Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012

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Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012

Date introduced: 12 September 2012
House: House of Representatives
Portfolio: Families, Housing, Community Services and Indigenous Affairs
Commencement: Various dates as set out in the table in section 2 of the Bill

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The primary purpose of the Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012 (the Bill) is to amend various Acts to:

- implement Budget measures in relation to the Cape York Welfare Reform trial and indigenous education payments
- harmonise the operations of the Social Security Appeals Tribunal (SSAT) under the relevant social security, child support, family assistance and paid parental leave laws and
- confirm the operation of existing policy and practice under the child support legislation in relation to payments by a person in respect of a child where the person subsequently discovers that they are not a parent of that child.

In addition, the Bill makes minor technical amendments to the Schoolkids bonus legislation and the A New Tax System (Family Assistance) Act 1999¹ and related A New Tax System (Family Assistance) (Administration) Act 1999.²

Structure of the Bill

The Bill is comprised of six Schedules, each of which has a discreet purpose. They are:

- Schedule 1—Extending Cape York welfare reform trial


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• Schedule 2—Indigenous education payments
• Schedule 3—Social Security Appeals Tribunal
• Schedule 4—Amendments relating to certain child support declarations
• Schedule 5—Schoolkids bonus and
• Schedule 6—Other amendments.

That being the case, the background to the amendments, the commencement date, the financial implications of the proposed changes and the key provisions of each Schedule are set out under the relevant Schedule heading.

Committee consideration

House of Representatives Selection Committee

On 13 September 2012, the House of Representatives Selection Committee referred the Bill to the House of Representatives Standing Committee on Social Policy and Legal Affairs (Social Policy and Legal Affairs Committee) for inquiry and report.3 The terms of reference were to examine the drafting of the changes regarding schoolkids bonus, child support legislation and the Social Security Appeals Tribunal. Given the Selection Committee reason for referral, the drafting of the changes and their consistency with the objectives and policy intent of the legislation were duly examined. As the inquiry had a narrow focus, the Social Policy and Legal Affairs Committee determined not to issue a call for submissions or to conduct a public hearing.

The report of Social Policy and Legal Affairs Committee which was published on 10 October 2012, contained a recommendation that the House of Representatives pass the Bill.4

Senate Selection of Bills Committee

On 20 September 2012, the Senate Selection of Bills Committee resolved to recommend that the Bill not be referred to committee for inquiry and report.5

3. Details of the inquiry are at:
4. House of Representatives Standing Committee on Social Policy and Legal Affairs, Social Security and Other Legislation Amendment (Further 2012 Budget and Other Measures) Bill 2012: advisory report, Canberra, October 2012, viewed 26 October 2012,
5. Selection of Bills Committee, Report No. 12 of 2012, Senate, Canberra, 20 September 2012, viewed 3 October 2012,

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Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) reported on the Bill on 19 September 2012. The Committee addressed the issue of undue trespass raised in relation to:

- reversal of burden of proof (items 28, 74, 116 and 140 of Schedule 3 of the Bill)
- privacy (items 36, 90 and 156 of Schedule 3 of the Bill) and
- retrospective application (subitem 2(1) of Schedule 4 of the Bill).

The comments of the Scrutiny of Bills Committee are noted with the corresponding key provisions within the Bills Digest.6

Parliamentary Joint Standing Committee on Human Rights

The Statement of Compatibility with Human Rights can be found at page 60 of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011, the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Joint Parliamentary Committee on Human Rights has not yet reported on this Bill.7

Schedule 1—extending Cape York welfare reform trial

Schedule 1 of the Bill amends the Social Security Administration Act 1999 (SSA Act)8 to enable income management to continue in Cape York for a further 12 months from 1 January 2013. The provisions are to commence on Royal Assent.

Income management

Income management (also known as ‘welfare quarantining’) refers to a policy under which a percentage of the welfare payments of certain people is set aside, to be spent only on ‘priority

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goods and services’ such as food, housing, clothing, education and health care. Compulsory income management was introduced by the Howard Government in 2007 as part of the legislation for the Northern Territory Emergency Response (NTER). At that time, income management schemes were also established as part of the Cape York Welfare Reform Trial (see below), for situations of child neglect and for situations where children of welfare recipients are not enrolled at and/or attending school. Provisions were also introduced for people to have their income managed voluntarily.

Since 2007, there have been a number of changes made to the way income management operates. It has also been extended to cover additional circumstances and geographical areas. The six different income management measures are:

- ‘Participation/Parenting’, applying to people in the Northern Territory who are in receipt of certain welfare payments for a period of time deemed by the Government to put them ‘at risk’
- ‘Vulnerable Welfare Payment Recipients’, applying to people who have been referred for income management by a Centrelink Social Worker
- ‘Child Protection Income Management’, applying to people in the Northern Territory and parts of Western Australia whom a child protection officer has referred to Centrelink
- the Cape York measure, applying to people in Cape York whom a statutory body has ordered should be subject to income management for engaging in dysfunctional behaviour
- ‘Place Based Income Management’, applying from 1 July 2012 to people living in one of five targeted communities who have been referred for income management and
- ‘Supporting People at Risk’, applying from 1 July 2012 to people referred for income management by particular state and territory agencies (initially Northern Territory authorities will have the power to refer people for income management for alcohol related problems).

On 7 September 2012, the Government announced that it would introduce income management in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands in South Australia. Following this announcement income management applies in some areas of the Northern Territory, Queensland, Western Australia, Victoria, New South Wales and South Australia.

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9. Explanatory Memorandum, Social Security and Other Legislation (Welfare Payment Reform) Bill 2007, p. i, viewed 2 October 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fems%2Fr2852_emscdf799fc74d7-4287-a78e-6b7aede2b182%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fems%2Fr2852_emscdf799fc74d7-4287-a78e-6b7aede2b182%22)
Cape York income management

Income management in Cape York forms part of the Cape York Welfare Reform Trial (CYWRT), a joint initiative of the Australian Government, the Queensland Government and Noel Pearson’s Cape York Institute for Policy and Leadership. The CYWRT is being implemented in the communities of Hope Vale, Coen, Aurukun and Mossman Gorge (‘the reform communities’), which have a combined population of around 1600.

The purpose of the trial is to address Indigenous disadvantage in the Cape York region by fostering personal responsibility and local leadership. This builds on the recommendations of the Cape York Institute’s welfare reform project report.

