its members, with that responsibility being transferred to the Director.

Items 1 and 2 repeal the definitions of 'Board' and 'member' from section 114A.

Section 114B provides for the establishment of the Institute. New subsections 114B(1A) and (1B) are added by **item 3** to provide respectively that the Institute must have a Director and that it consists of the Director and staff referred to in section 114M. A note will inform a reader that the Institute does not have a legal identity separate from the Commonwealth.

Item 4 amends subsection 114B(2) to confirm that the functions of a statutory body built on the executive management governance arrangements of the Uhrig Review are the Director's responsibility rather than that of the Institute itself. This amendment therefore replaces 'Institute' with 'Director' which confirms this requirement.

Item 5 inserts new subsection 114B(2A) so that the new function of the Institute is to assist the Director in the performance of his or her functions.

Items 6 and 7 replace references to the 'Board' with references to 'Director' in paragraphs 114B(3)(a) and (b).

Subsection 114B(4) provides that the Institute must specify any requests made by the Minister when providing each report under section 9 of the Commonwealth Authorities and Companies Act. This subsection is repealed by **item 8**.

Item 9 repeals sections 114BA, 114BB, 114C, 114D, 114E, 114F, 114G, 114H, 114J, 114K and 114L and substitutes new sections 114C, 114D, 114E, 114F, 114G, 114H, 114J, 114K, 114L, 114LA, 114LB, 114LC and 114LD.

Section 114BA provides powers that were conferred on the Institute as a body corporate under the Commonwealth Authorities and Companies Act. As a statutory agency that is part of the Commonwealth, the Institute will not deal with securities, nor be involved in legally binding partnerships, consortiums or business associations except on behalf of the Commonwealth. This section is no longer required.

Section 114BB specifies the powers of the Institute relating to property, contracts and gifts etc. These are matters that are dealt with under the Financial Management and Accountability Act or its Regulations. This section is no longer required.

Section 114C is also repealed by **item 9** because it deals with the Director and Board of Management of the Institute. The only relevant provision after implementation of the executive management governance arrangements of the Uhrig Review is subsection 114C(1). However, this provision is now encapsulated by the amendment at **item 3** with the insertion of new subsection 114B(1A).

New section 114C

This is a new section that doesn't exist in the current Part XIVA. It deals with the Minister's directions to the Director. New subsection 114C(1) provides that the Minister may, in writing, direct the Director about the performance of the Director's functions. This direction is a legislative instrument.

New subsection 114C(2) provides that particulars of any directions given by the Minister under new subsection 114C(1) must be of a general nature.

New subsection 114C(3) provides that the Director must comply with any directions given by the Minister under new subsection 114C(1).

New section 114D

This section replaces some of the requirements of current subsections 114C(3) and (4). New subsection 114D(1) provides that the Director is to be appointed by the Minister by written instrument. A note informs the reader that, under subsection 33(4A) of the *Acts Interpretation Act 1901*, the Director is eligible for reappointment.

New subsection 114D(2) provides that the Director is to be appointed on a full-time basis.

New section 114E

New section 114G provides that the Director holds office for the period specified in the instrument of appointment, with a limit that the term of appointment is not to exceed five years. Under the previous requirements, the Governor-General made the appointment and the period of the appointment could not exceed 7 years (see current section 114E).

New section 114F

New section 114F provides for an Acting Director to be appointed, consistent with the provisions of the Act that formerly enabled an Acting Director to be appointed with the exception that there will be no limit of 12 months on the period of the acting appointment as is the case under current subsection 114K(1).

New section 114G

New section 114G provides for the remuneration of the Director. This provision is equivalent to current section 114F except that it only applies to the Director rather than to all members of the Board.

New section 114H

New section 114H provides that the Director must not engage in paid employment outside the duties of the Director's office without the Minister's approval. This new section is an unambiguous requirement that could have been made by determination of the Governor-General of the terms and conditions of a member, including the Director, under current subsection 114C(5).

New section 114J

New section 114J provides for leave of absence of the Director. This provision is equivalent to current section 114G except that it only applies to the Director rather than to the Director and the other members of the Board.

