**Senate Standing Committee**

**for the**

**Scrutiny of Bills**

**Alert Digest No. 7 of 2009**

**17 June 2009**

**ISSN 1329-668X**

**Senate Standing Committee for the Scrutiny of Bills**

**Members of the Committee**

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator D Cameron

Senator J Collins

Senator R Siewert

Senator the Hon J Troeth

**Terms of Reference**

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

 (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

**TABLE OF CONTENTS**

|  |  |
| --- | --- |
| **Commentary on bills** |  |
| * Family Assistance Amendment (Further 2008 Budget Measures) Bill 2009
 | 5 |
| Private Health Insurance Legislation Amendment Bill 2009 | 11 |
| **Commentary on amendments to bills** | 12 |
| **Scrutiny of standing appropriations** | 14 |

Family Assistance Amendment (Further 2008 Budget Measures) Bill 2009

Introduced into the House of Representatives on 3 June 2009

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) to implement certain 2008 Budget measures.

Schedule 1 introduces mandatory continuous adjustment to allow for the reduction of a claimant’s rate of family tax benefit where there is a revised estimate (by the person or the Secretary) to assist in preventing overpayments following reconciliation.

Schedule 2 ceases fortnightly family tax benefit payments, and payment for a past period in the same income year in which a claim is made, for claimants and/or partners who fail to lodge income tax returns.

Schedule 3 makes minor amendments to the tax file number provisions in the family assistance law to ensure accurate information-sharing between the Australian Taxation Office and Centrelink for the purposes of reconciliation and debt offsetting.

The bill also contains application and transitional provisions.

Delayed commencement

Clause 2

Clause 2 of the bill contains a table of commencement information. Items 4 and 6 of the table provide that items 4, 5, 6 and 8 of Schedule 2 commence on 1 July 2010. Schedule 2 amends the Family Assistance Administration Actby providing for the non-payment of family tax benefit for the non-lodgement of tax returns. There is no explanation in the explanatory memorandum as to why items 4, 5, 6 and 8 of Schedule 2 commence on 1 July 2010. Where there is a delay in commencement of legislation longer than six months, the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with paragraph 19 of Drafting Direction No 1.3. The Committee **seeks the Minister’s advice** on the reason for the delayed commencement of these provisions.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

Retrospective application

Schedule 1, item 2

Proposed new section 31E of the Family Assistance Administration Act, to be inserted by item 1 of Schedule 1, provides for the continuous adjustment of the daily rate of family tax benefit payable by instalment. A claimant must have both a determination in force, and a variation or a revised estimate that does not result in a variation of a determination, in order to be paid by instalment. Proposed new subparagraph 31E(1)(a) provides that a determination is in force in an income year in which a claimant is entitled to be paid family tax benefit by instalment.

Item 2 of Schedule 1 inserts the application provisions for this provision with subitem 2(1) providing that variations made under new subsections 31A(1), 31B(1), 31C(1) or 31D(1) of the Family Assistance Administration Act apply ‘…regardless of whether the determination referred to in paragraph 31E(1)(a)…was made before, on or after that commencement’. Similarly, subitem 2(2) provides that new subsections 31E(1)(b)(v) and (vi) apply to revised estimates of income ‘…regardless of whether the determination referred to in paragraph 31E(1)(a) was made before, on or after that commencement’.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The explanatory memorandum does not explain why it is appropriate for these provisions to have retrospective operation. Therefore, the Committee **seeks the Minister’s advice** on the reason for the retrospective application of the provisions.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

Wide discretion

Schedule 2, item 3, new sections 32AB and 32AC

Proposed new Subdivision CA of the Family Assistance Administration Act, to be inserted by item 3 of Schedule 2, deals with non-payment of family tax benefit for non-lodgement of tax returns. A claimant’s family tax benefit cannot be paid during a prohibited period, and proposed new section 32AB prescribes prohibited periods for claimants. However, proposed new subsection 32AB(7) gives the Secretary the discretion to determine that a prohibited period ends if he or she is satisfied that there are ‘special circumstances’ that justify the Secretary doing so. The explanatory memorandum (at page 12) explains that examples of special circumstances ‘could include domestic violence, severe illness or severe financial hardship’.

Proposed new subsection 32AC(9) also allows the Secretary to determine that the prohibited period for a relevant partner ends in ‘special circumstances’. While it is possible that the special circumstances are similar to those mentioned above, the explanatory memorandum does not give any specific examples of what might constitute special circumstances. Similarly, in proposed new subsections 32AB(9) and 32AC(11), the Secretary may allow a grace period in ‘special circumstances’ but the explanatory memorandum gives no examples of what might constitute special circumstances. It appears possible for a claimant to seek both internal and merits review of grace period and prohibited period decisions under existing Part 5 of the Family Assistance Administration Act. However, this is also not mentioned in the explanatory memorandum with specific reference to the proposed new provisions contained in item 3 of Schedule 2.