The CYWRT commenced on 1 July 2008 and is administered by a statutory body, the Family Responsibilities Commission (FRC), established by the Family Responsibilities Commission Act 2008 (Qld). The FRC holds regular case conferences in each of the reform communities on a circuit.

Any person who is a welfare recipient living in one of the four CYWRT communities and who fits into any of the following categories may be referred to the FRC:

- the person’s child is absent from school three times in a school term without reasonable excuse
- the person has a child of school age who is not enrolled in school without lawful excuse
- the person is the subject of a child safety report
- the person is convicted of an offence in the Magistrates Court or
- the person breaches his or her tenancy agreement—for example, by using the premises for an illegal purpose, causing a nuisance or failing to remedy rent arrears.

People referred to the FRC are required to attend a conference in order to discuss the issues that have led to their referral. The FRC attempts to link individuals to relevant support services including:

- case managers to help children attend school

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12. This section reproduced from L Buckmaster, C Ey and M Klapdor, op. cit., pp. 12-14.

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• money management advisors and

• counsellors for drug and alcohol addiction, family violence and mental health issues.16

FRC Commissioners attempt to reach an agreement with individuals on actions they will take to assume greater responsibility, including attending support services and through personal actions such as putting children to bed early. People who have entered into such an agreement are case managed by the FRC for the period of the agreement.

In addition to this support role, the FRC has the power to require that the person’s income (generally, 60 to 75 per cent) be managed by Centrelink for a period of between three to 12 months under a program known as Conditional Income Management.17 The FRC uses income management both as a mechanism for ensuring that welfare payments are spent on necessities and as an incentive for the individual to engage with social supports and undertake behavioural change. As at 6 April 2012, 152 people were subject to income management in Cape York.18

In the 2012–13 Budget, the Government announced that it would extend its support for the CYWRT until 31 December 2013, with an additional $11.8 million over two years.19 The extension of the CYWRT also requires funding and legislation from the Queensland Government to extend the operation of the FRC. A Bill to extend the operation of the FRC until 31 December 2013, the Family Responsibilities Commission Amendment Bill 2012, was introduced into the Queensland Parliament on 11 September 2012.20 The 2012–13 Queensland Budget also includes increased funding of $5.7 million over two years to continue the Cape York Welfare Reform trial (including the Family Responsibilities Commission) until 31 December 2013.21

Is it working?

As argued in a recent Parliamentary Library Background Note on the evidence for income management:

16. FaHCSIA and KPMG, op. cit.
17. There is no information on the public record indicating why the proportion of income quarantined differs across the various income management measures.

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There are substantial difficulties associated with evaluating the effectiveness of income management. The first of these is that there are very few studies available that have attempted to directly measure the impact of income management separately from other policy interventions. Further, such evaluations as have been attempted should be treated with caution due to a range of methodological problems …

In relation to Cape York, the Background Note found that there was no unambiguous evidence for or against the effectiveness of income management. For example:

- There is no clear pattern in the rate and direction of changes in school attendance across the reform communities—for example, while the percentage of children attending school increased between Term 2, 2008 and Term 2, 2011, in Aurukun (37.9 per cent to 70.1 per cent) and Mossman Gorge (75.8 per cent to 79.5 per cent), it actually fell over the same period in Coen (96.8 per cent to 86.6 per cent) and
- There is no trend towards positive or negative change in key indicators of community wellbeing such as hospital admissions for assault-related conditions, offences against the person, convictions for breaches of alcohol restrictions, substantiated child protection notifications and admissions to child protection orders across any of the communities since the beginning of the reform trial.

As argued in the Background Note, in relation to the three main jurisdictions in which income management operates (NT, Qld and WA):

> The overall picture emerging from the available evidence is one in which positive changes have been uneven and fragile. On the other hand, there is no clear evidence that income management is responsible for a worsening of the situation in areas in which it operates.

> It is likely that the evidence in relation to income management will only become clearer over the long term, especially given the structural nature of the social problems involved.

### Change proposed in the Bill

As noted above, the Bill seeks to extend income management in Cape York for a further 12 months.

This requires an amendment to the SSA Act to extend the date up to which decisions by the FRC can result in a person being subject to income management to 1 January 2014. Currently, only decisions made before 1 January 2013 can result in a person’s income being managed by Centrelink.

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22. These include the lack of comparison group or baseline data; the limited amount of quantitative data; the strong reliance on qualitative measures; questions over the independence of some evaluations; and problems with other design aspects of various reviews. L Buckmaster, C Ey and M Klapdor, op. cit., p. 40.
23. Ibid., p. 41. For further information on evidence relating to the CYWRT and income management, see L Buckmaster and C Ey, op. cit.

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The Government previously extended income management for 12 months from 1 January 2012.\footnote{25}

In support of this change, the Government has provided the same rationale as it did with the previous extension:

To date, the Trial has made a real difference in the lives of Indigenous people in the Cape. Since it began in July 2008, the Cape York welfare reform communities have seen improved school attendance, care and protection of children and community safety.\footnote{26}

Similarly, in the Bills Digest for the previous extension, the following point was made in relation to the Government’s claim:

... changes that have taken place in the reform communities have been uneven and are fragile. This is not necessarily an argument against extending the trial. Indeed, it may be argued that it highlights the need for a continuation of the reform process (underpinned by income management). Nevertheless, it does suggest the need to continue to monitor the progress of the CYWRT.\footnote{27}

The Government says that ‘an evaluation of the trial is currently underway, and will help inform future efforts in Cape York’.\footnote{28}

**Financial implications**

The Government has provided $11.8 million for the continuation of the CYWRT until December 2013 ($5.9 million for both 2012–13 and 2013–14).\footnote{29} According to the Explanatory Memorandum to the Bill, this includes funding for measures not related to the Bill, such as case management to encourage school attendance.\footnote{30}

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\footnote{26}{Explanatory Memorandum, p. 2.}

\footnote{27}{D Daniels, J Garden, L Buckmaster and P Yeend, op. cit., p. 21.}


\footnote{29}{Australian Government, *Budget measures: budget paper no. 2: 2012–13*, op. cit.}

\footnote{30}{Explanatory Memorandum, p. 2.}

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Key provisions

Item 1 of Schedule 1 of the Bill amends paragraphs 123UF(1)(g) and 123UF(2)(h) of the SSA Act to omit references to 1 January 2013 and to substitute references to 1 January 2014. The amendments operate to extend the CYWRT by one year.

Schedule 2—Indigenous education payments

Schedule 2 of the Bill amends the Indigenous Education (Targeted Assistance) Act 2000 (Indigenous Education Act)31 to increase the Act’s legislative appropriation for the 2012 and 2013 calendar years.32 The provisions commence on Royal Assent.