New section 114K

New section 114K provides that the Director must give to the Minister a written notice of all interests, pecuniary or otherwise, that the Director has or acquires and that could conflict with the proper performance of the functions of the Director.

New section 114L

New section 114L provides that the Director holds office on the terms and conditions in relation to matters not covered by the Family Law Act that are determined by the Minister. This is similar to current subsection 114C(5) prior to its repeal where the Governor-General determined the member's terms and conditions of office.

New section 114LA

New subsection 114LA(1) provides that the Director may resign by giving the Minister a written resignation. New subsection 114LA(2) provides for the date of effect of the resignation. This section is similar to current section 114H.

New section 114LB

New subsection 114LB(1) provides that the Minister may terminate the appointment of the Director for misbehaviour or physical or mental incapacity. New subsection 114LB(2) provides that, if the Director:

- becomes bankrupt; or
- applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
- compounds with his or her creditors; or
- makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- is absent without reasonable excuse; or
- fails, without reasonable excuse, to comply with section 114H (outside employment); or
- fails, without reasonable excuse, to comply with section 114K (disclosure of interests);

then the Minister may terminate the appointment of the Director. This section is similar to current section 114J.

New section 114LC

New section 114LC provides that the annual report for the Institute must be a report on the Institute's operations during the year ending 30 June. The annual report is to be prepared by the Director and given to the Minister as soon as practicable after 30 June for presentation by the Minister to the Parliament.

New section 114LD

New subsection 114LD(1) enables the Director to delegate all or any of his or her functions or powers under Part XIVA of the Family Law Act to an SES employee (including any acting SES employee) of the Institute. A note informs the reader that the Director, as Chief Executive of the Institute has other powers of delegation under section 53 of the Financial Management and Accountability Act. New subsection 114LD(2) provides that a delegate must comply with any written directions of the Director when performing a delegated function or exercising a delegated power.

Item 10 amends subsection 114M(3) to reflect the fact that the Director has responsibility for the management of the Institute including the engaging of persons as consultants with the approval of the Minister. The Institute no longer has any responsibility for this role.

Item 11 repeals sections 114MA, 114MC, 114MD and 114MF, all of which become redundant once the Institute falls under the governance arrangements associated with a prescribed agency under the Financial Management and Accountability Act.

Part 2—Transitional provisions

Division 1—Preliminary

Item 12—Definitions

This item defines certain terms that are used in Part 2. **Subitem 12(2)** provides that, subject to **subitem 12(1)**, an expression used in this Part that is also used in the new law has the same meaning in this Part as it has in the new law.

Division 2—Assets, liabilities and legal proceedings

Item 13—Vesting of assets of old Institute

This item provides that, at the commencement time, the assets of the old Institute will become the asset of the Commonwealth. The Commonwealth will become the old Institute's successor in law in relation to those assets. The term 'asset' is defined in **item 12** of this Part.

Item 14—Vesting of liabilities of old Institute

This item provides that, at the commencement time, the liabilities of the old Institute will become the liabilities of the Commonwealth. The Commonwealth will become the old Institute's successor in law in relation to those liabilities. The meaning of 'liability' is defined in **item 12** of this Part.

Item 15—Certificates relating to vesting of land and item 16—Certificates relating to vesting of assets other than land

These items are standard provisions that facilitate the registration of the transfer of assets under any law of the Commonwealth, a State or a Territory that provides for the registration or recording of interests. For example, if an interest in land were transferred to the Commonwealth under **item 13**, the mechanism in **item 15** would facilitate the recording of this transfer in the relevant State's land titles register.

Item 17—Substitution of Commonwealth as a party to pending proceedings

Item 17 is intended to facilitate the smooth running of court and tribunal proceedings by substituting the Commonwealth as the appropriate party in any proceedings on foot at the commencement time in which the old Institute was a party.

Item 18—Transfer of custody of old Institute records

Any record or documents that are in the custody of the old Institute will be transferred into the custody of the Director at the commencement time.

Item 19—Access by Board members to records

This item allows Board members, after the commencement time, to continue to have access to certain records on the same terms as is currently allowed by section 27L(4) of the Commonwealth Authorities and Companies Act.

