SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2009

12 August 2009

SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

EIGHTH REPORT

OF

2009

12 August 2009

ISSN 0729-6258

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.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT OF 2009

The Committee presents its Eighth Report of 2009 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills and Acts which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 *****

Fair Work (State Referral and Consequential and Other Amendments) Act 2009

Family Assistance Amendment (Further 2008 Budget Measures) Act 2009

Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009

Infrastructure Australia Amendment (National Broadband Network and Other Projects) Bill 2009

Social Security and Family Assistance Legislation Amendment (2009 Budget Measures) Act 2009

Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Act 2009

* Although this bill has not yet been introduced in the Senate, the Committee may report on the proceedings in relation to this bill, under Standing Order 24(9).

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2009*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 7 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2009

Introduced into the House of Representatives on 17 June 2009
Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Building and Construction Improvement Act 2005* to provide a framework for cooperative and productive workplace relations in the building and construction industry.

In particular, the bill:

- abolishes the Office of the Australian Building and Construction Commissioner;
- creates a new agency, the Office of the Fair Work Building Industry Inspectorate (Building Inspectorate), to ensure compliance with the general workplace relations laws (as prescribed in the *Fair Work Act 2009*) by all building industry participants;
- removes existing building industry specific laws that provide for higher penalties for breaches of industrial law and broader circumstances under which industrial action attracts penalties;

- allows the Director of the Building Inspectorate to compulsorily obtain information (including through requiring a person to attend an examination and answer questions) or documents from a person whom the Director believes has information or documents relevant to an investigation;

- introduces certain safeguards in relation to the use of the power to compulsorily obtain information or documents;

- creates an office, the Independent Assessor, who may, on application from stakeholders, make a determination that the coercive interrogation powers will not apply to a particular project; and
- retains the provisions that establish the Office of the Federal Safety Commissioner and its related Occupational Health and Safety Accreditation Scheme.

The bill also contains consequential and transitional provisions.

Independence of Administrative Appeals Tribunal
Schedule 1, item 52, new subsection 44(1)

Proposed new subsection 15(1), to be inserted by item 49 of Schedule 1, provides that the Building Inspectorate will be headed by a Director appointed by the Minister. The Director's functions are set out in proposed new section 10 and include inquiring into, and investigating, 'any act or practice by a building industry participant that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code' (proposed new paragraph 10(c)).

Item 52 of Schedule 1 substitutes a new Part 1 of Chapter 7 of the Building and Construction Improvement Act relating to powers to obtain information. Division 3 of the new Part 1 provides for examination notices that regulate the Director's conduct of certain examinations.

Under proposed new section 45, the Director may apply to a presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice. Proposed new subsection 44(1) provides that '(t)he Minister may, by writing, nominate an AAT presidential member to issue examination notices under this Division'. The explanatory memorandum and the second reading speech provide no explanation for this variation from the usual practice of the President of the AAT constituting members of the tribunal to hear applications to the tribunal.

However, the second reading speech cites the report by the Hon Justice Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (March 2009) (Wilcox Report). The Wilcox Report refers (at paragraph 6.9) to the Ministerial nomination of members of the AAT to determine whether to issue telecommunications interceptions warrants that allow specific investigative powers. Justice Wilcox also lists the President of the AAT as a person he consulted in preparing his report.

Nevertheless, the Committee notes that the *Administrative Appeals Tribunal Amendment Act 2005* repealed a number of special constitution provisions in various Acts requiring the tribunal to be constituted in a particular way, which enhanced the tribunal's independence. The Committee **seeks the Minister's comments** on the reasons for the departure in the bill from the usual practice of allowing the President of the AAT to allocate the work of the tribunal.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee has sought my comments on the reasons for the departure in the Bill from the usual practice of allowing the President of the Administrative Appeals Tribunal (AAT) to allocate the work of the tribunal.

As the Committee has noted, new section 44 of the Bill allows the Minister to nominate AAT presidential members to issue examination notices under new section 47. AAT presidential members are nominated and perform the functions conferred by the Bill in an individual capacity. Consequently, an application made by the Director under subsection 45(1) to an AAT presidential member for an examination notice is not an application to the tribunal, but to the member in his or her personal capacity. As there are no functions or powers conferred on the AAT as a whole there is no work for the President of the AAT to allocate under these provisions.

The nomination process adopted in the Bill is a similar process to that contained in the *Telecommunications (Interception and Access) Act 1979*. Under that Act the Minister similarly nominates AAT members in an individual capacity to issue warrants under the Act. As a matter of practice, the nomination process will also allow individual presidential members to elect to perform the role of issuing examination notices by consenting to the Minister's nomination under section 44.

I note that this process reflects the recommendations in the Wilcox Report surrounding safeguards on compulsory interrogation.

The Committee thanks the Minister for her clarification of this matter.

Drafting note
Schedule 1, item 52, new subsection 47(1)

Proposed new subsection 47(1), to be inserted by item 52 of Schedule 1, provides that a 'nominated AAT presidential member' must issue an examination notice if 'satisfied of the following' and a list of matters is provided in paragraphs (a) to (g). The word 'and' does not link the items in this list to make it clear that the member must be satisfied of all the factors. The explanatory memorandum states (at paragraph 127) that the presidential member must 'consider' certain factors which 'include' factors set out in the list. The use of the word 'consider' is erroneous and the word 'include' suggests that the list is not definitive. However, the Committee notes that the list set out in the explanatory memorandum *is* linked by the word 'and'.

Also, regrettably, this part of the explanatory memorandum does not refer to the Wilcox Report which is the origin of the list (see the Wilcox Report at paragraph 1.25). Having regard to section 15AB of the *Acts Interpretation Act 1901* – which allows reference to extrinsic material (including explanatory memoranda and reports of inquiries) when interpreting legislation – it would be helpful to include specific references to the Wilcox Report in the explanatory memorandum (where relevant) and also to use the precise language of the section.

The Committee **seeks the Minister's advice** on whether the explanatory memorandum might be amended to provide clarity in relation to the cumulative nature of the factors to be considered by a nominated AAT presidential member, and the reasons for their inclusion in the bill. The Committee also **seeks the Minister's advice** as to whether proposed new subsection 47(1) might be amended to include the word 'and' in order to link the matters the presidential member must consider in deciding whether to issue a notice.

Relevant extract from the response from the Minister

The Committee has raised a number of concerns with new subsection 47(1) which is inserted by item 52 of Schedule 1 to the Bill. The Committee has sought my advice on measures that may be taken to clarify the cumulative nature of the factors to be considered by a nominated AAT presidential member before issuing an examination notice under new subsection 47(1). The Committee also notes that the Explanatory Memorandum does not acknowledge the Wilcox Report as the origin of the factors listed in subsection 47(1) and raises concern that the memorandum's explanation of this provision is erroneous.

I do not share the Committee's view that subsection 47(1) requires amendment. Following my Department's consultation with the Office of Parliamentary Counsel (OPC), I am satisfied that the Bill's current drafting makes it clear that a nominated AAT presidential member must be satisfied of all the matters listed in subsection 47(1) before an examination notice can be issued. OPC has advised that in accordance with usual drafting practice, conjunctions such as the word 'and' suggested by the Committee are not used at the end of every paragraph in a list that is preceded with the word 'following'. In these circumstances, OPC's view is that the provision itself will make it clear whether the paragraphs in the list are cumulative or alternative. New subsection 47(1) requires the nominated AAT presidential member to be 'satisfied of the following'. This means that the paragraphs in subsection 47(1) are cumulative. A requirement that the member must be satisfied of 'any one of the following', or 'any or all of the following' would indicate that the paragraphs were alternatives.

I also highlight paragraph 130 of the Explanatory Memorandum which, although referring to subsection 47(2), clarifies the cumulative nature of the factors in subsection 47(1). Paragraph 130 states that '...the notice could only be issued on application and when the presidential member is satisfied of each of the criteria set out in paragraphs 47(1)(a)-(g) and could not be made in any other circumstances'.

The Committee has expressed concern about the explanation of new subsection 47(1) in paragraph 127 of the Explanatory Memorandum. The introductory words to this paragraph read as follows: 'This section sets out the factors that the AAT presidential member must consider when determining an application. These factors include that the presidential member must be satisfied that...'.

The Committee is concerned that the explanation that the factors 'include' those listed suggests that the list is not definitive. The word 'include' is used because the list provided does not cover all the factors that are listed in subsection 47(1). As the list is not exhaustive of the factors the AAT presidential member must be satisfied of before a notice can be issued, I consider the use of the word 'include' to be appropriate in this case.

The Committee also noted that the reference to factors that the AAT member must 'consider' is erroneous. While I agree that the word 'consider' does not reflect the precise wording of new subsection 47(1), I do not agree that its use is erroneous. The

AAT member will have to consider each of the factors listed before he or she can be satisfied of them as is required in subsection 47(1). I consider that, taken as a whole, the Explanatory Memorandum makes it clear that an AAT presidential member must be satisfied of all the factors listed in new subsection 47(1) before an examination notice can be issued.

The Committee has also sought my advice on possible amendment of the Explanatory Memorandum to include reference to the Wilcox Report as the source of the factors in new subsection 47(1). The factors in this provision are based on those suggested in the Wilcox Report. It is very clear from my Second Reading Speech that the Bill implements the Wilcox Report. As such, I do not consider there to be a need to amend the Explanatory Memorandum as suggested by the Committee, especially in light of my response to the Committee's other comments above.

The Committee thanks the Minister for this informative response and for clarifying the current drafting practice.

Strict liability
Schedule 1, item 69, new subsections 59B(5) and (6)

Proposed new subsection 59B(1), to be inserted by item 69 of Schedule 1, requires the Director to issue an identity card to a Fair Work Building Industry Inspector appointed under section 59. A person commits a strict liability offence if he/she ceases to be an inspector and does not, within 14 days of so ceasing, return the identity card to the Director or the Minister (proposed new subsections 59B(5) and (6).