Australian Government assistance to Indigenous education is provided through the Indigenous Education Act. In the 2012–13 Budget, the Government announced the continuation of some existing initiatives and the introduction of new initiatives in the area of Indigenous education.33 This Bill amends the Indigenous Education Act to increase its appropriation by approximately $16 million over the calendar years 2012 and 2013. The increased appropriation is intended to:

... continue existing initiatives and provide funding for several new initiatives, including expansion of the Sporting Chance Program, Teach Remote Stage 2, Student Education Trusts delivered as part of the Cape York Welfare Reform Trial, and initiatives that support teachers, professional development and front-line services to improve Aboriginal children’s access to quality education.34

It should be noted that the increased allocations for Indigenous education in the Budget, were ‘more than offset by the redirection to Stronger Futures spending of savings of $56.3 million over four years ($152.9 million over ten years) by ceasing the Closing the Gap—Intensive Literacy and Numeracy Programs for Underachieving Indigenous Students’ 35

Financial implications

According to the Explanatory Memorandum to the Bill, the financial impact of this Schedule will be:

32. Explanatory Memorandum, p. 4.
35. J Gardiner-Garden, op. cit.

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• $11.9 million for 2012 (increasing the appropriation to $132.6 million) and
• $4.2 million for 2013 (increasing the appropriation to $137.7 million).\textsuperscript{36}

Key provisions

Items 1 and 2 of Schedule 2 of the Bill amend subsections 14B(1) (table item 4) and 14C(1)(table item 1) of the Indigenous Education Act respectively, to increase the starting amount for the appropriation for:

• 2012 from $120 701 000 to $132 607 000 and
• 2013 from $133 527 000 to $137 699 000.

Schedule 3—Social Security Appeals Tribunal

Schedule 3 of the Bill amends four Acts:

• \textit{A New Tax System (Family Assistance) (Administration) Act 1999} (FA Admin Act)
• \textit{Child Support (Registration and Collection) Act 1988} (CSRC Act)
• \textit{Paid Parental Leave Act 2010} (PPL Act) and

The purpose of the amendments is to:

• harmonise certain provisions of those four Acts in relation to the operation of the SSAT
• address gaps in privacy protection for information and documents related to a review and
• permit an SSAT member to disclose otherwise protected information to a person in certain circumstances if the information concerns a threat to the life, health or welfare of a person.

The amendments in Schedule 3 of the Bill commence on the 28\textsuperscript{th} day after Royal Assent.

Financial implications

According to the Explanatory Memorandum to the Bill, the amendments will have negligible financial impact.\textsuperscript{37}

\textsuperscript{36} Explanatory Memorandum, p. 2.
\textsuperscript{37} Ibid., p. 2.

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Amendments to the FA Admin Act

Review of Decisions

The SSAT can review decisions made under the FA Admin Act about entitlement to family assistance, such as family tax benefit, baby bonus or child care benefit, the rate at which family assistance is paid and the raising of debts relating to family assistance overpayments and the rate at which they are to be repaid.38

Items 4–28 of Schedule 3 of the Bill amend Part 5 of the FA Admin Act, which relates to the review of decisions.

Items 1–3 insert notes as guidance to readers about the legal basis for the constitution and membership of the SSAT, including the Principal Member.

Items 4 and 5 amend section 110 of the FA Admin Act to clarify that, in the exercise of his, or her, functions and powers under the FA Admin Act, the ‘Principal Member’ of the SSAT must pursue the same objects as those for the SSAT as a whole—that is, to be fair, just, economical, informal and quick.39 Equivalent amendments, to add explanatory notes and clarify the manner in which the Principal Member of the SSAT must exercise his or her powers, are made to the other Acts amended by Schedule 3 to the Bill.40

Parties

Item 8 of Schedule 3 of the Bill inserts proposed paragraph 118(1)(c) into the FA Admin Act so that, where the decision under review is a ‘care percentage decision’41, each person who is a ‘responsible person’42 for the child to whom the decision relates, is a party to the review by the SSAT. Each party will be given a statement of the decision under review (section 120 of the FA Admin Act). Under existing section 123 of the FA Admin Act a party may have another person make submissions to the SSAT on their behalf. The amendment in item 11 limits that right so that a party has a right to have another person make submission on their behalf only if the Principal Member gives permission to do so (proposed subsection 123(3) of the FA Admin Act). In making that decision, proposed subsection

39. The term ‘Principal Member’ in the FA Admin Act means the Principal Member of the Social Security Appeals Tribunal – see subsection 3(1) of that Act.
41. Section 3 of the FA Admin Act defines a ‘care percentage decision’ as a decision to the extent that the decision involves (wholly or partly) a determination of an individual’s percentage of care for a child.
42. Under section 5 of the Child Support (Assessment) Act 1989 a ‘responsible person’ for a child is a parent or non-parent carer of the child.

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123(3A) requires the Principal Member to have regard to the wishes of the parties and the need to protect their privacy.\(^\text{43}\)

References to directions hearings

**Items 15–21** of Schedule 3 of the Bill rename ‘pre-conference’ hearings to ‘directions hearings’. This change has no legal effect as the existing provisions already allow the Principal Member to give directions to the participants at pre-conference hearings—for example, the time by which submissions are to be given to the SSAT. However, the change in terminology describes the process more accurately. In addition, the use of the term ‘directions hearing’ is consistent with the language contained in the *Administrative Appeals Tribunal Act 1975*.\(^\text{44}\)

Dismissal and withdrawal of applications for review

**Item 26** of Schedule 3 of the Bill repeals and substitutes sections 135 and 136 of the FA Admin Act. According to the Explanatory Memorandum:

> these changes align the rules relating to dismissals of applications in the Family Assistance Administration Act with similar rules in other legislation that confers jurisdiction upon the SSAT...
> In addition, the new rules provide for greater flexibility, for example, by expanding the circumstances in which an application can be dismissed and by providing the SSAT with the capacity to reinstate applications that have been dismissed in certain circumstances.\(^\text{45}\)

**Proposed subsection 135(1)** of the Act sets out the circumstances in which the Principal Member may dismiss an application for review. These include where the decision is not reviewable (**proposed paragraph 135(1)(a)**), all the parties have consented (**proposed paragraph 135(1)(c)**), all the parties have failed to attend the hearing (**proposed paragraph 135(1)(e)**), and where the Principal Member is satisfied that the parties do not wish to proceed (**proposed paragraph 135(1)(d)**).