Division 3—Reference to, and things done by or in relation to, old Institute

Item 20—References in instruments

This item provides for instruments made before the commencement time that refers to the old Institute (including a reference to the Board) to continue to have effect after the commencement time, with a reference that reflects the revised structure of the Institute. The meaning of *instrument* is defined in **item 12** of this Part.

This is required given that other provisions of this Bill repeal the Board and its members other than the Director and vest what were the statutory functions of the Institute in the Director.

Subitem 20(1) provides that where required the substitute reference for the old Institute may be the Director.

Subitem 20(2) provides that, where required, the substitute reference may be to the Commonwealth where the instrument relates to assets or liabilities.

Subitem 20(3) provides for instruments made before the commencement time that refer to staff of the old Institute to continue to have effect after the commencement time as if such references were a reference to a member of staff of the new Institute.

The item is intended to avoid the need for instruments to be amended or replaced.

After the commencement time, it will normally be appropriate for instruments to be taken to refer to the Director, as the Director will have the statutory functions that the old Institute had before the commencement time. However, it is possible that, in some cases, **subitems 20(1), (2) or (3)** will lead to an inappropriate result. **Subitem 20(4)** empowers the Minister to make an instrument that is a legislative instrument, providing that:

- **subitems 20(1), (2) or (3)** do not apply in a specified reference including:

- **subitem 20(1)** applies as if the reference to the Director were a reference to the Commonwealth;
- **subitem 20(2)** applies as if the reference to the Commonwealth were a reference to the Director; or
- **subitem 20(3)** applies as if the reference to a member of staff of the new Institute were a reference to the Director.

In instances where none of the above combinations is appropriate and the Minister makes an instrument determining that **subitem 20(1), (2) or (3)** does not apply, **subitem 20(5)** provides that regulations may determine what the most appropriate substitute reference in the instrument is to be.

Item 21—Operation of laws

This item provides that, if anything was done by or in relation to the old Institute (including the Board) before the commencement time, for the purposes of the operation of any law of the Commonwealth, then it is taken to have been done after the commencement time by, or in relation to, the Director.

This item is intended to avoid the need for things to be done again. If, for example, the Board did something under a law before the commencement time, then, after the commencement time, the Director will be taken to have done that thing.

After the commencement time, it will normally be appropriate for things to be taken to have been done by the Director, as the Director will have the statutory functions that the old Institute had before the commencement time. However, it is possible that, in some cases, **subitem 21(1)** will lead to an inappropriate result. To cover this possibility, **subitem 21(3)** empowers the Minister to make an instrument that is a legislative instrument, providing that **subitem 21(1)** does not apply in a particular case, or that it applies as if the reference to the Director were a reference to the Commonwealth.

If the Minister makes an instrument under **paragraph 21(3)(a)** in relation to a specified thing, **subitem 21(4)** permits regulations to be made in relation to that thing, providing that, after the commencement time, the thing is taken to have been done by, or in relation to, a specified person or body other than the Commonwealth or the Director.

Subitem 21(5) provides that, to avoid doubt, for the purposes of this item, doing a thing includes making an instrument.

Item 22—Financial statements and other reporting requirements

This item is required to enable the efficient and effective discharge of reporting obligations of the old and new Institute.

Subitem 22(1) provides for the Director to provide any reports (including financial statements or otherwise) relating to the old Institute required under law for a period where the reporting period ends after the commencement period. For example, where the old Institute was required to produce an annual report, and the end of that reporting period occurs after commencement, the Director is obliged to satisfy the reporting requirements of the old Institute.

Subitem 22(2) provides that, in circumstances under **subitem 22(1)** where the Director is obliged to provide a report relating to a specified period in which the Director must report for both the old Institute and the new Institute, for instance, where commencement occurs during the reporting period, the Director may discharge this reporting requirement through a single report covering both the old and new Institute.

Subitem 22(3) provides for the Director to provide any reports (including financial statements or otherwise) relating to the old Institute required under law for a period where the reporting period ends before the commencement period, and, where the report has not been provided by the commencement time, the Director must provide the report. For example, where the old Institute was required to produce an annual report covering the period 1 July 2005 to 30 June 2006 and the Act commences on 1 July 2006, the Director will be required and enabled to provide that report relating to the old Institute.