Current subsection 221(1) of the Family Assistance Administration Act provides that the Secretary may delegate to an officer all or any of the powers of the Secretary under the family assistance law. ‘Officer’ is defined in section 3 to include an employee of the agency and any other person engaged by the agency under contract or otherwise. This gives the Secretary the power to delegate to a broad range of officers the discretion to decide whether there are special circumstances to allow the end of a prohibited period or a grace period. The Committee **seeks the Minister’s advice** on whether there could be more precise definition in the bill in relation to who will be exercising these discretions, as well as the particular circumstances in which it is anticipated that the discretions will be exercised.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee’s terms of reference.*

Retrospective application

Schedule 2, item 7

Item 3 of Schedule 2 inserts a new Subdivision CA into the Family Assistance Administration Actto deal with non-payment of family tax benefit for non-lodgement of tax returns. Item 7 of Schedule 2 provides for the application of the amendment made by item 3 which commences on 1 July 2009. Subitem 7(1) provides that the amendment made by item 3 ‘applies in relation to a variation made under subsection 28(2) of the [Family Assistance Administration Act]before, on or after the commencement of that item (regardless of whether the determination being varied was made before, on or after that commencement)’. The explanatory memorandum does not provide any explanation of the reason for this retrospective commencement. Therefore, the Committee **seeks the Minister’s advice** on the reason for the retrospective application of the provision.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

Retrospective application

Schedule 2, item 8

Proposed new section 32AE, to be inserted by item 6 of Schedule 2, relates to non-entitlement to payment of family tax benefit after three variations under subsection 28(2). Item 8 of Schedule 2 provides for the application of the amendment made by item 6 which commences on 1 July 2010. Subitem 8(1) provides that the amendment made by item 6 ‘applies in relation to a variation made under subsection 28(2) of the Family Assistance Administration Actbefore, on or after the commencement of that item (regardless of whether the determination being varied was made before, on or after that commencement)’. The explanatory memorandum does not provide any explanation of the reason for this retrospective commencement. Therefore, the Committee **seeks the Minister’s advice** on the reason for the retrospective application of the provision.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

Retrospective application

Schedule 3, item 3

Section 154A of the Family Assistance Administration Actrelates to the use of tax file numbers that have been provided to the Secretary under a provision of the family assistance law. Under section 154A, the Secretary may provide an individual’s tax file number to the Commissioner of Taxation for the purpose of being informed of the individual’s taxable income for a particular income year. In return, the Commissioner may provide the Secretary with particulars of the individual’s taxable income, which is a component of adjusted taxable income under the *A New Tax System (Family Assistance) Act 1999*.

Item 1 of Schedule 3 amends section 154A to extend the period of time for which the Commissioner of Taxation may use an individual’s tax file number record, provided by the Secretary for a specified income year, to provide the Secretary with the individual’s income details for that year. Item 1 also includes amendments which specify that the Commissioner may provide the Secretary with other components of the individual’s adjusted taxable income for the year (which are relevant for reconciliation purposes), in addition to taxable income.

Item 3 of Schedule 3 provides for the application of section 154A (as amended by item 1) to ‘a record of a tax file number provided under subsection 154A(2) of [the Family Assistance Administration Act]: (a) during the period starting on 1 July 2006 and ending immediately before the commencement of this Schedule (the ***pre-commencement period***)…’ The explanatory memorandum does not provide any explanation of the reason for this retrospective commencement. Therefore, the Committee **seeks the Minister’s advice** on the reason for the retrospective application of the provision.

*Pending the Minister’s advice, the Committee draws Senators’ attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

Private Health Insurance Legislation Amendment Bill 2009

Introduced into the House of Representatives on 3 June 2009

Portfolio: Health and Ageing

Background

This bill amends the *Private Health Insurance Act 2007* to allow insurers to permanently offer extended family policies that cover ‘dependent child non-students’.

The bill also contains consequential amendments to the *Private Health Insurance Act 2007*, consistent with the introduction of the Private Health Insurance (National Joint Replacement Register Levy) Bill 2009 (which imposes a levy upon sponsors of joint replacement prostheses in order to recover the costs of maintaining the National Joint Replacement Register).

The bill also amends the *Age Discrimination Act 2004* to provide an exemption from any unlawful age discrimination under that Act which may arise from allowing a higher premium to be set for policies that include ‘dependent child non-students’.

*The Committee has no comment on this bill.*

**COMMENTARY ON AMENDMENTS TO BILLS**

Carbon Pollution Reduction Scheme Bill 2009

On 4 June 2009, the House of Representatives agreed to 144 government amendments to the bill, none of which fall within the Committee’s terms of reference.

Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009

On 4 June 2009, the House of Representatives agreed to two amendments to the bill, neither of which falls within the Committee’s terms of reference.