An additional circumstance is where the application is frivolous or vexatious (**proposed paragraph 135(1)(b)**). The Principal Member may dismiss an application for review on this basis only if:

\(^{43}\) At page 8, the Explanatory Memorandum to the Bill states that: ‘There may be circumstances where the other party may wish to object to, or have concerns with, the person nominated to make submissions under existing subsection 123(3). Proposed subsections 123(3) and (3A) take into account these views, including the need to protect privacy’.

\(^{44}\) For example, section 33 of the *Administrative Appeals Tribunal Act 1975* sets out the procedures for the Tribunal including the authority for the President of the Tribunal to hold a ‘directions hearing’. The text of the *Administrative Appeals Tribunal Act 1975* can be viewed at: [http://www.comlaw.gov.au/Details/C2012C00114/Download](http://www.comlaw.gov.au/Details/C2012C00114/Download)

\(^{45}\) Explanatory Memorandum, p. 10.

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• first, the Principal Member has received and considered the submissions from the applicant for the review, or communicated with the applicant about the grounds for review or made reasonable (but unsuccessful) attempts to do so and
• second, all of the parties, other than the applicant, have consented to the dismissal (proposed subsection 135(2)).

Proposed subsections 135(3)–(5) allow the Principal Member to reinstate the application if the applicant requests reinstatement with 28 days (or a longer period if there are special circumstances), or if the application was dismissed in error.

Under proposed subsection 135(3), the power to reinstate an application that has been dismissed does not apply where an application is dismissed on the grounds that it is frivolous or vexatious (proposed subsection 135(3)). The rationale for this provision is that:

... in deciding that an application is frivolous or vexatious, the Principal Member would have concluded that the application for review had no prospects of success, and there would be no utility in permitting an application for reinstatement of an application for review which had already been found to be without merit. 46

However, it would be possible for the Principal Member to reinstate such an application if he, or she, considered that the application had been dismissed in error under proposed subsection 135(5).

Under existing section 136 of the FA Admin Act the Principal Member may dismiss an application if the Principal Member is satisfied that the person does not intend to proceed with the application, after having communicated with the person or after making reasonable, though unsuccessful, attempts to communicate with the person. In that case, the application is taken to have been withdrawn at the time at which the application was dismissed.

Proposed subsection 136(1) provides that an applicant for review may notify the SSAT that the application for review is discontinued or withdrawn. There is no requirement for the Principal Member to communicate with the applicant. Rather under proposed subsection 136(2) notification may be oral and the person receiving the notification is to make a written record of day on which it was received. Once such notification is given, the Principal Member is taken to have dismissed the application. Consistent with the provisions outlined above, the Principal Member may reinstate the application if the applicant requests reinstatement within 28 days (or a longer period if there are special circumstances) (proposed subsections 136(4)–(5)).

46. Explanatory Memorandum, p. 12.

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Restrictions on disclosure of information

Item 28 of Schedule 3 of the Bill inserts new Subdivision G—Restrictions on disclosure of information into Division 3 of Part 5 of the FA Admin Act. The new Subdivision G creates two criminal offences which carry penalties of two years imprisonment.47

Proposed subsection 141C(1) allows the Principal Member to make an order directing a person not to disclose specified information—in the order (proposed paragraph 141C(a)), except as specified in the order (proposed paragraph 141C(b)) or except to specified persons (proposed paragraph 141C(c))—being information which has been disclosed to the person for the purposes relating to a review of a decision under the FA Admin Act (proposed subsection 141C(2)).

The first of the criminal offences arises where the Principal Member has made such an order and the person contravenes the order.

Proposed section 141E applies where the Principal Member makes an order directing a person (under proposed subsection 141C(1)) not to disclose specified information except to an ‘authorised recipient’—that is a person, or a member of a class of persons, who is specified in the order (proposed subsection 141E(1)). The Principal Member may make another order directing the ‘authorised recipient’ not to disclose the information specified in the primary order. The second of the criminal offences arises where the Principal Member has made such an order and the ‘authorised recipient’ contravenes the order (proposed subsection 141E(2)).

In both cases, the offence will not apply if the person already knew the information before it was disclosed to them for the purposes of the review (proposed subsections 141C(4) and 141E(3)). In any relevant criminal proceedings the onus of proof will be on the defendant to establish, on the balance of probabilities, that they had prior knowledge of the information (proposed subsections 141C(4) and 141E(3)).48

47. Note that subsection 4B(2) of the Crimes Act 1914 provides that where a person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty which is calculated using the formula set out in that subsection. The text of the Crimes Act 1914 can be viewed at: http://www.comlaw.gov.au/Details/C2012C00720/Download

48. See the Note to proposed subsection 141C(4) which states that ‘A defendant bears an evidential burden in relation to the matter in subsection (4): see subsection 13.3(3) of the Criminal Code Act 1995. Evidential burden is defined under subsection 13.3(3) of the Criminal Code Act 1995 to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’. Subsection 13.3(6) of the Criminal Code provides that the defendant is required to discharge such a burden on the balance of probabilities. (This may be contrasted to the requirement that a legal burden of proof on the prosecution must be proved ‘beyond reasonable doubt’—subsection 13.3(2) of the Criminal Code.) The text of the Criminal Code can be viewed at: http://www.comlaw.gov.au/Details/C2012C00547/Download

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Comments by the Scrutiny of Bills Committee

The Scrutiny of Bills Committee noted the reversal of the onus of proof which is contained in proposed subsections 141C(4) and 141E(3). However, the Committee accepted the explanation for the provisions in the Explanatory Memorandum to the Bill—‘that the recipient of the information that is subject to a non-disclosure order given by the SSAT... will be best placed to know whether he or she knew the information before they were given the information at the review and produce appropriate evidence’. In addition, the Scrutiny of Bills Committee accepted that the approach ‘is consistent with that set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’. Accordingly, the Committee made no further comment on this issue.

Amendments to the Child Support (Registration and Collection) Act

SSAT review of decisions in relation to the CSRC Act

The SSAT can review decisions made under the CSRC Act about, amongst other things, a decision about an application for an extension of time, a decision about an objection to a decision of the Registrar, a decision to make a determination whether there were special circumstances for the late lodgement of an objection (or a decision not to make such a determination) and a decision to make a determination about the date of effect of internal reviews under the FA Admin Act that apply for child support purposes (or a decision not to make such a determination).