Item 23—Director

This item allows for the person holding office as the Director immediately before the commencement time to become the Director after the commencement time, on the same terms and conditions as applied immediately before the commencement time, without the need for the Minister to make a new appointment. **Paragraph 23(2)(a)** provides that this item does not have the effect of extending the term of the Director. This will not prevent the termination provisions from applying to the Director in the usual manner.

Division 4—Miscellaneous

Item 24—Appropriation of money

This item clarifies that, for the purposes of an Appropriation Act, references to the old Institute are taken, after commencement, to be read as references to the new Institute. This is to ensure that the Institute has ongoing access to appropriated funds.

Subitem 24(2) relates to circumstances where, at the commencement time, money (cash and cash equivalents) of the old Institute is transferred to the Consolidated Revenue Fund as part of **item 13** in this Schedule. In such instances, this item provides the required appropriation for the Institute to access such money after the commencement time.

Item 25—Exemption from stamp duty and other State or Territory taxes

This item ensures that the operation of the transitional provisions in this Part, including the transfer of assets and liabilities, do not result in a liability to pay State or Territory stamp duty or tax.

Item 26—Constitutional safety net – acquisition of property

It is not expected that any provisions in this Part will result in an acquisition of property within the meaning of that expression in the Constitution. However, if it does, **item 26** sets out the standard Constitutional safety net provision.

Item 27—Certificates taken to be authentic

To avoid ambiguity, certificates, including those relating to matters covered in **items 15 and 16** of this Part, which may be made by the Minister, are to be taken as authentic.

Item 28—Delegation by Minister

Subitem 28(1) provides that the Minister may delegate all or any of his or her powers and functions under this Part to the Secretary of the Department of Families, Community Services and Indigenous Affairs and to the Director. The delegation must be in writing.

Subitem 28(2) provides that, in exercising or performing powers or functions under a delegation under **subitem 29(1)**, the delegate must comply with any directions of the Minister.

Subitem 28(3) states that a power or function delegated to the Director under **subitem 28(1)** must not be sub-delegated under subsection 114LC(1) of the new law.

Item 29—Regulations

Subitem 29(1) provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Part.

Subitem 29(2) clarifies that, in particular, regulations may be made prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by this Schedule.

Schedule 9 – FTB Part B quarantining

Summary

This Schedule makes minor changes to the income test rules for FTB Part B where a secondary earner returns to work for the first time after the birth of a child. The amendments ensure that certain technical aspects are consistent with intended policy outcomes.

Background

FTB Part B is intended to assist families with one main income. In the case of couples, Part B is calculated on the basis of the secondary (or lower) income earner's adjusted taxable income. Part 4 of Schedule 1 to the Family Assistance Act sets out the rate calculation process for FTB Part B, including the income testing arrangements.

From 1 July 2005, amendments were made to modify the way in which the FTB Part B income testing arrangements operate where the secondary earner in a couple commences, or returns to, paid work for the first time after the birth of a child. Instead of applying the usual annual income test to the secondary earner's income for the particular income year (which can result in a debt on reconciliation), the legislation enables the secondary earner to receive the maximum rate of FTB Part B for the period in the particular income year when the secondary income earner was not working or receiving passive employment income (for example, paid leave). This period is colloquially referred to as the FTB Part B quarantine period.

A number of uncommon scenarios have since been identified where the quarantine provisions do not operate as intended. These scenarios relate to customers who claim FTB during the second income year after the entitlement year (the 'second lodgement year'), customers with multiple partners, and customers where the person who is the secondary earner swaps in a couple. Amendments are made addressing these scenarios in a manner consistent with intended policy outcomes and as explained in further detail below.

Explanation of the changes

Claims during second lodgement year

There is a time limit to notify a return to work to be eligible for the FTB Part B quarantine, which is the end of the first lodgment year. The definition of 'returns to paid work' in subsection 3B(3) of the Family Assistance Act includes a requirement to notify of a return to paid work during a particular income year at some time in the following income year.