The explanatory memorandum does not refer (at the relevant paragraphs 183-185) to *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. It justifies the imposition of strict liability in this instance 'because of the consequences of a person who is not an inspector misusing an identity card'. The Committee **seeks the Minister's advice** on whether the recommendations in the *Guide* were considered in the drafting of this provision and, if so, whether the explanatory memorandum could be amended to reflect such consideration.

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.

Relevant extract from the response from the Minister

The Committee has sought my advice on whether the recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the context of the strict liability offence in new subsections 59B(5) and (6) and, if so, whether the Explanatory Memorandum could be amended to reflect such consideration.

New subsections 59B(5) and (6) are modelled on subsections 702(5) and (6) of the *Fair Work Act 2009.* Those provisions create the same strict liability offence applying to Fair Work Inspectors.

I confirm that the *Guide* was considered in the drafting of the strict liability offence in new subsections 59B(5) and (6).

I trust that my responses will assist you and your Committee in finalising its consideration of the Bill.

The Committee thanks the Minister for this response.

Fair Work (State Referral and Consequential and Other Amendments) Act 2009

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2009*. The Acting Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 26 June 2009. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses and received Royal Assent on 25 June 2009, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 6 of 2009

Introduced into the House of Representatives on 27 May 2009
Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Fair Work Act 2009* (Fair Work Act) to enable the states to refer matters to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution with a view to establishing a national workplace relations system. The bill makes transitional arrangements for Victorian employees and employers who are currently covered by the *Workplace Relations Act 1996* (Workplace Relations Act) as a result of a reference of power, and who are expected to be covered by a new reference of power.

The bill also makes transitional and consequential amendments to 67 Commonwealth Acts which refer to parts of the Workplace Relations Act that will be repealed by the bill. The bill also makes more significant amendments to certain other Commonwealth legislation to provide clarity and consistency with respect to the operation of that legislation in the new federal workplace relations system established by the Fair Work Act.

The more significant of these amendments are amendments to the *Human Rights and Equal Opportunity Commission Act 1986*, the *Migration Act 1958* (Migration Act), the *Privacy Act 1988*, the *Seat of Government (Administration) Act 1910* and the *Northern Territory (Self-Government) Act 1988*.

Insufficiently defined administrative powers
Schedule 2, item 51, subitem 11(2) of new Schedule 6A

Schedule 2 contains amendments to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to ensure that it operates effectively in relation to transitional and common rules that have effect in relation to Victorian employers and employees under the Victorian reference (see explanatory memorandum at paragraph 66).

Subitem 11(2) of proposed new Schedule 6A, to be inserted by item 51 of Schedule 2, provides for a notification of the cut-off for the state reference public sector transitional award modernisation process. Fair Work Austalia (FWA) must, at least six months before the end of the prescribed period (1 July 2012), advise parties who are still covered by a state reference public sector transitional award about the time limit of 31 December 2013 for making applications for a state reference public sector modern award; as well as the fact that, if no application is made before that time, FWA will commence the modernisation process in relation to any employees or employers who are still covered by the transitional award.

Subitem 11(2) provides that FWA 'may give that advice by any means it considers appropriate'. This gives FWA a broad discretion in relation to advising people and organisations about their rights and obligations. The explanatory memorandum does not explain why FWA is required to have unlimited discretion in choosing a method of notification. The Committee therefore **seeks the Minister's advice** on the reason for granting this broad discretion to FWA.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Acting Minister

Item 51 of Schedule 2 to the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 inserts new Schedule 6A into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 to provide a mechanism for the making of State reference public sector modern awards.

Under new Schedule 6A a person covered by a State reference public sector transitional award has until the end of 31 December 2013 to apply to Fair Work Australia (FWA) for the instrument to be modernised or terminated. If no application is made FWA will commence the State reference public sector award modernisation process after 31 December 2013 in relation to that award.

To ensure that parties covered by a State reference public sector transitional award can make an informed decision about whether to apply for the making of a State reference public sector modern award, subitem 11(2) of new Schedule 6A requires FWA to advise parties that are still covered by a State reference public sector transitional award:

- about the time limit (31 December 2013) for making applications for a State reference public sector modern award; and

- of FWA's obligation to commence the modernisation process in relation to that instrument after 31 December 2013 if no application is made by that date.

FWA must provide this advice at least six months before - that is, before 1 July 2013.

The provision of advice about the State reference public sector award modernisation process is a purely administrative function which does not have an effect on a person's rights. FWA is a quasi-judicial tribunal which must perform its functions and exercise its powers in a way that is fair and just, and open and transparent (see section 577 of the *Fair Work Act 2009*). It will exercise discretion about how to notify persons relevant to its proceedings in a wide range of contexts, subject to these principles.

The Committee thanks the Acting Minister for this comprehensive response, noting that it would have been helpful if this information had been included in the explanatory memorandum.

Family Assistance Amendment (Further 2008 Budget Measures) Act 2009

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 7 of 2009*. The Minister for Families, Housing, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 3 August 2009. A copy of the letter is attached to this report.

Although the bill has now been passed by both Houses and received Royal Assent on 24 June 2009, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 7 of 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 Act by 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.

Relevant extract from the response from the Minister

The Committee seeks advice on the reason for the delay in commencement of items 4, 5, 6 and 8 of Schedule 2.

Item 6 introduces new section 32AE into the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). New section 32AE applies to claimants who have not lodged relevant income tax returns for three years. As a consequence, for each year of non-lodgment, there would be a decision under subsection 28(2) of the Family Assistance Administration Act that the claimant is not, and never was, entitled to family tax benefit for the year that they have not lodged their tax return. Claimants to whom new section 32AE applies will cease to be entitled to receive family tax benefit (FTB) based on an estimate.

Some claimants may have had three decisions under subsection 28(2) of the Family Assistance Administration Act as at 1 July 2009. The commencement of new section 32AE on 1 July 2010 is intended to provide claimants to whom this section may apply with additional time to lodge the relevant income tax returns before their entitlement to be paid FTB based on an estimate would cease due to the operation of the section.

Items 4 and 5 are consequential amendments to new section 32AA to reflect the commencement of item 6 and item 8 sets out the application provisions for item 6. Each of these consequential amendments commence on the same date as the primary amendment in item 6.

The Committee thanks the Minister for this response, noting that it would have been useful if this information had been included in the explanatory memorandum.

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.

Relevant extract from the response from the Minister

The Committee seeks advice on the reason for the retrospective application of the application provisions in Schedule 1, item 2.

If an effective claim for Family Tax Benefit (FTB) is made, the Secretary must determine the claim (section 13 of the Family Assistance Administration Act refers). Section 16 of the Family Assistance Administration Act applies if the claim is one for payment of FTB by instalment. As soon as a section 16 determination is made it remains in force at all times subject to section 21 of the Family Assistance Administration Act. As a consequence the claimant does not have to reapply for FTB by instalments each year.

The new provision in Schedule 1 applies to all section 16 determinations, including those made before the commencement of this Schedule. However, the provision will only apply to vary a claimant's existing section 16 determination prospectively from the commencement of the Schedule on 1 July 2009.

Accordingly, while the provisions in item 2 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

The Committee thanks the Minister for this response, noting again that it would have been useful if this information had been included in the explanatory memorandum.

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.

Relevant extract from the response from the Minister

The Committee seeks advice on whether there could be more precise definition in the bill in relation to who will be exercising the discretions in new section 32AB and 32AC, as well as the particular circumstances in which it anticipated that the discretions will be exercised.

Delegation of discretion

As noted by the Committee, subsection 221(1) of the Family Assistance Administration Act provides that the Secretary may delegate all or any of the powers of the Secretary under the family assistance law. I understand that the Secretary has not yet delegated his powers under sections 32AB and 32AC.

The Secretary commonly delegates powers of this nature to the CEO of Centrelink, who in turn sub-delegates the powers to relevant staff. I understand that, because of the sensitive nature of the discretion, the power is likely to be exercised only by senior officers within Centrelink.

Although there may be a number of decision-makers with delegated authority under the new provisions, the decisions are reviewable and there are administrative practices that ensure that decision-makers have regard to policy guidelines.

In the circumstances, I do not consider it necessary or appropriate for there to be a more precise definition in relation to who will be exercising these discretions.

Exercise of discretion

As stated in the explanatory memorandum in relation to new subsection 32AB(7), special circumstances may include, but are not limited to, domestic violence, severe illness or severe financial hardship. The explanation in the explanatory memorandum also applies in relation to the other provisions which enable the grace period to be extended in special circumstances.

It is common in the family assistance law for certain discretions to be exercised in special circumstances. Generally, special circumstances are interpreted by Courts and Tribunals to mean those that are unusual, uncommon or exceptional. It is difficult for legislation to exhaustively define what is special so that it will cover every given case. Whether circumstances are special will depend upon the context in

which they occur. I understand that the policy guidelines being developed by my Department will provide guidance on the exercise of the discretions.

In short, I do not consider that it was appropriate for a more precise definition to be inserted in the Bill.

The Committee thanks the Minister for this comprehensive response.

Retrospective application
Schedule 2, item 7

Item 3 of Schedule 2 inserts a new Subdivision CA into the Family Assistance Administration Act to 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.

Relevant extract from the response from the Minister

The Committee seeks advice on the reason for the retrospective application of the application provisions in Schedule 2, item 7.

Section 28 of the Family Assistance Administration Act applies where a claimant and/or their partner are required to lodge an income tax return and have not lodged

within prescribed timeframes. If this occurs, a subsection 28(2) variation must be made and consequently the claimant is not, and never was, entitled to FTB for the entitlement income year.