Consistent with the other amendments in Schedule 3 of the Bill, items 30–32 amend the CSRC Act to insert notes as guidance to readers about the legal basis for the constitution and membership of the SSAT, including the Principal Member.

49. Items 74 (proposed subsections 103ZAA(4) and 103ZAC(3) of the CSRC Act), 116 (proposed subsections 273A(4) and 273C(3) of the PPL Act) and 140 (proposed subsections 177B(4) and 177D(3) of the SSA Act) are in identical terms. The Committee comments apply to each of these items.
50. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 18.
52. See item 1 of the table at subsection 89(1) of the CSRC Act. The reviewable decision is made under subsection 83(1), CSRC Act.
53. See item 2 of the table at subsection 89(1) of the CSRC Act. The reviewable decision is made under subsection 87(1), CSRC Act.
54. See item 3 of the table at subsection 89(1) of the CSRC Act. The reviewable decision is made under subsection 87AA(2), CSRC Act.
55. See item 4 of the table at subsection 89(1) of the CSRC Act. The reviewable decision is made under subsection 110Y(3) or 110Z(3) of the CSRC Act.
56. Items 1–3 of Schedule 3 of the Bill are in identical terms.

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The amendments in items 33–35, 47, 68–71, 75, 76, 79 and 81–86 omit references to ‘proceedings’ and insert instead references to ‘review’. These amendments are intended to ensure consistency in the language of the CSRC Act, as Part VIIA of this Act, which relates to internal Departmental review of decisions, already uses the word ‘review’.

Protected Information

Existing section 16 prescribes the secrecy provisions that apply under the CSRC Act. Subsection 16(1) specifies that the terms of section 16 apply to the Minister; a person appointed or employed by, or a provider of services for, the Commonwealth; and a person to whom protected information is, or has been, communicated as prescribed in section 16.

Subsection 16(2) creates an offence where a person to whom section 16 applies makes a record of any ‘protected information’ or communicates to a person any protected information concerning another person, whether directly or indirectly. The penalty for the offence is imprisonment for one year.

Section 16 also provides for exceptions to the offence provision. For example, paragraph-16(3)(e) of the CSRC Act prescribes the circumstances under which protected information can be disclosed by the Child Support Registrar or a person authorised by the Registrar if the information concerns a credible threat to the life, health or welfare of a person and either:

- the Registrar believes on reasonable grounds that the communication is necessary to prevent or lessen the threat or
- there is reason to suspect that the threat may afford evidence that an offence may be, or has been, committed against a person and the Registrar communicates the information for the purpose of preventing, investigating or prosecuting such an offence.

Item 36 of Schedule 3 of the Bill inserts proposed subsection 16(3A) to create an additional exception to the offence provision in subsection 16(2). The proposed provision will allow an SSAT member to disclose protected information in the same circumstances as the Registrar is permitted to under paragraph 16(3)(e), the only difference being that paragraph 16(3)(e) specifies that the threat must be ‘credible’. This is unstated in proposed subsection 16(3A). However it is probably unnecessary due to the reasonableness requirement in proposed paragraph 16(3A)(a).

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57. Subsection 16(1) of the CSRC Act defines ‘protected information’ as information that (a) concerns a person and is disclosed to or obtained by another person in the course of, or because of, the other person’s duties under or in relation to the CSRC Act; or (b) information to which paragraph (a) applies that is communicated to a person in circumstances authorised by section 16 of the CSRC Act.

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National Framework for Protecting Australia’s Children

This amendment is consistent with actions under the National Framework for Protecting Australia’s Children. It has been reported that:

In 2007-08, there were 55,120 reports of child abuse and neglect substantiated by child protection services.

For the first time since national data collection there was a reduction in child abuse substantiations from the previous year (2006-07). This is a promising indication that substantial increases in family support may be effective at preventing child abuse and neglect. Data in future years will tell us if this trend continues.

Despite this, the rate has more than doubled over the past 10 years and the number of children subject to child abuse and neglect remains unacceptably high.

And further

Australia needs to move from seeing ‘protecting children’ merely as a response to abuse and neglect to one of promoting the safety and wellbeing of children. Leading researchers and practitioners – both in Australia and overseas – have suggested that applying a public health model to care and protection will deliver better outcomes for our children and young people and their families.

... Ultimately, the aim of a public health approach is to reduce the occurrence of child abuse and neglect and to provide the most appropriate response to vulnerable families and those in which abuse or neglect has already occurred.

The National Framework for Protecting Australia’s Children sets out six outcomes including that ‘children and families access adequate support to promote safety and intervene early’. The amendment to permit an SSAT member to communicate any protected information to a person, if the information concerns a threat to the life, health or welfare of a person is compatible with that outcome.

58. The National Framework for Protecting Australia’s Children has adopted a definition of the term ‘child’ as being anyone under the age of 18 years.
60. Ibid., pp. 7–8.
61. Ibid., p. 17.

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Comments by the Scrutiny of Bills Committee

The Scrutiny of Bills Committee considered the terms of proposed section 16(3A) of the CSRC Act noting that:

The Statement of Compatibility (at page 6) states that this provision may be considered ‘reasonable and proportionate’ to any infringement on the right to privacy ‘because it strengthens a person’s right to protection from exploitation, violence and abuse, and ensures there is no legal impediment to attempts to safeguard the welfare and safety of individuals’.

The Scrutiny of Bills Committee left the question to the Senate as a whole to consider whether these measures are appropriate.

Powers relating to the dismissal or withdrawal of appeals

Sections 100 and 100A of the CSRC Act already make provision for the SSAT Principal Member to dismiss an application for review on his or her own initiative or at the request of an applicant. Items 48–50 of Schedule 3 of the Bill add to the existing provisions of the CSRC Act in a manner that is consistent with similar provisions in other statutes, such as the FA Admin Act.

Item 48 inserts proposed subsections 100(3)–(5) to allow the SSAT Principal Member to reinstate an application which has previously been dismissed if a party to the review makes a written request within 28 days after being notified of the dismissal (or a longer period if there are special circumstances), or if the application was dismissed in error. As noted above in relation to the FA Admin Act, the power to reinstate an application that has been dismissed does not apply where an application is dismissed on the grounds that it is frivolous or vexatious or where all of the parties have been removed from the proceeding under subsection 101(5) of the CSRC Act. However, it would be possible for the Principal Member to reinstate such an application if he or she considered that the application had been dismissed in error under proposed subsection 100(5).