A similar time limit is also reflected in the conditions that need to be satisfied in order for the quarantine to apply. The relevant condition is in subclause 29A(7) of Schedule 1 to the Family Assistance Act.

This time limit is appropriate for customers who receive their FTB in fortnightly instalments as it is the same time limit that applies for notifying other changes of circumstances to receive full arrears of FTB (see, for example, the date of effect rule in subsection 31(2) of the Family Assistance Administration Act).

However, as a claim for FTB for a past period can be made up to 2 years after the relevant income year, this time frame is incompatible with a past period claim made during the second lodgment year. The FTB Part B quarantining measure is intended to apply to such claimants if they advise of the secondary earner's return to work in the past period claim form. **Items 1, 2, 3, 6 and 7** make the amendments required to address this issue.

Item 1 amends the definition of 'returns to paid work' in subsection 3B(3) of the Family Assistance Act by reworking paragraph (c) of the definition. The existing notification requirement would continue to apply under new subparagraph (c)(i) except in the situation where a claim is made for FTB for a past period that occurs in the year in which the secondary earner returned to work and is made during the second income year following that year. In the latter situation, new subsection 3B(5), as inserted by **item 3**, would apply (new subparagraph (c)(ii) refers). Under new subsection 3B(5), the notification requirement would be satisfied if the Secretary is notified of the return to work in the claim form.

Item 2 makes a technical, consequential amendment to subsection 3B(4).

Clause 29A of Schedule 1 to the Family Assistance Act sets out the conditions that need to be satisfied for an individual's rate of FTB Part B to be worked out under the quarantining provisions.

Item 6 makes the existing notification obligation in subclause 29A(7) subject to new subclause 29A(8), as inserted by **item 7**. New subclause 29A(8) applies where a claim is made for FTB for a past period that occurs in the year in which the secondary earner returned to work and is made during the second income year following that year. The notification requirement in this situation is satisfied by notification of the return to work in the past period claim.

Item 4 makes a technical, consequential amendment to paragraph 29A(1)(b) of Schedule 1 that acknowledges the new condition in subclause 29A(8).

Multiple partners

Subject to an exception for shared care of a child by separated parents (set out in subclause 29B(4) of Schedule 1 to the Family Assistance Act), the intention is that only one individual's return to work in relation to a child can attract the FTB Part B quarantine.

However, the legislation does not work in this way where a customer had two different partners during the period before s/he returned to work, and the customer was the secondary earner with respect to one partner and not the other, and the partner who was the secondary earner also returns to work in that same income year. In this situation, both the customer as secondary earner and the second partner as secondary earner could meet the relevant conditions set out in clauses 29A, 29B and 29C of Schedule 1 to the Family Assistance Act. The result is that the customer could benefit from the quarantine twice in the same income year in respect of the one child.

In this situation, it is only one individual's return to work that should attract the benefits of the FTB Part B quarantine. The relevant return to work should be the return to work of the individual for whom the potential FTB Part B quarantine period begins first.

New subclause 29A(4B), as inserted by **item 5**, achieves this effect. New subclause 29A(4B) applies where more than one secondary earner returns to work for the first time in respect of the one child in the same income year. The provision makes it clear that the quarantining provisions cannot apply in relation to a secondary earner whose quarantine period (the period mentioned in paragraph 29C(1)(a)) does not begin first.

An example of the operation of the new rule in subclause 29A(4B) is as follows.

Mary receives FTB for her one child and was partnered to Bob during July-October 2005, single in November-December 2005, and partnered to Greg during January-June 2006. Mary was the secondary earner in July-October 2005, and returned to work for the first time on 1 May 2006. Greg was the secondary earner in January-June 2006, and returned to work for the first time on 1 February 2006.

The potential FTB Part B quarantine period for Mary's return to work is 1 July 2005 to 31 October 2005. The potential FTB Part B quarantine period for Greg's return to work is 1 January 2006 to 31 January 2006. Therefore, Mary's return to work will attract the FTB Part B quarantine period for 1 July 2005 to 31 October 2005. No quarantine will apply for Greg's return to work.