The subsection 28(2) decision is usually made in November of the second income year after the entitlement income year.

The application provisions in item 7 provide that the new provisions in Schedule 2, item 3 will apply to all FTB instalment claimants where there has been a subsection 28(2) variation, regardless of whether this variation occurred before, on or after commencement of this legislation. The subsection 28(2) variation is a trigger for the provisions in item 3 to apply. However, these provisions will only apply prospectively in relation to a claimant's current FTB entitlement and will not affect any previous year's entitlement.

Therefore, whilst the provisions in item 7 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

The Committee thanks the Minister for this response.

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 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.

Relevant extract from the response from the Minister

The Committee seeks advice on the reasons of the retrospective application of Schedule 2, item 8.

Where a subsection 28(2) variation is made, the claimant is not entitled, and never was, entitled to FTB for the entitlement year for which they have not lodged relevant tax returns. However, the claimant can continue to be paid FTB by instalments and as a consequence they may have debts for a number of years for which they have not lodged tax returns.

The provisions in Schedule 2 prevent the accumulation of these debts by restricting the manner in which a claimant can be paid FTB.

For those claimants who currently have three subsection 28(2) variations, new section 32AE will apply. However, this new section will only apply to claimants prospectively from 1 July 2010 and will only affect their FTB entitlement from 1 July 2010.

Accordingly, whilst the provisions in item 8 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

The Committee thanks the Minister for this response.

Retrospective application
Schedule 3, item 3

Section 154A of the Family Assistance Administration Act relates 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.

Relevant extract from the response from the Minister

> The Committee seeks advice on the reason for the retrospective application of the application provisions in Schedule 3, item 3.

Prior to the amendments introduced by this Bill, the legislation provided that the Commissioner of Taxation must destroy an individual's tax file number record for an income year three years after the end of that income year. The amendments to section 154A made by item 1 of Schedule 3 provide authority for the Commissioner to maintain the tax file number record of an individual until either the Commissioner provides the Secretary with details of the individual's adjusted taxable income or the individual notifies the Secretary that they are not required to lodge tax returns.

The application provision in item 3 ensure that the extended period that the Commissioner may maintain an individual's tax file number record applies for individuals who have been paid FTB for the 2006-07, 2007-08 and 2008-09 income years. The application provisions in item 3 also ensure that components of adjusted taxable income in addition to taxable income can be provided by the Australian Taxation Office (ATO) to Centrelink, for individuals who have been paid FTB for the 2006-07, 2007-08 and 2008-09 income years.

Without this application provision, individuals or their partners who lodge tax returns for these income years outside of the three years would not have their adjusted taxable income information automatically provided from the ATO to Centrelink. This could result in the individual not being paid their correct entitlement, or not having an outstanding family assistance debt set aside, because Centrelink would not be aware that they have met the lodgement requirements.

Accordingly, while the provisions in item 3 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

The Committee thanks the Minister for this response.

Comments from the Minister in relation to explanatory memorandum

There are several references in the *Digest* where the Committee notes that the explanatory memorandum does not provide an explanation in relation to a particular matter. I have taken the Committee's comments on board and will endeavour to ensure that future explanatory memorandums will provide fuller explanations on these types of matters, as appropriate.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

The Committee thanks the Minister for this response and is pleased to note her undertaking to endeavour to ensure that future explanatory memoranda will provide fuller explanations in relation to particular matters.

Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 5 of 2009*. The Minister for Financial Services, Superannuation and Corporate Law responded to the Committee's comments in a letter dated 23 June 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 5 of 2009

Introduced into the House of Representatives on 19 March 2009
Portfolio: Treasury

Background

This bill amends the *Life Insurance Act 1995* (Life Insurance Act) and makes consequential amendments to a number of other Acts to establish a prudential regulation regime administered by the Australian Prudential Regulation Authority (APRA) – modelled on the existing prudential regulation regime for authorised deposit-taking institutions and general insurers – in relation to the non-operating holding companies (NOHCs) of life insurance companies.

The bill also amends the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993* to harmonise court injunction powers across prudential legislation so that APRA can seek injunctions for conduct relating to the financial health of an entity. The amendments to the *Superannuation Industry (Supervision) Act 1993* will apply to the conduct of superannuation trustees that offer First Home Saver Accounts under the *First Home Saver Accounts Act 2008*.

The bill also contains application provisions.

Denial of natural justice
Schedule 1, item 21, new section 28C

Schedule 1 provides for NOHCs of life insurance companies to be registered under the Life Insurance Act and to come under the supervision of APRA. Item 21 of Schedule 1 inserts a new Division 2 which provides for registration of NOHCs of life companies. Proposed new section 28C requires APRA to give written notice of advice to a registered NOHC if APRA is considering revocation of its registration. Under proposed new paragraph 28C(2)(b), APRA must give the relevant NOHC at least 90 days after the notice is given to make submissions about the revocation but APRA must also 'consider any submissions made by the registered NOHC by that date'. The Committee notes that this has the effect of limiting the actual time available to particular NOHCs to make a submission that can be duly considered and **seeks the Treasurer's advice** as to whether this has the effect of limiting the provision of natural justice to NOHCs.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Treasurer has asked me to respond to you.

The Committee inquired whether the proposed paragraph 28C(2)(b) of the bill has the effect of limiting the actual time available to particular NOHCs to make a submission that can be duly considered, where APRA has given notice to the authorised NOHC that APRA proposes to revoke the entity's authorisation.

Section 28C creates a mechanism by which APRA may revoke the authorisation of a NOHC if APRA is satisfied that one of the triggers specified in subsection 28C(1) is satisfied.

A NOHC has significant control over the registered life insurer which is a subsidiary of the NOHC, as such, it is considered necessary to require such NOHCs to seek authorisation from APRA and to be subject to prudential supervision. The triggers specified in subsection 28C(1) go to the question of whether it is in the interests of the registered life insurer that is the subsidiary of the NOHC, and of the policyholders of the life insurer, for the NOHC's authorisation to be revoked.

In making a decision as to whether an authorized NOHC should have its authorisation revoked, APRA is carrying out its duties and functions of protecting the policyholders, and protecting the stability of the life insurance industry and of the financial system generally. The procedures established under section 28C balance the NOHC's rights and interests with the interests of the policyholders, the life insurance industry and the financial system.

Where APRA is satisfied of a trigger under subsection 28C(1), APRA is required to give the authorised NOHC notice under subsection 28C(2). The notice must specify that APRA proposes to revoke the authorised NOHC's authorisation and the reasons, and provide at least 90 days for the NOHC to make a submission to APRA. APRA is required to consider any submissions made by the NOHC during the period specified in the notice.

The qualification 'by that date' in the last sentence of subsection 28C(2) does not require that APRA consider the submissions during the 90 day period. Such an interpretation would make the subsection inherently inconsistent and incoherent. Courts do not give such interpretations to Acts where there are alternate interpretations. An interpretation that is not inconsistent is that APRA must consider, during any reasonable period, submissions made by the NOHC 'by that date', that is, during the 90 day period.

This provision, in effect, provides the NOHC with at least 90 days to make a submission to APRA. This ensures that APRA provides sufficient natural justice to the affected NOHC while maintaining the ability to take decisive action to revoke an entity's authority in order to protect the interests of the relevant policyholders, or of the life insurance industry or the financial system.

The Committee thanks the Minister for this response, which satisfies its concerns.

Retrospective commencement
Schedule 1, items 81-88, section 132A

Existing section 132A of the Life Insurance Act requires life insurance companies to notify APRA of certain matters. Items 81 to 87 of Schedule 1 amend section 132A. Item 88 is an application provision which states that '(t)he amendments…made by this Part [Part 7] apply in relation to matters of which a body corporate becomes aware on or after commencement of the amendments (whether the matter arose before, on or after that commencement)'.

The explanatory memorandum (at paragraph 1.51) misleadingly states that the amendments 'apply to matters or breaches that a registered NOHC becomes aware of on or after their 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 Committee **seeks the Treasurer's advice** as to whether further explanation might be provided of the new section 132A notification requirements in relation to matters that arose before commencement of the bill but come to the attention of the NOHC on or after commencement.

Pending the Treasurer'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.

Relevant extract from the response from the Minister

The Committee inquired whether the obligation in proposed section 132A of the bill to report certain matters to APRA creates a retrospective obligation.

The explanatory memorandum for the bill is not misleading in relation to this provision. The amendments to section 132A do not retrospectively create an offence for a matter that has occurred before the commencement of the amendments.

Section 132A is directed at the requirement to notify APRA of certain matters. The obligation to notify APRA of specified matters, as imposed by the proposed amendments to section 132A, would only arise after the commencement of the proposed amendments. Therefore, the amendments to section 132A do not have retrospective operation.

In addition, section 132A would require an authorised NOHC to report to APRA where the NOHC becomes aware that it has breached a provision of the Life Insurance Act and the breach is significant. An authorised NOHC is required to report to APRA within 10 business days.

An authorised NOHC incurs obligations to comply with prudential requirements following their authorisation under proposed section 28A. Prior to authorisation, an NOHC would not have obligations to comply with any prudential requirements under the Life Insurance Act. As a result, section 132A would not apply to matters that occur prior to an NOHC becoming an authorised NOHC under section 28A.

As section 132A would only apply to matters which occur after an NOHC has become an authorised NOHC, it does not have retrospective operation.

The Committee thanks the Minister for this clarification.

Entry and search powers
Schedule 1, items 91-116

Items 91 to 116 of Schedule 1 extend the existing investigation powers of APRA (including entry and search without warrant powers) to registered NOHCs and associated companies. The explanatory memorandum does not refer to the Committee's report on *Entry, Search and Seizure Provisions in Commonwealth Legislation (Twelfth Report of 2006)*. However, the Committee notes that the bill and explanatory memorandum contain the necessary elements of investigation procedures, including the giving of notice, the provision of an identity card, request for production of documents, request for assistance and obtaining a warrant in appropriate circumstances.