Where a person has been removed from the proceeding under this subsection, proposed subsection 103X(6) (inserted by item 72) requires the SSAT to provide that person with written notice as well as the reasons for the decision within 14 days.

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62. The Scrutiny of Bills Committee also made the same reference to the identical provisions which are inserted by item 90 (proposed section 130A of the PPL Act) and item 156 (proposed section 19A of the SSA Act).

63. Senate Standing Committee for the Scrutiny of Bills, op. cit., pp. 18–19.

64. The changes made by items 48 and 50 are consistent with the changes made by item 26, as outlined above.

65. Subsection 101(5) of the CSRC Act provides that the SSAT Principal Member may direct that a person is no longer a party to a review if (a) the party consents; (b) the SSAT Principal Member is satisfied that the party does not intend to participate in or proceed with the review; (c) the party fails to comply with a direction or order of the SSAT or of the SSAT Principal Member given in relation to the review; or (d) the party fails to attend the hearing.

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Item 50 repeals existing subsections 100A(3)–(5) and substitutes proposed subsections 100A(3)–(4) to make clear that it is the SSAT Principal Member, rather than the SSAT, who is empowered to dismiss an application for review and to reinstate an application which has been dismissed at the request of one of the parties to the review in equivalent terms to those in proposed subsections 136(4)–(5) of the FA Admin Act (as discussed above).

References to directions hearings

Consistent with the amendments to the FA Admin Act (items 15-21 of Schedule 3 of the Bill outlined above), items 51-57 amend the CSRC Act to omit references to ‘pre-hearing conference’ and substitute references to ‘directions hearing’.

Parties

Under existing subsection 103C(2) of the CSRC Act a party may have another person make submissions to the SSAT on their behalf. Consistent with the amendments to the FA Admin Act (item 11 of Schedule 3 of the Bill outlined above), item 58 repeals existing subsection 103C(2) of the CSRC Act and substitutes proposed subsections 103C(2)–(2A) to limit that right so that a party has the right to have another person make submissions on their behalf only if the Principal Member gives permission to do so.

These amendments are included for the same reasons as outlined under item 11 above.

Creation of criminal offences in the event of certain disclosures of information

Item 74 of Schedule 3 of the Bill inserts proposed sections 103ZAA–103ZAC into the CSRC Act which create offences where the SSAT Principal Member has made an order restricting disclosure of information and disclosure is made in contravention of that order, in identical terms to those in proposed sections 141C–141E of the FA Admin Act (inserted by item 28) as outlined above.

66. Existing subsection 100A(5) is obsolete. This subsection allows the SSAT to reinstate an application if it has been dismissed under subsection 100A(2) in error. Because an application is dismissed by force of subsection 100A(2) only if the applicant notifies the SSAT in writing that the application is discontinued or withdrawn, it follows that an application is not dismissed if there was no such notification to the SSAT. Source: Explanatory Memorandum, p. 20.

67. In child support proceedings under Part VIIA of the CSRC Act, it is not uncommon for parties to ask that their current partners be their representatives. It is also common for the other party to be strongly opposed to such representation. Subsection 103C is amended to clarify that the permission of the SSAT Principal Member is required for a party to have another person make submissions on their behalf. Source: Explanatory Memorandum, p. 21.

68. As noted above in footnote 48, item 28 (proposed subsections 141C(4) and 141E(3) of the FA Admin Act), item 116 (proposed subsections 273A(4) and 273C(3) of the PPL Act) and item 140 (proposed subsections 177B(4) and 177D(3) of the SSA Act) are in identical terms and the comment of the Senate Scrutiny of Bills Committee, discussed above, applies to all of these related provisions.

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Similarly, the offence will not apply if the person already knew the information before it was disclosed to them for the purpose of the review. In any relevant criminal proceedings the onus of proof will be on the defendant to establish, on the balance of probabilities, that they had prior knowledge of the information.69

Amendments to the Paid Parental Leave Act

The Paid Parental Leave Act 2010 (PPL Act)70 provides for financial support to primary carers (mainly birth mothers) of newborn and newly adopted children, to allow those carers to take time off work to care for the child after the child’s birth or adoption and encourage women to continue to participate in the workforce. Generally, the financial support is provided only to primary carers who have a regular connection to the workforce.71

The SSAT can review decisions made under the PPL Act about rejection of a claim for paid parental leave, a debt raised in relation to an overpayment of paid parental leave, or the cancellation of paid parental leave.72

The Bill amends the PPL Act, consistent with the other amendments in Schedule 3, to:

- insert notes as guidance to readers about the legal basis for the constitution and membership of the SSAT, including the Principal Member73
- allow for the disclosure of information by an SSAT member where the information concerns a threat to the life, health or welfare of a person and the disclosure is for the purpose of preventing, investigating or prosecuting an offence74
- omit references to ‘pre-hearing conference’ or ‘conference’ and substitute references to ‘review’75
- allow the SSAT Principal Member to dismiss an application for review and to reinstate the application in specified circumstances76
- consider the wishes of the parties in determining representation at a hearing77

69. Proposed subsections 103ZAA(4) and 103ZAC(3) of the CSRC Act. See also footnote 49.
73. Items 87–89 of Schedule 3 of the Bill.
74. Proposed section 130A of the PPL Act, inserted by item 90 of Schedule 3 to the Bill. The Scrutiny of Bills Committee made reference to the identical provisions which are inserted by Item 36 (proposed subsection 16(3A) of the CSRC Act) and item 156 (proposed section 19A of the SSA Act). See footnotes 61-62 above.
75. Items 95, 96, 102–105 and 108 of Schedule 3 of the Bill.
76. Proposed sections 251–252 of the PPL Act, inserted by item 113 of Schedule 3 of the Bill. The changes made by item 113 are consistent with the changes made by item 26, as outlined above.
77. Proposed subsection 237(2) of the PPL Act inserted by item 98 of Schedule 3 of the Bill.

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• provide a statement of reasons for a decision to remove a person as a party and
• create offences where the SSAT Principal Member has made an order restricting disclosure of
  information and a disclosure is made in contravention of the order.

Amendments to the Social Security (Administration) Act

Items 117–158 of Schedule 3 of the Bill amend the Social Security (Administration) Act 1999
(SS Admin Act), consistent with the other amendments in Schedule 3 of the Bill, to:

• insert notes as guidance to readers about the legal basis for the constitution and membership of the
  SSAT, including the Principal Member
• allow for the disclosure of information by an SSAT member where the information concerns a
  threat to the life, health or welfare of a person and the disclosure is for the purpose of
  preventing, investigating or prosecuting an offence
• omit references to ‘pre-hearing conference’ or ‘conference’ and substitute references to
  ‘review’
• allow the SSAT Principal Member to dismiss an application for review and to reinstate the
  application in specified circumstances
• consider the wishes of the parties in determining representation at a hearing and
• create offences where the SSAT Principal Member has made an order restricting disclosure of
  information and a disclosure is made in contravention of the order.