Secondary earner swaps in a couple

A related issue is where the secondary earner swaps in a couple in different years, but the FTB recipient remains the same. For example, a customer is the secondary earner and returns to work for the first time in one income year, and the customer's partner is the secondary earner in a subsequent income year and the partner returns to work for the first time in that income year. The intention is that the partner's return to work does not also attract the FTB Part B quarantine for the same child. The existing legislation does not achieve this effect. New subclause 29A(4A), as inserted by **item 5**, addresses this issue.

New subclause 29A(4A) applies where more than one secondary earner returns to work for the first time in respect of the same child but in different income years. In this situation, the quarantine provisions cannot apply in respect of a return to work that is not the earliest return to work.

These amendments are taken to have commenced on 1 July 2005 (the table in clause 2 of this Bill refers) and apply in relation to the 2005-2006 income year and later income years (**subitem 8(1)** refers). This is consistent with the commencement and application dates for the broader changes to the FTB Part B income test made by Schedule 1 to the *Family and Community Services Legislation Amendment (Family Assistance and Related Measures) Act 2005*.

While these changes are technically retrospective, the practical benefit of the FTB Part B quarantining measure (incorporating the amendments made by this Schedule) first applies to families after July 2006 for the 2005-06 year. This is because the measure is applied after the end of the relevant income year when the FTB reconciliation conditions are satisfied and not during the financial year. Therefore, the changes are not, in practice, retrospective.

Under subclause 29A(4) of Schedule 1 to the Family Assistance Act, the quarantine provisions apply in respect of the secondary earner's first return to work after the birth of a child, etc. If the secondary earner's first return to work was before 1 July 2005, a subsequent return to work on or after 1 July 2005 will not meet the conditions for the quarantine. It was never intended that, where the secondary earner swaps in a couple in different years, the couple should benefit from the quarantine twice, but this is technically what may result under the present legislation. For example, a customer is the secondary earner in 2003-04 and returns to work for the first time after the birth of a child on 1 January 2004, and the customer's partner is the secondary earner in 2005-06 and the partner returns to work for the first time after the birth of the same child on 1 November 2005. The later return to work on 1 November 2005 by the partner was never intended to meet the conditions for the quarantine, because the customer has already had a first return to work after the birth of the child.

Subitem 8(2) provides that new subclause 29(4A) applies in respect of a return to work, whether that occurs before, on or after 1 July 2005. This ensures that the intention described above is met by taking into account any return to work after the birth of a child, etc. While this is strictly a retrospective amendment, it is merely to correct what is clearly an unintended anomaly. In any event, the quarantine being refined here will not start to apply until 1 July 2006.

Schedule 10 – Technical amendments relating to income estimates

Summary

This Schedule makes some technical amendments to income estimates provisions in the Family Assistance Administration Act. The changes clarify that there may be situations where a customer's rate of FTB or the amount of a customer's CCB by fee reduction will need be worked out on the basis of an indexed estimate or indexed actual income for the customer (default estimates) and a reasonable estimate of the partner's adjusted taxable income (ATI) provided by the customer. These amendments commence on 1 July 2006.

Background

From 1 July 2006, a new system of estimating income, incorporating automatic updating of estimates, commences. Under this new system, the Secretary will have the capacity to use default estimates to work out a customer's fortnightly rate of FTB or amount of CCB by fee reduction where the customer has not provided a reasonable estimate of ATI for the current income year.

There are two types of default estimates, an indexed estimate and indexed actual income.

At the beginning of each income year (commencing 1 July 2006), customers who are entitled to be paid FTB by instalment and whose rate is worked out on the basis of an estimate of ATI (as provided by the customer or a default estimate) will have their rate of FTB worked out on the basis of an indexed estimate unless they provide a reasonable estimate of ATI for the relevant income year. For members of a couple, this will ordinarily mean a rate of FTB worked out on the basis of an indexed estimate of ATI for both the customer and partner, unless a reasonable estimate of ATI is provided by the customer for each. Consistent with this, the legislation enables the Secretary to determine an individual's eligibility for, or rate of, FTB on the basis of an indexed estimate and, if the individual is a member of a couple, on the basis of an indexed estimate for the customer, combined with the most recent default estimate for the partner. The combination of an indexed estimate for the customer and a reasonable estimate provided by the customer for the partner is not contemplated in the existing legislation.