In the circumstances, the Committee makes no further comment on this bill.

Relevant extract from the response from the Minister

The Committee noted that the explanatory memorandum of the bill did not refer to the Committee's report on *Entry, Search and Seizure Provisions in Commonwealth Legislation* (*Twelfth Report of 2006*). The Government has considered this Report in drafting the legislation, but omitted to refer to this Report in the explanatory memorandum to the bill.

I trust this information will be of assistance to the Committee.

The Committee thanks the Minister for this response.

Infrastructure Australia Amendment (National Broadband Network and Other Projects) Bill 2009

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2009*. Senator the Hon Nick Minchin responded to the Committee's comments in a letter dated 10 August 2009. A copy of the letter is attached to this report.

Extract from Alert Digest No. 8 of 2009

Introduced into the Senate on 15 June 2009
By Senator Minchin

Background

This bill amends the *Infrastructure Australia Act 2008* to ensure proper assessment of the proposed National Broadband Network and other projects.

In particular, the bill:

- requires that the proposed National Broadband Network be assessed by Infrastructure Australia, in accordance with its existing functions, and the Building Australia Fund evaluation criteria; and

- provides a mechanism whereby, in future, either House of the Parliament can refer a project to Infrastructure Australia for analysis and assessment in accordance with its functions.

Drafting note
Schedule 1, item 1, new subsections 5A(1), (2) and (3)

Schedule 1 contains amendments relating to assessment of the proposed national broadband network. Item 1 of Schedule 1 amends the Infrastructure Australia Act by inserting a new section 5A which requires Infrastructure Australia to give advice about the proposal for a national broadband network (proposed new subsection 5A(4)) and report to the Minister by 30 July 2009 (proposed new subsection 5A(5)).

The Committee notes that proposed new subsections 5A(1), 5A(2) and 5A(3) contain recitations of facts, which might more appropriately be included in a preamble rather than in operative provisions creating positive duties. The Committee **seeks the Senator's advice** on the reason for including descriptive comments in the operative provisions of the bill, and whether consideration might be given to amending the bill to include these comments in a preamble.

Relevant extract from the response from the Senator

I note the Committee's comments in relation to proposed new subsections that the Committee believes are descriptive provisions.

The subsections cited – 5A(1), 5A(2) and 5A(3) – do not merely describe existing functions of Infrastructure Australia (IA), but establish a positive requirement for IA to undertake the stated functions.

According to the Act, IA has various functions, under section 5(1) and 5(2). In relation to the performance of these functions, section 5 of the Act states:

(3) Infrastructure Australia is to perform a function under subsection (1) or paragraph (2)(a), (b), (e), (f) or (i):
(a) if it thinks fit; or
(b) on request by the Minister.

(4) Infrastructure Australia is to perform a function under paragraph (2)(c), (d), (g) or (h) on request by the Minister.

Arguably these functions *may* include looking at the NBN proposal (eg, under 5(2)(d)), but there is no guarantee under the current Act that that is the case. In any event, under section 5 the performance of such a function would be contingent on the Minister's request and the Government has a stated policy not to require a cost benefit analysis for the NBN proposal.

The proposals in the bill impose a positive duty upon IA to undertake the function of advising the Minister on the NBN (subsection 5A(1)) and the function of advising taxpayers as investors in the NBN (subsection 5A(2)). Similarly, subsection 5A(3) authorises IA to undertake any of the functions it has under section 5 to pursue these new functions, again without requiring the contingencies "if it thinks fit" or "on request by the Minister" to be met.

I do not believe it is not accurate to describe these proposals as 'recitation of fact', especially given that neither IA nor the Communications Minister has given any indication these important functions were to be undertaken by IA under the existing Act.

I trust this information addresses your concerns, but if not, I would be happy to consider amendments to the Bill in committee-of-the-whole to clarify meaning.

The Committee thanks the Senator for this response. It would have been helpful if the explanation of the operation of the proposed provisions had been included in the explanatory memorandum because it provides important clarification. Nevertheless, in light of the explanation, the Committee considers that its original point stands: proposed subsections 5A(1), (2) and (3) may be better included in an information or text box that precedes the substantive provisions since they state functions that exist under current law and do not impose new duties and responsibilities (as compared to the remaining subsections in new section 5A). The Committee **leaves to the Senate as a whole** the consideration of any amendments put forward by Senator Minchin to address this matter.

Social Security and Family Assistance Legislation Amendment (2009 Budget Measures) Act 2009

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 6 of 2009*. The Minister for Families, Housing Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 4 July 2009. A copy of the letter is attached to this report.

Although this bill has now been passed by both Houses and received Royal Assent on 27 May 2009, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 6 of 2009

Introduced into the House of Representatives on 12 May 2009
Portfolio: Families, Housing, Community Services and Indigenous Affairs
Introduced into the Senate on 13 May 2009 and passed by the Senate on 14 May 2009

Background

This bill gives effect to a number of measures announced as part of the 2009-10 Budget.

Schedule 1 of the bill amends the *Social Security Act 1991* to provide a new ongoing payment, called Carer Supplement, which will be available to a wide range of eligible carers (an estimated 500,000 carers each year). Carer supplement will not be indexed.

In 2009, carer supplement will be paid to people who received a qualifying payment for the period including 12 May 2009. From 1 July 2010, carer supplement will be paid to people who receive a qualifying payment for a period which includes the test day (1 July) each year.

Schedule 1 also amends the *Social Security (Administration) Act 1999* in relation to lump sum benefits and the *Income Tax Assessment Act 1997* to exempt the carer supplement from income tax.

Schedule 2 amends the *A New Tax System (Family Assistance) Act 1999* so that indexation is not applied to higher income thresholds for the Family Tax Benefit Part A higher income free areas, Family Tax Benefit Part B primary earner income limit and the Baby Bonus family income limit from 1 July 2009 to 30 June 2012.

Wide delegation of power
Schedule 1, item 7, new section 47AB

Proposed new section 47AB, to be inserted into the *Social Security (Administration) Act 1999* by item 7 of Schedule 1, requires the Secretary to pay the carer supplement to an eligible person 'in such manner as the Secretary considers appropriate'. The Committee notes that this gives the Secretary very wide latitude.

In administering the Social Security (Administration) Act, the Secretary must have regard to certain principles under section 8 of that Act which include the delivery of services in a 'fair, courteous, prompt and cost-efficient manner' (paragraph 8(a)(iii)). However, the Secretary may also delegate any or all of his or her powers to 'an officer' under subsection 234(1) of the Act (subject to some limitations). The term 'officer' is broadly defined in the Act to include any person engaged by an agency (subsection 234(7)). The Committee **seeks the Minister's advice** in relation to the rationale for the potential delegation of the broad power contained in proposed new section 47AB.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it 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.

Relevant extract from the response from the Minister

The Committee has commented in Alert Digest No. 6 of 2009 on section 47AB of the *Social Security (Administration) Act 1999* (the Social Security Admin Act). Section 47AB was introduced into the Social Security Admin Act by the Social

Security and Family Assistance Legislation Amendment (2009 Budget Measures) Bill 2009 (the 2009 Budget Measures Bill), and provides:

If an individual is qualified for carer supplement for a year, the Secretary must pay the supplement to the individual:

(a) on the date or dates that the Secretary considers to be the earliest date or dates on which it is reasonably practicable for the payment to be made; and

(b) in such manner as the Secretary considers appropriate.

The Committee notes that the words in paragraph (b) 'in such manner as the Secretary considers appropriate' give the Secretary very wide latitude. The Committee seeks my advice about the rationale for the potential delegation of this power. I note that the 2009 Budget Measures Bill received Royal Assent on 27 May 2009.

I think it is important to note that the words in paragraph 47AB(b) do not affect a person's entitlement to receive carer supplement. A person's qualification for carer supplement is dealt with in Schedule 1 Part 1 of the 2009 Budget Measures Bill. Neither the Secretary nor anyone to whom he delegates his powers has any discretion to decide whether a person is qualified to receive carer supplement. Qualification is entirely based on receipt of a qualifying instalment (see new section 992X). There is also no discretion for the Secretary or anyone to whom he delegates his powers to not pay carer supplement to a qualified person. The use of the word 'must' in section 47AB means that the Secretary is required to pay carer supplement to a qualified person.

Paragraph 47AB(b) provides the Secretary (or his delegate) with a discretion to determine the manner of payment of carer supplement. In practice, the exercise of powers of this nature is usually limited to a small number of administratively feasible options, such as payment by electronic deposit in a bank account or by cheque. Nonetheless, it is considered appropriate for the power in section 47AB to be cast in the manner in which it has been drafted to enable the carer supplement to be paid in whatever manner is considered most administratively suitable.

I note that the form of words in paragraph 47AB(b) has often been used previously in the Social Security Admin Act in relation to other payments to carers, for example in paragraph 47B(1)(b), which relates to one-off payments to carers, paragraph 47AA(1)(b), which relates to one-off payments to older Australians, and paragraph 50A(b) which relates to payments of child disability assistance. In short, those words have been used in the administration of the social security law in the context of payments to carers since at least 2004.

The rationale for the potential delegation of the power is that it is reasonable for it to be exercised by officers who are well-placed to determine administratively appropriate methods for paying carer supplement. The Secretary commonly delegates powers of this nature to the CEO of Centrelink, who in turn sub-delegates the powers to senior national managers within Centrelink.