In addition, items 143–157 amend Schedule 3 to the SS Admin Act, which sets out the constitution
and membership of the SSAT. Existing clause 12 relates to circumstances where the hearing of a
review has been commenced, or completed, by the SSAT and a member who constituted (or was
one of the members who constituted) the SSAT for the review subsequently becomes unavailable.
Proposed subparagraph 12(1)(b)(iii) of the SSA Act provides that the member may be unavailable,
amongst other things, because the Principal Member has directed the member not to continue to
take part in the review. Such a direction must not be given, according to proposed
subclause 12(1AA), unless the Principal Member has taken into account the SSAT objective that it
operates so as to be fair, just, economical, informal and quick and that the direction is in the interest
of justice. In addition, the Principal Member must consult the member concerned.

78. Proposed section 257A inserted by item 115 of Schedule 3 of the Bill.
79. Proposed sections 273A–273C of the PPL Act, inserted by item 116 of Schedule 3 of the Bill.
80. Items 141 and 142 of Schedule 3 of the Bill.
81. Proposed clause 19A of Schedule 3 to the SS Admin Act, inserted by item 156 of Schedule 3 of the Bill. The Scrutiny
    of Bills Committee made reference to the equivalent provisions which are inserted by item 36 (proposed subsection
    16(3A) of the CSRC Act) and item 90 (proposed section 130A of the PPL Act). See footnotes 61-62.
82. Items 127–130 and 133 of Schedule 3 of the Bill.
83. Proposed sections 171–172, inserted by item 138 of Schedule 3 of the Bill. The changes made by items 138 are
    consistent with the changes made by item 26, as outlined above.
84. Proposed subsection 161(3) inserted by item 123 of Schedule 3 of the Bill.
85. Proposed sections 177B–177D, inserted by item 140 of Schedule 3 of the Bill.

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Proposed clause 12A provides the process by which the SSAT can be reconstituted in the event that a hearing of a review has commenced, or is completed, but no decision has been made. In that case, the Principal Member may reconstitute the SSAT using the same or different members in order to conduct the review (proposed subclause 12A(2)). The SSAT, as reconstituted, may have regard to the record of any previous hearing of the review and of any directions hearings (proposed subclause 12A(4)). Where a direction is given to reconstitute the SSAT, the Principal Member may also give a direction under proposed clause 12B as to which member will preside at the hearing.

Schedule 4—amendments relating to certain child support declarations

Schedule 4 of the Bill amends the Child Support (Assessment) Act 1989 (Child Support Assessment Act)\(^86\) to clarify aspects of the Child Support Scheme (the Scheme) in light of a 2011 Family Court of Australia (Family Court) judgement. The provisions commence on Royal Assent.

The purpose of the Scheme is to ‘ensure that children receive an adequate level of financial support from both parents following separation’.\(^87\) The Scheme is administered by the Child Support Agency (CSA), which is part of the Department of Human Services (DHS) portfolio. The CSA provides two main services to separated parents:

- assisting with calculating how much child support should be paid based on the parents’ financial ability to do so, and on the percentage of care which each parent provides and
- facilitating the collection and transfer of child support payments.\(^88\)

The Scheme is underpinned by the Child Support Assessment Act.

Change proposed in the Bill

The change proposed in Schedule 4 of the Bill is intended to clarify the following situation:

- section 107 of the Child Support Assessment Act allows the Family Court to make a declaration that a person should not be assessed in respect of the costs of a child because the person is not a parent of the child
- this is intended to be applied in cases where a person has paid child support for a child the person believed he had fathered, but later discovered that he had not. In those cases a

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\(^{88}\) Ibid.
section 107 declaration operates so that an application for child support for the child is taken never to have been accepted by the Child Support Registrar and

- the practice has been for amounts of child support previously paid by the person who believed he was the father to be applied to his child support liability or debt for any remaining children. Any excess child support paid could be recovered from the payee by applying for a court order.

The Family Court judgement in *Child Support Registrar v Farley and Anor (Farley)* 89 changed the operation of the policy. It did this by requiring in such cases that the payer take court action to obtain repayment from the payee in respect of an overpayment for the ‘excluded child’; and also to make further payment to the payee of an equivalent amount in the form of an ‘underpayment’ in respect of the other child or children for whom the payer is liable. 90

According to the Explanatory Memorandum, ‘this would be an unnecessarily complex process for ‘balancing’ the payer’s liabilities’. 91

**Financial implications**

This Schedule is expected to have a negligible financial impact. 92

**Key provisions**

**Item 1** of Schedule 4 of the Bill inserts *proposed section 107A* into the Child Support Assessment Act to codify the implementation of section 107 declarations, such that amounts of child support previously paid by the father are to be applied to their child support liability or debt for any remaining children in the case. Any excess child support paid may be recovered from the payee by applying for a court order.

**Item 2** of Schedule 4 to the Bill provides that the amendment made by item 1 applies to section 107 declarations made before, or after, the commencement of the amendment—that is, *proposed section 107A* will apply retrospectively (subitem 2(1)). 93

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90. Explanatory Memorandum, p. 51.
91. Ibid.
92. Ibid., p. 2.
93. *Item 2* is an applications provision. Application provisions serve to remove uncertainties and solve problems as to the manner in which a new law is to affect the variety of complete and incomplete situations and transactions existing at the moment in time that a law comes into force. G C Thornton, *Legislative Drafting: third edition*, Butterworths, London, 1987, p. 166.

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**Comment**

The Parliament has the power to pass legislation retrospectively. Generally though, governments must justify the need for retrospective operation and ensure that the legislation does not unduly impinge on a person’s rights or responsibilities. The retrospective operation of this amendment is intended to support longstanding policy and administration so that previously decided cases are not revisited, as this could disadvantage parties.

In addition, subitem 2(2) provides that the retrospective operation of new section 107A of the Child Support Assessment Act does not apply to the particular declaration made in *Farley* or to any similar declaration so as not to alter the rights and liabilities of the parties in any court proceedings.