Some scenarios have been identified where such a combination may be relevant, albeit for a short period of time. Circumstances can arise where a customer is issued a notice advising an indexed estimate for the customer and, if the customer is partnered, the partner, together with a start date (generally 1 July of the relevant income year) from which the indexed estimate or estimates will be used to determine rate, but before the commencement date arrives, the customer partners or re-partners.

In these circumstances, there will be an indexed estimate for the customer with a specified start date but there will only be a customer provided estimate of ATI for the new partner. While the customer could be issued with another notice advising an indexed estimate for the new partner (assuming all the relevant statutory conditions are met), there may be a period where the customer's rate of FTB can only be determined on the basis of an indexed estimate for the customer and estimate of ATI provided by the customer for the partner.

Amendments are made by this Schedule to address this scenario by acknowledging the relevance of such a combination for the purposes of working out an individual's rate of FTB.

The same issue exists for CCB and is addressed in a similar way.

The other type of default estimate is indexed actual income. Where a customer is being paid FTB on the basis of a default estimate and actual ATI for the customer (or partner) becomes known, a further automatic uplift will be applicable provided specified statutory conditions are met.

Explanation of the changes

Section 20C of the Family Assistance Administration Act applies to members of a couple and ensures that an amount of ATI used for the purposes of calculating a customer's FTB Part A rate can include a combination of the most recent indexed estimates and/or indexed actual income as appropriate and that the appropriate lower amount is used for the purposes of calculating a rate of FTB Part B. Under existing section 20C, the potential relevance of a reasonable estimate of a partner's ATI as provided by the customer is not contemplated – for reasons set out above, it should be.

Item 1 reworks subsection 20C(3) to allow a customer's eligibility for, or rate of, FTB Part A to be determined on the basis of the customer's indexed estimate or indexed actual income and either the most recent indexed estimate or indexed actual income for the partner if there is one or, if not, a reasonable estimate of the partner's ATI provided by the customer.

Item 3 makes comparable amendments to subsection 55AC(3) of the Family Assistance Administration Act, which applies in relation to payment of CCB by fee reduction.

Item 2 reworks paragraph 20C(5)(b) to cover off the possibility of a customer's FTB Part B rate being based on the partner's most recent indexed estimate or indexed actual income if there is one or, if not, a reasonable estimate of the partner's ATI provided by the customer. An amount for the partner's ATI (indexed estimate, indexed actual income or reasonable estimate provided by the customer) would only be relevant for the purposes of FTB Part B if it is less than the customer's indexed estimate or indexed actual income.

Schedule 11 – Definition

Summary

The definition of ‘income tax refund’ is amended to include refundable tax offsets, thus reflecting the intended policy and existing administration.

Background

Debts can be recovered under the Family Assistance Administration Act using one or more of the methods set out in section 82, including the application of an income tax refund owing to the person or another person (with that other person’s consent). Sections 87 and 93 of the Family Assistance Administration Act are the relevant recovery provisions.

Subsection 3(1) of the Family Assistance Administration Act defines an ‘income tax refund’ as an amount payable to a person in respect of an overpayment of:

- income tax imposed by the *Income Tax Act 1986*;
- Medicare levy payable in accordance with Part VIIB of the *Income Tax Assessment Act 1936*; or
- an amount payable by the person by an assessment made under Part IV of the *Income Tax Assessment Act 1936* because of specified enactments that provide for higher education funding.

The existing definition does not include income tax refunds that arise through an excess of refundable tax offsets. The exclusion of refundable tax offsets from the definition is unintended, and the exclusion arises for technical reasons due to the way in which the definition was drafted.

There are three types of refundable tax offsets. These are the private health insurance rebate, the franking tax offset (which relates to dividends paid to shareholders by Australian resident companies), and the baby bonus.

The original intention, which is reflected in current debt recovery practices, was that the definition of income tax refund also includes tax refunds that arise from refundable tax offsets. This Schedule makes the relevant amendment.