I understand that the Secretary has not yet delegated his powers under section 47AB. In practice, the Secretary commonly delegates powers of this nature to the CEO of Centrelink, who in turn sub-delegates the powers. Given the similarities between carer supplement and previous payments to carers, it is likely that the delegations for section 47AB will be similar to the delegations for sections such as section 47AA and 47B of the Social Security Admin Act. The delegations for sections 47AA and 47B to decide the manner of payment are limited to senior national managers within Centrelink. I am confident that the delegation in relation to this provision will be appropriately handled.

In summary, I do not consider that section 47AB will make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers.

Thank you again for writing.

The Committee thanks the Minister for this extremely comprehensive response, which addresses its concerns. However, the Committee considers that it would have been appropriate for this information to have been included in the explanatory memorandum.

Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Act 2009

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 8 of 2009*. The Minister for Families, Housing, Community Services and Indigenous Affairs responded to the Committee's comments in a letter dated 3 August 2009. A copy of the letter is attached to this report.

Although the bill has now been passed by both Houses and received Royal Assent on 29 June 2009, the Minister's response may, nevertheless, be of interest to Senators.

Extract from Alert Digest No. 8 of 2009

Introduced into the House of Representatives on 15 June 2009
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill gives effect to a number of measures announced in the 2009-10 Budget, including key elements of the Federal Government's Secure and Sustainable Pension Reform package. The pension reform measures in the bill implement the reforms in social security and aged care. A further bill, to be introduced at a later date, will introduce the pension reform measures for veterans and their dependants, as announced in the Budget.

Schedules 1, 2 and 3 amend the *Social Security Act 1991* to:

- increase the single maximum basic rates of certain social security pensions by $1,560.00 per annum, or $30 per week, on 20 September 2009;
- allow for the indexation of the maximum basic rates of certain social security pensions to a new index, the Pensioner and Beneficiary Living Cost Index; and

- provide, from 20 March 2010, for a new 'combined couple benchmark' for maximum basic rates, which will be 41.76 per cent of the annualised Male Total Average Weekly Earnings figure, and benchmark the single pension at 66.33 per cent of the maximum combined couple basic rate of pension, which is 27.7 per cent of the annualised Male Total Average Weekly Earnings figure.

Schedule 4 amends the *Social Security Act 1991*, the *Social Security (Administration) Act 1999* and the *Income Tax Assessment Act 1997* to:

- simplify the payments made to pensioners living in Australia by consolidating a number of smaller payments and allowances into one 'pension supplement'; and

- provide for an increase to pension payments via the new pension supplement of $10.14 per week for couples combined and $2.49 per week for singles.

Schedules 5 to 12 amend the *Social Security Act 1991* to:

- increase the amount of pension supplement payable to individuals to compensate for anticipated increases in the cost of living arising out of the introduction of the Carbon Pollution Reduction Scheme;

- remove the legislative instrument powers that were included in the Carbon Pollution Reduction Scheme (Household Assistance) Bill 2009;

- increase the income test taper rate from 40 cents to 50 cents per dollar of income over the ordinary income-free area and remove the additional income test free area for dependent children from the calculation of the amount of a person's ordinary income-free area;

- introduce a new Work Bonus into the social security law to allow age pensioners to keep more of the money they earn through work;

- provide for the assessment of employment income for people in receipt of social security pensions and who are of age pension age on the same basis as people who are under age pension age;

- close the existing Pension Bonus Scheme to new entrants from 20 September 2009;

- allow pensioners, who will be affected by changes to the social security law made by the bill on the date of commencement, to transition to the new arrangements;

- increase the qualifying age for age pension for both men and women from 65 to 67 years by six months every two years commencing on 1 July 2017; and

- improve existing arrangements in relation to advance payments, to enable social security recipients to have greater access to advances of certain social security pensions.

Schedule 13 amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to provide for adjusted taxable income for the Commonwealth seniors health card to include income salary sacrificed to superannuation.

Schedule 14 amends the *A New Tax System (Family Assistance) Act 1999* to provide for the indexation of the FTB under 13 child rate and the FTB 13-15 child rate so that these rates are indexed on 1 July 2009 and each subsequent 1 July in accordance with movements in the Consumer Price Index only; and provides for the maternity immunisation allowance to be indexed once every year, on 1 July.

Schedule 15 amends the portability arrangements in the *Social Security Act 1991* to allow certain social security recipients, whose overseas absence is for the purpose of undertaking overseas study as part of a full-time Australian course, may be paid for the duration of the overseas study, provided the study can be credited towards their Australian course.

Schedule 16 amends the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to exclude payments made under the Western Australian Cost of Living Rebate Scheme and the value of a Western Australian Country Age Pension Fuel Card from the social security and veterans' affairs income tests.

Schedule 17 amends the *Aged Care Act 1997* as a result of the increase in the rate of age pension on 20 September 2009 to increase the contribution to the cost of living for people in residential aged care.

Schedule 18 amends the *Veterans' Entitlements Act 1986* to add a new 'operational area' to Schedule 2 to allow members of the Australian Defence Force allotted for duty in an operational area to have access to pensions, treatment and other benefits available under that Act.

Delayed commencement
Clause 2

Subclause 2(1) contains the table of commencement information and includes two items with delayed commencement. Item 6 of the table provides that Schedule 5 commences immediately after the commencement of Schedule 1 of the *Carbon Pollution Reduction Scheme Amendment (Household Assistance) Act 2009* which means delayed commencement (see *Alert Digest No. 6 of 2009*).

Item 13 of the table provides that Schedule 12 commences on 1 July 2010. The explanatory memorandum does not explain the reasons for this delayed commencement, although the Committee notes that it is probably due to pension changes at the start of the 2010-11 financial year. The Committee **seeks the Minister's clarification** as to the delayed commencement of Schedule 12.

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.

Relevant extract from the response from the Minister

The Committee seeks clarification as to the delayed commencement of Schedule 12.

Schedule 12 reforms the advance payment arrangements for pensioners other than those receiving Parenting Payment Single. The changes increase the flexibility of the advance payment arrangements and include allowing more than one advance in a 12 month period, increasing the maximum advance amounts and increasing both the maximum and minimum advance amounts in line with pension rate increases.

The commencement of this measure on 1 July 2010 provides pensioners and Centrelink with a period of time to adjust to the significant reforms to the payment arrangements for pensioners occurring on 20 September 2009 as part of the Government's Secure and Sustainable Pension Reform package. Two measures will be implemented on 1 July 2010: the changes to advance payments and the option to

receive the minimum Pension Supplement on a quarterly basis instead of receiving the whole amount fortnightly. Implementing these two measures at the same time will give pensioners greater choice and more flexibility to plan and budget effectively.

The Committee thanks the Minister for this clarification.

Retrospective application
Schedule 13, items 2 and 4

Schedule 13 of the bill provides for adjusted taxable income for the Commonwealth seniors health card to include income salary sacrificed to superannuation. Items 2 and 4 of Schedule 13 provide that the substantive amendments in Schedule 13 apply in relation to seniors health cards granted 'before, on or after the commencement' of the relevant amendments but do not affect a person's qualification for a seniors health card before that commencement.

Under principle (1)(a)(i) of its terms of reference, the Committee is required to consider whether legislation trespasses unduly on personal rights and liberties. A person's legitimate expectation that government and its agencies will honour expectations that it has created in relation to property is regarded as a human right in many jurisdictions, although approaches to its application vary. The Committee looks to extrinsic materials, including explanatory memoranda and second reading speeches, to understand the balancing of human rights that has produced the outcome in the proposed legislation.

The explanatory memorandum states (at page 89) that the amendments will have no adverse retrospective effect. However, the Committee remains concerned about the impact of these provisions on people's legitimate expectations of government, especially when those expectations are affected by the legislation having retrospective effect. Therefore, the Committee **seeks the Minister's advice** as to whether further explanation and justification for the retrospective application of the changes might be provided.

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.

Relevant extract from the response from the Minister

The Committee seeks advice as to whether further explanation and justification for the retrospective application of the changes made by Schedule 13 might be provided. Schedule 13 provides for income that is salary sacrificed to superannuation to be assessed as adjusted taxable income for the Commonwealth seniors health card. Items 2 and 4 of Schedule 13 provide that the substantive amendments in this Schedule apply to seniors health cards granted 'before, on or after the commencement' of the relevant amendments. However, these items do not affect a person's qualification for a seniors health card before that commencement.

Although the explanatory memorandum refers to the changes in Schedule 13 having 'no adverse retrospective effect', the intention was to express that the legislation has no retrospective effect at all. Even though the changes may apply in relation to a seniors health card granted before the commencement date (1 July 2009), they will only operate prospectively in relation to an individual's qualification for the seniors health card from 1 July 2009.

On occasions, changes in government policy will be brought into effect by legislation which may adversely affect certain people. However, I do not consider that legislation of this nature, such as the provisions under consideration here, can reasonably be regarded as undermining people's legitimate expectations of government.

I would also note that, whilst Schedule 13 introduces a stricter income test for the seniors health card, there is some capacity within existing rules for the impact of the new rules to be alleviated. Ordinarily, an individual's income for assessing qualification for the seniors health card is generally based on income received in the previous financial year, in this case 2008-09. However, it is possible within the terms of the legislation for a person to request that their qualification for the card be based on an 'estimate' of their income for the current financial year being 2009-10. Accordingly, it would be possible for a cardholder to lodge with Centrelink an estimate of their income for the current financial year and to adjust their finances accordingly to remain within the income thresholds.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

The Committee thanks the Minister for this response.

Senator the Hon Helen Coonan
Chair

THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

07 AUG 2009

Senator the Hon Helen Coonan
Chair
Australian Senate - Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

I refer to Ms Julie Dennett's letter of 25 June 2009, drawing my attention to the Committee's comments on the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill) as contained in *Alert Digest No. 8 of 2009.*

The Committee has sought my comments or advice on a number of aspects of the Bill and I provide responses as follows.