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

On 2 June 2009, the House of Representatives agreed to 110 government amendments to the bill. On 17 June 2009, the Senate also agreed to these government amendments (as well as a number of other amendments to be considered in the Committee’s next Alert Digest). Amendments Nos. 22 and 34 fall within the Committee’s terms of reference because they result in the application of legislation prior to its commencement.

**Application prior to commencement**

**Amendments Nos. 22 and 34**

Amendment No. 22 amends item 4 of Schedule 6 of the bill by omitting ‘F[air]W[ork] (safety net provisions) commencement day’ and substituting ‘W[orkplace]R[elations] Act repeal day’. The supplementary explanatory memorandum states (at paragraph 36) that ‘(t)his means that FWA [the Fair Work Authority] can receive an application for the making of a modern enterprise award and commence the process of considering the application before the modern award system commences’. The consequence is that FWA will apply a law before it has commenced.

Amendment No. 34 inserts new item 16A into the bill. New item 16A provides that ‘(f)or the purposes of making a modern enterprise award before the F[air]W[ork] (safety net provisions) commencement day, the following provisions of the F[air]W[ork] Act [2009] apply as if they had already commenced’. The relevant provisions of the Fair Work Act deal with the National Employment Standards, the modern awards objective, terms of modern awards, the minimum wages objective, and any provisions that are necessary for the effectual operation of any of those provisions.

While the Committee recognises that these amendments have already been agreed to by the Senate, it nevertheless **draws to the attention of Senators** the existence of these provisions.

*The Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.*

**SCRUTINY OF STANDING APPROPRIATIONS**

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators’ attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

1. inappropriately delegate legislative powers; or
2. insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee’s approach to scrutiny of standing appropriations are set out in the Committee’s *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

**Bills introduced with standing appropriation clauses – 42nd Parliament**

|  |  |
| --- | --- |
| **\*Indicates passed by Senate** | **Bills and Clauses** |
|  | **Australian Business Investment Partnership Bill 2009** — clauses 13 and 14 |
|  | **Car Dealership Financing Guarantee Appropriation Bill** — clause 5 |
|  | **Carbon Pollution Reduction Scheme Bill 2009** — subclauses 103B(5), 139(4) and 291(4) |
| **\*** | **COAG Reform Fund Bill 2008** — clause 5 (CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997* |
| **\*** | **Commonwealth Securities and Investment Legislation Amendment Bill 2008** — Schedule 1, item 10, subsection 5BA(7) |
| **\*** | **Defence Home Ownership Assistance Scheme Bill 2008** —Clause 84 |
| **\*** | **Dental Benefits Bill 2008** —clause 65 |
| **\*** | **Education Legislation Amendment Bill 2008** — Schedule 1, item 6, section 14B |
| **\*** | **Fair Work Bill 2008** —Subclause 559(4) |
| **\*** | **Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008** —Schedule 1, item 29 |
| **\*** | **Federal Financial Relations Bill 2009** —clause 22 |
| **\*** | **Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009** — Schedule 4, subitem 2(3) |
| **\*** | **Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008** —Schedule 1, item 49, section 54A, and Schedule 2, item 23, section 70E (CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*) |
| **\*** | **Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008** —Schedule 1, item 79, section 94B (CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*) |
| **\*** | **Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008** —Schedule 5, item 141, section 65A |
|  | **Guarantee of State and Territory Borrowing Appropriation Bill 2009** —clause 5 |
| **\*** | **Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008** —clause 5 |
|  | **International Monetary Agreements Amendment (Financial Assistance) Bill 2009** —Schedule 1, item 4, subsection 8CA(4)  |
| **\*** | **Nation-building Funds Bill 2008 —clauses 13, 61, 68, 75, 82, 132, 181, 188, 215 and 255** —(CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997)* |
| **\*** | **Protection of the Sea Legislation Amendment Bill 2008** —Schedule 1, item 20, section 46N |
|  | **Safe Work Australia Bill 2008** —clause 64 (CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*) |
|  | **Safe Work Australia Bill 2008 [No. 2]** —clause 64 (CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*) |
| **\*** | **Schools Assistance Bill 2008** —clause 167 |
|  | **Uranium Royalty (Northern Territory) Bill 2008** – clause 18 |
| **\*** | **Veterans’ Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008** — Schedule 1, item 1 |
| **\*** | **Wheat Export Marketing Bill 2008** —clause 58 (CRF appropriated by virtue of section 21 of the *Financial Management and Accountability Act 1997*) |

**Other relevant appropriation clauses**

|  |  |
| --- | --- |
| **\*Indicates passed by Senate** | **Bills and Clauses** |
| **\*** | **Household Stimulus Package Bill 2009** —Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year). |

|  |  |
| --- | --- |
| **\*** | **Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008** —Schedule 4, item 4: special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year). |
| **\*** | **Social Security and Veterans’ Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008** —Schedule 2, items 1 and 2, and Schedule 4, item 1: special appropriation clauses – for a finite period of time (ie. for circumstances arising in a particular financial year). |