Explanation of the changes

Item 1 reworks the definition of ‘income tax refund’ in subsection 3(1) of the Family Assistance Administration Act so that it includes a refund of a tax offset covered under the refundable tax offset rules in Division 67 of the *Income Tax Assessment Act 1997*. The substance of the remaining elements of the definition has not been changed.

The first year that tax refunds were applied to FTB debts was on reconciliation for the 2001-02 income year, that is, from 1 July 2002. The commencement date of 1 July 2002 for this amendment (as set out in clause 2 of this Bill) reflects this.

For FTB debts, the amendment would apply to any FTB debts whenever determined (as outstanding previous year debts can be recovered from newly determined tax refunds) and to income tax refunds determined on or after 1 July 2002 (irrespective of the income year to which the refund relates). The relevant application provision is in **subitem 2(1)** of this Schedule. The provision supports current debt recovery practices.

For CCB debts, the amendment would apply to CCB debts determined on or after 1 July 2006 and to income tax refunds determined on or after 1 July 2007 (irrespective of the income year to which the refund relates). The differing approach to CCB debts is because the capacity to recover CCB debts from tax refunds becomes a recovery option from 1 July 2006, by virtue of the amendments made by Schedule 4 of the *Family Assistance, Social Security and Veterans' Affairs Legislation Amendment (2005 Budget and Other Measures) Act 2006*. The relevant application provision is in **subitem 2(2)** of this Schedule.

Schedule 12 – Shared parental responsibility

Summary

Technical amendments are made to provisions in the Family Assistance Act and the *Child Support (Assessment) Act 1989* (the CSA Act) as a consequence of the recent family law reforms relating to shared parental responsibility.

Background

As part of the family law reforms contained in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the amending Act), certain terms used in Family Law Act such as ‘contact’ are being changed, and defined terms in Part VII of the Family Law Act are being moved to subsection 4(1) of the Family Law Act, which is the general definitions section.

There remains a reference to ‘contact’ in the Family Assistance Act that is being replaced by the concept of ‘spending time’.

Some of the amendments to the Family Assistance Act and the CSA Act in the amending Act have been misdescribed. The relevant amendments are remade made by this Schedule.

Explanation of the changes

Item 1 amends the definition of ‘family law order’ in subsection 3(1) of the Family Assistance Act by replacing the existing reference to ‘section 60D’ of the Family Law Act with a reference to ‘section 4’. This amendment remakes an amendment that was misdescribed in the amending Act. The amendment is consistent with changes made in the amending Act to relocate the definition of ‘family law order’ in section 60D of the Family Law Act (which contained definitions for Part VII about children) to the general definition provision in subsection 4(1) of the Family Law Act.

Item 2 makes a technical amendment to paragraph 22(3)(c) of the Family Assistance Act by replacing the existing reference to ‘have contact’ with a reference to ‘spend time’. This amendment reflects the changes in terminology to remove the reference to ‘contact’ in the Family Law Act, made by the amending Act.

Item 3 amends the definition of ‘court order’ in subsection 8A(7) of the CSA Act by replacing the existing reference to ‘section 60D’ of the Family Law Act with a reference to ‘section 4’. This amendment remakes an amendment that was misdescribed in the amending Act. The amendment is consistent with changes made in the amending Act to relocate the definition of ‘court order’ in section 60D of the Family Law Act (which contained definitions for Part VII about children) to the general definition provision in subsection 4(1) of the Family Law Act.

The commencement of these amendments is linked, by clause 2 of this Bill, to the commencement of similar amendments in the amending Act. While this is retrospective, the amendments are technical only and will not adversely affect customers.

Schedule 13 – Other amendments

Items 1 to 4 make minor technical amendments to subsection 19B(1) of the Social Security Act, subparagraphs 212(1)(d)(iii) and (iv) and paragraph 212(2)(d) of the Social Security Administration Act to take into account previously repealed provisions. These amendments are a result of amendments made by *A New Tax System (Family Assistance) (Consequential and Related Measures) Act (No. 2) (1999)* Act No. 83 of 1999, and commence on Royal Assent.