Independence of the Administrative Appeals Tribunal (Schedule 1, item 52, new subsection 44(1))

The Committee has sought my comments on the reasons for the departure in the Bill from the usual practice of allowing the President of the Administrative Appeals Tribunal (AAT) to allocate the work of the tribunal.

As the Committee has noted, new section 44 of the Bill allows the Minister to nominate AAT presidential members to issue examination notices under new section 47. AAT presidential members are nominated and perform the functions conferred by the Bill in an individual capacity. Consequently, an application made by the Director under subsection 45(1) to an AAT presidential member for an examination notice is not an application to the tribunal, but to the member in his or her personal capacity. As there are no functions or powers conferred on the AAT as a whole there is no work for the President of the AAT to allocate under these provisions.

The nomination process adopted in the Bill is a similar process to that contained in the *Telecommunications (Interception and Access) Act 1979.* Under that Act the Minister similarly nominates AAT members in an individual capacity to issue warrants under the Act. As a matter of practice, the nomination process will also allow individual presidential members to elect to perform the role of issuing examination notices by consenting to the Minister's nomination under section 44.

Telephone: (02) 6277 7320 Facsimile: (02) 6273 4115 Email: dpm@dpm.gov.au

I note that this process reflects the recommendations in the Wilcox Report surrounding safeguards on compulsory interrogation.

Drafting note (Schedule 1, item 52, new subsection 47(1))

The Committee has raised a number of concerns with new subsection 47(1) which is inserted by item 52 of Schedule 1 to the Bill. The Committee has sought my advice on measures that may be taken to clarify the cumulative nature of the factors to be considered by a nominated AAT presidential member before issuing an examination notice under new subsection 47(1). The Committee also notes that the Explanatory Memorandum does not acknowledge the Wilcox Report as the origin of the factors listed in subsection 47(1) and raises concern that the memorandum's explanation of this provision is erroneous.

I do not share the Committee's view that subsection 47(1) requires amendment. Following my Department's consultation with the Office of Parliamentary Counsel (OPC), I am satisfied that the Bill's current drafting makes it clear that a nominated AAT presidential member must be satisfied of all the matters listed in subsection 47(1) before an examination notice can be issued. OPC has advised that in accordance with usual drafting practice, conjunctions such as the word 'and' suggested by the Committee are not used at the end of every paragraph in a list that is preceded with the word 'following'. In these circumstances, OPC's view is that the provision itself will make it clear whether the paragraphs in the list are cumulative or alternative. New subsection 47(1) requires the nominated AAT presidential member to be 'satisfied of the following'. This means that the paragraphs in subsection 47(1) are cumulative. A requirement that the member must be satisfied of 'any one of the following', or 'any or all of the following' would indicate that the paragraphs were alternatives.

I also highlight paragraph 130 of the Explanatory Memorandum which, although referring to subsection 47(2), clarifies the cumulative nature of the factors in subsection 47(1). Paragraph 130 states that '...the notice could only be issued on application and when the presidential member is satisfied of each of the criteria set out in paragraphs 47(1)(a)-(g) and could not be made in any other circumstances'.

The Committee has expressed concern about the explanation of new subsection 47(1) in paragraph 127 of the Explanatory Memorandum. The introductory words to this paragraph read as follows: 'This section sets out the factors that the AAT presidential member must consider when determining an application. These factors include that the presidential member must be satisfied that...'.

The Committee is concerned that the explanation that the factors 'include' those listed suggests that the list is not definitive. The word 'include' is used because the list provided does not cover all the factors that are listed in subsection 47(1). As the list is not exhaustive of the factors the AAT presidential member must be satisfied of before a notice can be issued, I consider the use of the word 'include' to be appropriate in this case.

The Committee also noted that the reference to factors that the AAT member must 'consider' is erroneous. While I agree that the word 'consider' does not reflect the precise wording of new subsection 47(1), I do not agree that its use is erroneous. The AAT member will have to consider each of the factors listed before he or she can be satisfied of them as is required in subsection 47(1). I consider that, taken as a whole, the Explanatory Memorandum makes it clear that an AAT presidential member must be satisfied of all the factors listed in new subsection 47(1) before an examination notice can be issued.

The Committee has also sought my advice on possible amendment of the Explanatory Memorandum to include reference to the Wilcox Report as the source of the factors in new subsection 47(1). The factors in this provision are based on those suggested in the Wilcox Report. It is very clear from my Second Reading Speech that the Bill implements the Wilcox Report. As such, I do not consider there to be a need to amend the Explanatory Memorandum as suggested by the Committee, especially in light of my response to the Committee's other comments above.

Strict liability (Schedule 1, item 69, new subsections 59B(5) and (6))

The Committee has sought my advice on whether the recommendations in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered in the context of the strict liability offence in new subsections 59B(5) and (6) and, if so, whether the Explanatory Memorandum could be amended to reflect such consideration.

New subsections 59B(5) and (6) are modelled on subsections 702(5) and (6) of the *Fair Work Act 2009*. Those provisions create the same strict liability offence applying to Fair Work Inspectors.

I confirm that the *Guide* was considered in the drafting of the strict liability offence in new subsections 59B(5) and (6).

I trust that my responses will assist you and your Committee in finalising its consideration of the Bill.

Yours sincerely

Julia Gillard
Minister for Employment and Workplace Relations

OFFICE OF SENATOR THE HON MARK ARBIB

Minister for Employment Participation
Minister Assisting the Prime Minister for Government Service Delivery

26 JUN 2009

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for the letter of 2 June 2009 to draw attention to the comments of the Senate Standing Committee for the Scrutiny of Bills on the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009, contained in the Committee's *Alert Digest No. 6 of 2009* (2 June 2009). I am responding as the Acting Minister for Employment and Workplace Relations.

Please find attached my reply to the Committee's concerns.

I trust the Committee finds this information useful.

Yours sincerely

Mark Arbib
Acting Minister for Employment and Workplace Relations

Commonwealth Parliament Offices, 70 Phillip Street, Sydney NSW 2000 **Telephone:** (02) 9251 3766 **Facsimile** (02) 9251 3767
Parliament House, Canberra ACT 2600 **Telephone:** (02) 6277 7630 **Facsimile** (02) 6273 5188 senator.arbib@aph.gov.au

Item 51 of Schedule 2 – Notification of the cut-off for the State reference public sector award modernisation process

Item 51 of Schedule 2 to the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 inserts new Schedule 6A into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 to provide a mechanism for the making of State reference public sector modern awards.

Under new Schedule 6A a person covered by a State reference public sector transitional award has until the end of 31 December 2013 to apply to Fair Work Australia (FWA) for the instrument to be modernised or terminated. If no application is made FWA will commence the State reference public sector award modernisation process after 31 December 2013 in relation to that award.

To ensure that parties covered by a State reference public sector transitional award can make an informed decision about whether to apply for the making of a State reference public sector modern award, subitem 11(2) of new Schedule 6A requires FWA to advise parties that are still covered by a State reference public sector transitional award:

- about the time limit (31 December 2013) for making applications for a State reference public sector modern award; and
- of FWA's obligation to commence the modernisation process in relation to that instrument after 31 December 2013 if no application is made by that date.

FWA must provide this advice at least six months before – that is, before 1 July 2013.

The provision of advice about the State reference public sector award modernisation process is a purely administrative function which does not have an effect on a person's rights. FWA is a quasi-judicial tribunal which must perform its functions and exercise its powers in a way that is fair and just, and open and transparent (see section 577 of the *Fair Work Act 2009*). It will exercise discretion about how to notify persons relevant to its proceedings in a wide range of contexts, subject to these principles.

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

– 3 AUG 2009

MN09-002447

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (Committee), about the then *Family Assistance Amendment (Further 2008 Budget Measures) Bill 2009*. This Bill has since passed into law.

The committee commented on a number of aspects in this legislation which I have addressed as follows:

Family Assistance Amendment (Further 2008 Budget Measures) Act 2009

Delayed Commencement
Clause 2

The Committee seeks advice on the reason for the delay in commencement of items 4, 5, 6 and 8 of Schedule 2.

Item 6 introduces new section 32AE into the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act). New section 32AE applies to claimants who have not lodged relevant income tax returns for three years. As a consequence, for each year of non-lodgment, there would be a decision under subsection 28(2) of the Family Assistance Administration Act that the claimant is not, and never was, entitled to family tax benefit for the year that they have not lodged their tax return. Claimants to whom new section 32AE applies will cease to be entitled to receive family tax benefit (FTB) based on an estimate.

Some claimants may have had three decisions under subsection 28(2) of the Family Assistance Administration Act as at 1 July 2009. The commencement of new section 32AE on 1 July 2010 is intended to provide claimants to whom this section may apply with additional time to lodge the relevant income tax returns before their entitlement to be paid FTB based on an estimate would cease due to the operation of section.

Items 4 and 5 are consequential amendments to new section 32AA to reflect the commencement of item 6 and item 8 sets out the application provisions for item 6. Each of these consequential amendments commence on the same date as the primary amendment in item 6.

Retrospective application
Schedule 1, item 2

The Committee seeks advice on the reason for the retrospective application of the application provisions in Schedule 1, item 2.

If an effective claim for Family Tax Benefit (FTB) is made, the Secretary must determine the claim (section 13 of the Family Assistance Administration Act refers). Section 16 of the Family Assistance Administration Act applies if the claim is one for payment of FTB by instalment. As soon as a section 16 determination is made it remains in force at all times subject to section 21 of the Family Assistance Administration Act. As a consequence the claimant does not have to reapply for FTB by instalments each year.

The new provision in Schedule 1 applies to all section 16 determinations, including those made before the commencement of this Schedule. However, the provision will only apply to vary a claimant's existing section 16 determination prospectively from the commencement of the Schedule on 1 July 2009.

Accordingly, while the provisions in item 2 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

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

The Committee seeks advice on whether there could be more precise definition in the bill in relation to who will be exercising the discretions in new section 32AB and 32AC, as well as the particular circumstances in which it anticipated that the discretions will be exercised.

Delegation of discretion

As noted by the Committee, subsection 221(1) of the Family Assistance Administration Act provides that the Secretary may delegate all or any of the powers of the Secretary under the family assistance law. I understand that the Secretary has not yet delegated his powers under sections 32AB and 32AC.

The Secretary commonly delegates powers of this nature to the CEO of Centrelink, who in turn sub-delegates the powers to relevant staff. I understand that, because of the sensitive nature of the discretion, the power is likely to be exercised only by senior officers within Centrelink.

Although there may be a number of decision-makers with delegated authority under the new provisions, the decisions are reviewable and there are administrative practices that ensure that decision-makers have regard to policy guidelines.

In the circumstances, I do not consider it necessary or appropriate for there to be a more precise definition in relation to who will be exercising these discretions.

Exercise of discretion

As stated in the explanatory memorandum in relation to new subsection 32AB(7), special circumstances may include, but are not limited to, domestic violence, severe illness or severe financial hardship. The explanation in the explanatory memorandum also applies in relation to the other provisions which enable the grace period to be extended in special circumstances.

It is common in the family assistance law for certain discretions to be exercised in special circumstances. Generally, special circumstances are interpreted by Courts and Tribunals to mean those that are unusual, uncommon or exceptional. It is difficult for legislation to exhaustively define what is special so that it will cover every given case. Whether circumstances are special will depend upon the context in which they occur. I understand that the policy guidelines being developed by my Department will provide guidance on the exercise of the discretions.

In short, I do not consider that it was appropriate for a more precise definition to be inserted in the Bill.

Retrospective Application
Schedule 2, item 7

The Committee seeks advice on the reason for the retrospective application of the application provisions in Schedule 2, item 7.

Section 28 of the Family Assistance Administration Act applies where a claimant and/or their partner are required to lodge an income tax return and have not lodged within prescribed timeframes. If this occurs, a subsection 28(2) variation must be made and consequently the claimant is not, and never was, entitled to FTB for the entitlement income year.

The subsection 28(2) decision is usually made in November of the second income year after the entitlement income year.

The application provisions in item 7 provide that the new provisions in Schedule 2, item 3 will apply to all FTB instalment claimants where there has been a subsection 28(2) variation, regardless of whether this variation occurred before, on or after commencement of this legislation. The subsection 28(2) variation is a trigger for the provisions in item 3 to apply. However, these provisions will only apply prospectively in relation to a claimant's current FTB entitlement and will not affect any previous year's entitlement.

Therefore, whilst the provisions in item 7 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

Retrospective application
Schedule 2, item 8

The Committee seeks advice on the reasons of the retrospective application of Schedule 2, item 8.

Where a subsection 28(2) variation is made, the claimant is not entitled, and never was, entitled to FTB for the entitlement year for which they have not lodged relevant tax returns. However, the claimant can continue to be paid FTB by instalments and as a consequence they may have debts for a number of years for which they have not lodged tax returns.

The provisions in Schedule 2 prevent the accumulation of these debts by restricting the manner in which a claimant can be paid FTB.

For those claimants who currently have three subsection 28(2) variations, new section 32AE will apply. However, this new section will only apply to claimants prospectively from 1 July 2010 and will only affect their FTB entitlement from 1 July 2010.

Accordingly, whilst the provisions in item 8 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

Retrospective application
Schedule 3, item 3

The Committee seeks advice on the reason for the retrospective application of the application provisions in Schedule 3, item 3.

Prior to the amendments introduced by this Bill, the legislation provided that the Commissioner of Taxation must destroy an individual's tax file number record for an income year three years after the end of that income year. The amendments to section 154A made by item 1 of Schedule 3 provide authority for the Commissioner to maintain the tax file number record of an individual until either the Commissioner provides the Secretary with details of the individual's adjusted taxable income or the individual notifies the Secretary that they are not required to lodge tax returns.

The application provision in item 3 ensure that the extended period that the Commissioner may maintain an individual's tax file number record applies for individuals who have been paid FTB for the 2006-07, 2007-08 and 2008-09 income years. The application provisions in item 3 also ensure that components of adjusted taxable income in addition to taxable income can be provided by the Australian Taxation Office (ATO) to Centrelink, for individuals who have been paid FTB for the 2006-07, 2007-08 and 2008-09 income years.

Without this application provision, individuals or their partners who lodge tax returns for these income years outside of the three years would not have their adjusted taxable income information automatically provided from the ATO to Centrelink. This could result in the individual not being paid their correct entitlement, or not having an outstanding family assistance debt set aside, because Centrelink would not be aware that they have met the lodgement requirements.

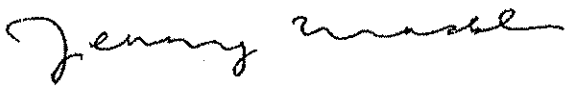
Accordingly, while the provisions in item 3 may apply to a determination made prior to the commencement of the item, I do not consider that the item has a retrospective impact.

Explanatory memorandum

There are several references in the *Digest* where the Committee notes that the explanatory memorandum does not provide an explanation in relation to a particular matter. I have taken the Committee's comments on board and will endeavour to ensure that future explanatory memorandums will provide fuller explanations on these types of matters, as appropriate.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely



JENNY MACKLIN MP

The Hon Chris Bowen MP
Minister for Human Services
Minister for Financial Services, Superannuation and Corporate Law

23 JUN 2009

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Coonan

Thank you for your letter of 14 May 2009 providing the opportunity for the Treasurer to respond to the Committee's comments on the Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009. The Treasurer has asked me to respond to you.

The bill introduces provisions to regulate the non-operating holding companies (NOHCs) of life insurers. It also introduces provisions to harmonise court injunctions provisions across the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and *Superannuation Industry (Supervision) Act 1993*.

Responses to the Committee's comments are as follows.

Revocation of a NOHC's authorisation by the Australian Prudential Regulation Authority (APRA)

The Committee inquired whether the proposed paragraph 28C(2)(b) of the bill has the effect of limiting the actual time available to particular NOHCs to make a submission that can be duly considered, where APRA has given notice to the authorised NOHC that APRA proposes to revoke the entity's authorisation.

Section 28C creates a mechanism by which APRA may revoke the authorisation of a NOHC if APRA is satisfied that one of the triggers specified in subsection 28C(1) is satisfied.

A NOHC has significant control over the registered life insurer which is a subsidiary of the NOHC, as such, it is considered necessary to require such NOHCs to seek authorisation from APRA and to be subject to prudential supervision. The triggers specified in subsection 28C(1) go to the question of whether it is in the interests of the registered life insurer that is the subsidiary of the NOHC, and of the policyholders of the life insurer, for the NOHC's authorisation to be revoked.

In making a decision as to whether an authorised NOHC should have its authorisation revoked, APRA is carrying out its duties and functions of protecting the policyholders, and

PO Box 6022
Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7410
Facsimile: 02 6273 4116
http://minscl.treasurer.gov.au

protecting the stability of the life insurance industry and of the financial system generally. The procedures established under section 28C balance the NOHC's rights and interests with the interests of the policyholders, the life insurance industry and the financial system.

Where APRA is satisfied of a trigger under subsection 28C(1), APRA is required to give the authorised NOHC notice under subsection 28C(2). The notice must specify that APRA proposes to revoke the authorised NOHC's authorisation and the reasons, and provide at least 90 days for the NOHC to make a submission to APRA. APRA is required to consider any submissions made by the NOHC during the period specified in the notice.

The qualification 'by that date' in the last sentence of subsection 28C(2) does not require that APRA consider the submissions during the 90 day period. Such an interpretation would make the subsection inherently inconsistent and incoherent. Courts do not give such interpretations to Acts where there are alternate interpretations. An interpretation that is not inconsistent is that APRA must consider, during any reasonable period, submission made by the NOHC 'by that date', that is, during the 90 day period.

This provision, in effect, provides the NOHC with at least 90 days to make a submission to APRA. This ensures that APRA provides sufficient natural justice to the affected NOHC while maintaining the ability to take decisive action to revoke an entity's authority in order to protect the interests of the relevant policyholders, or of the life insurance industry or the financial system.

Obligation to report certain matters to APRA

The Committee inquired whether the obligation in proposed section 132A of the bill to report certain matters to APRA creates a retrospective obligation.

The explanatory memorandum for the bill is not misleading in relation to this provision. The amendments to section 132A do not retrospectively create an offence for a matter that has occurred before the commencement of the amendments.

Section 132A is directed at the requirement to notify APRA of certain matters. The obligation to notify APRA of specified matters, as imposed by the proposed amendments to section 132A, would only arise after the commencement of the proposed amendments. Therefore, the amendments to section 132A do not have retrospective operation.

In addition, section 132A would require an authorised NOHC to report to APRA where the NOHC becomes aware that it has breached a provision of the Life Insurance Act and the breach is significant. An authorised NOHC is required to report to APRA within 10 business days.

An authorised NOHC incurs obligations to comply with prudential requirements following their authorisation under proposed section 28A. Prior to authorisation, an NOHC would not have obligations to comply with any prudential requirements under the Life Insurance Act. As a result, section 132A would not apply to matters that occur prior to an NOHC becoming an authorised NOHC under section 28A.

As section 132A would only apply to matters which occur after an NOHC has become an authorised NOHC, it does not have retrospective operation.

Entry and search powers

The Committee noted that the explanatory memorandum of the bill did not refer to the Committee's report on *Entry, Search and Seizure Provisions in Commonwealth Legislation (Twelfth Report of 2006)*. The Government has considered this Report in drafting the legislation, but omitted to refer to this Report in the explanatory memorandum to the bill.

I trust this information will be of assistance to the Committee.

Yours sincerely

CHRIS BOWEN

SENATOR THE HON NICK MINCHIN

Leader of the Opposition in the Senate
Shadow Minister for Broadband,
Communications and the Digital Economy
Liberal Senator for South Australia

Senator the Hon Helen Coonan
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

10 AUG 2009

Dear Helen,

Thank you for your recent letter and for highlighting the comments of the Committee in the Scrutiny of Bills Alert Digest No 8 of 2009 regarding the Infrastructure Australia Amendment (National Broadband Network and Other Projects) Bill 2009.

I note the Committee's comments in relation to proposed new subsections that Committee believes are descriptive provisions.

The subsections cited – 5A(1), 5A(2) and 5A (3)- do not merely describe existing functions of Infrastructure Australia (IA), but establish a positive requirement for IA to undertake the stated functions.

According to the Act, IA has various functions, under section 5(1) and 5(2). In relation to the performance of these functions, section 5 of the Act states:

> (3) Infrastructure Australia is to perform a function under subsection (1) or paragraph (2)(a), (b), (e), (f) or (i):
> (a) if it thinks fit; or
> (b) on request by the Minister.
> (4) Infrastructure Australia is to perform a function under paragraph (2)(c), (d), (g) or (h) on request by the Minister.

Arguably these functions *may* include looking at the NBN proposal (eg, under 5(2)(d)), but there is no guarantee under the current Act that that is the case. In any event, under section 5 the performance of such a function would be contingent on the Minister's request and the Government has a stated policy not to require a cost benefit analysis for the NBN proposal.

The proposals in the bill impose a positive duty upon IA to undertake the function of advising the Minister on the NBN (subsection 5A(1)) and the function of advising taxpayers as investors in the NBN (subsection 5A(2)). Similarly, subsection 5A(3) authorises IA to undertake any of the functions it has under section 5 to pursue these new functions, again without requiring the contingencies "if it thinks fit" or "on request by the Minister" to be met.

36 Grenfell Street, Kent Town, SA 5067
PO Box 2141, Kent Town SA 5071

Telephone: 08 8362 8600
Facsimilie: 08 8362 8579
Toll Free: 1300 301 647

I do not believe it is not accurate to describe these proposals as 'recitation of fact', especially given that neither IA nor the Communications Minister has given any indication these important functions were to be undertaken by IA under the existing Act.

I trust this information addresses your concerns, but if not, I would be happy to consider amendments to the Bill in committee-of-the-whole to clarify meaning.

Yours sincerely

Nick Minchin

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

MN09-002538

04 JUL 2009

Senator the Hon Helen Coonan
Chair of the Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 3 June 2009 about the Social Security and Family Assistance Legislation Amendment (2009 Budget Measures) Bill.

The Committee has commented in Alert Digest No. 6 of 2009 on section 47AB of the *Social Security (Administration) Act 1999* (the Social Security Admin Act). Section 47AB was introduced into the Social Security Admin Act by the Social Security and Family Assistance Legislation Amendment (2009 Budget Measures) Bill 2009 (the 2009 Budget Measures Bill), and provides:

If an individual is qualified for carer supplement for a year, the Secretary must pay the supplement to the individual:

(a) on the date or dates that the Secretary considers to be the earliest date or dates on which it is reasonably practicable for the payment to be made; and

(b) in such manner as the Secretary considers appropriate.

The Committee notes that the words in paragraph (b) 'in such manner as the Secretary considers appropriate' give the Secretary very wide latitude. The Committee seeks my advice about the rationale for the potential delegation of this power. I note that the 2009 Budget Measures Bill received Royal Assent on 27 May 2009.

I think it is important to note that the words in paragraph 47AB(b) do not affect a person's entitlement to receive carer supplement. A person's qualification for carer supplement is dealt with in Schedule 1 Part 1 of the 2009 Budget Measures Bill. Neither the Secretary nor anyone to whom he delegates his powers has any discretion to decide whether a person is qualified to receive carer supplement. Qualification is entirely based on receipt of a qualifying instalment (see new section 992X). There is also no discretion for the Secretary or anyone to whom he delegates his powers to not pay carer supplement to a qualified person. The use of the word 'must' in section 47AB means that the Secretary is required to pay carer supplement to a qualified person.

Paragraph 47AB(b) provides the Secretary (or his delegate) with a discretion to determine the manner of payment of carer supplement. In practice, the exercise of powers of this nature is usually limited to a small number of administratively feasible options, such as payment by electronic deposit in a bank account or by cheque. Nonetheless, it is considered appropriate for the power in section 47AB to be cast in the manner in which it has been drafted to enable the carer supplement to be paid in whatever manner is considered most administratively suitable.

I note that the form of words in paragraph 47AB(b) has often been used previously in the Social Security Admin Act in relation to other payments to carers, for example in paragraph 47B(1)(b), which relates to one-off payments to carers, paragraph 47AA(1)(b), which relates to one-off payments to older Australians, and paragraph 50A(b) which relates to payments of child disability assistance. In short, those words have been used in the administration of the social security law in the context of payments to carers since at least 2004.

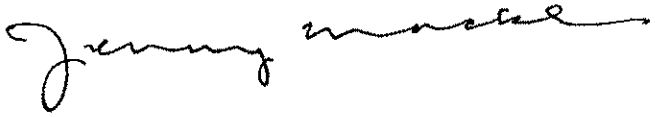
The rationale for the potential delegation of the power is that it is reasonable for it to be exercised by officers who are well-placed to determine administratively appropriate methods for paying carer supplement. The Secretary commonly delegates powers of this nature to the CEO of Centrelink, who in turn sub-delegates the powers to senior national managers within Centrelink.

I understand that the Secretary has not yet delegated his powers under section 47AB. In practice, the Secretary commonly delegates powers of this nature to the CEO of Centrelink, who in turn sub-delegates the powers. Given the similarities between carer supplement and previous payments to carers, it is likely that the delegations for section 47AB will be similar to the delegations for sections such as section 47AA and 47B of the Social Security Admin Act. The delegations for sections 47AA and 47B to decide the manner of payment are limited to senior national managers within Centrelink. I am confident that the delegation in relation to this provision will be appropriately handled.

In summary, I do not consider that section 47AB will make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers.

Thank you again for writing.

Yours sincerely



JENNY MACKLIN MP

The Hon Jenny Macklin MP
Minister for Families, Housing, Community Services and Indigenous Affairs

Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 7560
Facsimile: (02) 6273 4122

MN09-002558

-3 AUG 2009

Senator the Hon Helen Coonan
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills (Committee), about the *Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009.* This Bill has since passed into law.

The Committee commented on a number of aspects in this legislation which I have addressed as follows:

Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Act 2009

Delayed Commencement
Clause 2

The Committee seeks clarification as to the delayed commencement of Schedule 12.

Schedule 12 reforms the advance payment arrangements for pensioners other than those receiving Parenting Payment Single. The changes increase the flexibility of the advance payment arrangements and include allowing more than one advance in a 12 month period, increasing the maximum advance amounts and increasing both the maximum and minimum advance amounts in line with pension rate increases.

The commencement of this measure on 1 July 2010 provides pensioners and Centrelink with a period of time to adjust to the significant reforms to the payment arrangements for pensioners occurring on 20 September 2009 as part of the Government's Secure and Sustainable Pension Reform package. Two measures will be implemented on 1 July 2010: the changes to advance payments and the option to receive the minimum Pension Supplement on a quarterly basis instead of receiving the whole amount fortnightly. Implementing these two measures at the same time will give pensioners greater choice and more flexibility to plan and budget effectively.

Retrospective application
Schedule 13, items 2 and 4

The Committee seeks advice as to whether further explanation and justification for the retrospective application of the changes made by Schedule 13 might be provided. Schedule 13 provides for income that is salary sacrificed to superannuation to be assessed as adjusted taxable income for the Commonwealth seniors health card. Items 2 and 4 of Schedule 13 provide that the substantive amendments in this Schedule apply to seniors health cards granted 'before, on or after the commencement' of the relevant amendments. However, these items do not affect a person's qualification for a seniors health card before that commencement.

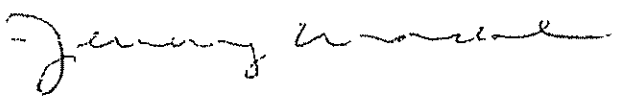
Although the explanatory memorandum refers to the changes in Schedule 13 having 'no adverse retrospective effect', the intention was to express that the legislation has no retrospective effect at all. Even though the changes may apply in relation to a seniors health card granted before the commencement date (1 July 2009), they will only operate prospectively in relation to an individual's qualification for the seniors health card from 1 July 2009.

On occasions, changes in government policy will be brought into effect by legislation which may adversely affect certain people. However, I do not consider that legislation of this nature, such as the provisions under consideration here, can reasonably be regarded as undermining people's legitimate expectations of government.

I would also note that, whilst Schedule 13 introduces a stricter income test for the seniors health card, there is some capacity within existing rules for the impact of the new rules to be alleviated. Ordinarily, an individual's income for assessing qualification for the seniors health card is generally based on income received in the previous financial year, in this case 2008-09. However, it is possible within the terms of the legislation for a person to request that their qualification for the card be based on an 'estimate' of their income for the current financial year being 2009-10. Accordingly, it would be possible for a cardholder to lodge with Centrelink an estimate of their income for the current financial year and to adjust their finances accordingly to remain within the income thresholds.

Thank you again for giving me the opportunity to comment in response to the Committee's concerns.

Yours sincerely



JENNY MACKLIN MP