In its report, the Scrutiny of Bills Committee noted that the explanation for the retrospective application of this provision:

- was not sufficiently detailed for the Committee to adequately consider whether it was appropriate in this instance and
- only noted that ‘those who have relied on the Registrar’s existing policy may be disadvantaged were their cases to be revisited’.

The Scrutiny of Bills Committee raised the concern that the retrospective change may operate to the detriment of a party to an assessment of child support and stated that ‘the decision in *Farley* concluded that the policy was unlawful’.

Accordingly, the Scrutiny of Bills Committee has sought further information from the Minister relating to the rationale for applying these provisions retrospectively. However, at the time of writing this Bills Digest, the Minister’s response has not been reported.

**Schedule 5—Schoolkids Bonus**

The Schoolkids Bonus was announced in the 2012–13 Budget and is a direct cash payment for certain families with children undertaking primary or secondary education. It replaced the Education Tax Refund, which allowed families to claim 50 per cent of the cost of education-related expenses in their tax returns (up to a maximum of $397 for each primary school child and $794 for each secondary school child). In 2010 the Review of Australia’s Future Tax System, led by Ken Henry, the constitutional validity of retrospective legislation was affirmed by the High Court in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, viewed 28 September 2012, [http://www.austlii.edu.au/au/cases/cth/HCA/1991/32.html](http://www.austlii.edu.au/au/cases/cth/HCA/1991/32.html)

97. Ibid.

The Schoolkids Bonus will provide eligible families with an annual amount of $410 for each child in primary school and $820 for each child in high school. Eligible families are those who qualify for Family Tax Benefit Part A (FTB-A) and young people undertaking educational activities who are receiving Youth Allowance or other qualifying income support payments on the two days when qualification for the Bonus is determined (1 January and 30 June each year). The new Schoolkids Bonus will be paid in two instalments each year, in January and July, from 2013.\footnote{See: Department of Human Services (DHS), ‘Schoolkids Bonus’, DHS website, viewed 28 September 2012, \url{http://www.humanservices.gov.au/customer/services/schoolkids-bonus}}

As a transitional measure, the Government paid the 2011–12 Education Tax Refund in full in June 2012 for all eligible families. This transitional measure, referred to as an 'ETR payment', was paid directly to families who received the qualifying benefits for children attending school and no claim was required. The Government has claimed that up to one million families did not claim their full entitlement or did not claim any amount under the previous system.\footnote{J Macklin (Minister for Families, Community Services and Indigenous Affairs), \textit{Schoolkids Bonus}, op. cit.} It required families to keep receipts of school education-related expenses and claim up to 50 per cent of these expenses at the end of the financial year (up to a maximum refund of $397 for each primary school child and $794 for each secondary school child).

The Bill introducing the Schoolkids Bonus and the transitional ETR Payment was passed by the Parliament in two days: it was introduced into the House of Representatives on 9 May 2012 and passed without amendment by the Senate on 10 May 2012.\footnote{Family Assistance and Other Legislation Amendment (Schoolkids Bonus Budget Measures) Bill 2012 was introduced into the House of Representatives on 9 May 2012 and was passed by both Houses on 10 May 2012. The Bill homepage is at: \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4805%22}}

As a result, a number of issues affecting the eligibility for a small number of potential recipients do not appear to have been noticed or were not able to be addressed at the time.

The measures proposed in Schedule 5 of the Bill expand eligibility for the Schoolkids Bonus to certain recipients of Carer Payment, Parenting Payment and Special Benefit who might not otherwise have been eligible (that is, if they were not also in receipt of FTB-A or being paid FTB-A in respect of a child undertaking certain educational activities). Some of the proposed measures will remove references to certain age requirements so that the key criterion for determining the level of payment is the level of education being undertaken (either primary or secondary) rather than the actual age of the child. Further measures will allow the Minister to determine via legislative
instrument what educational activities should be included in the eligibility criteria for payment of the Schoolkids Bonus. This allows the bonus to be paid in respect of children undertaking educational activities that might fall outside the existing definitions under social security, student assistance and family assistance law.

The proposed measures are in line with the policy intent of the original Budget measure and correct some issues in the existing provisions that may have been overlooked due to the speed with which the original legislation was pushed through the Parliament.

Financial implications

This Schedule is expected to have a negligible financial impact.103

Key provisions

**Items 1–59** of Schedule 5 of the Bill amend the *A New Tax System (Family Assistance) Act 1999* (FA Act). The amendments commence on Royal Assent.

**Item 1** adds a new definition of *current education period* into the list of definitions contained in subsection 3(1) of the FA Act. The term *current education period* refers to the six-month period following each bonus test day (1 January and 30 June) so that the current education period for a bonus test day that is 1 January means the period from that day until 30 June. The term *bonus test day* refers to the point in time that eligibility for the Schoolkids Bonus is determined.

**Item 2** omits the reference to a minimum age limit of 16 in subparagraph 35UA(2)(c)(i) of the FA Act, which sets out the Schoolkids Bonus age requirements for students in respect of whom Youth Allowance is paid. Youth Allowance is usually only paid to those who are 16 or over and inclusion of the lower age limit here is superfluous. Removing the reference to a lower age limit at this point allows the minimum age requirement to be determined according to eligibility criteria under social security law. Similar changes are made to other sections of the FA Act by items 10, 26, 28, 36 and 43 so that the minimum age requirement is no longer 16—rather it is the age that is provided for by the relevant payment.

**Item 3** repeals and substitutes paragraph 35UA(2)(d) of the FA Act, which sets out the educational activity requirements for Youth Allowance recipients to be eligible for the Schoolkids Bonus. **Proposed subparagraph 35UA(2)(d)(ii)** refers to **proposed subsection 35UA(6)**, inserted by **item 15** of Schedule 5 of the Bill, which states that *eligible activity* means ‘study, education or an activity of a kind prescribed in a legislative instrument by the Minister for the purposes of this subsection’.104 This

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103. Explanatory Memorandum, p. 2.
104. Section 5 of the *Legislative Instruments Act 2003* defines a ‘legislative instrument’ as an instrument of a legislative character that is, or was, made under a delegation of power from Parliament. An instrument has a legislative

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will mean that the Minister can make a determination as to what educational activities will qualify children for the Schoolkids Bonus. Item 4 repeals and replaces paragraph 35UA(3)(d) to include proposed subparagraph 35UA(2)(d)(iii), which allows certain ABSTUDY recipients undertaking a course of primary education, a secondary course of education determined under section 5D of the Student Assistance Act 1973, or another eligible activity as determined by the Minister under proposed subsection 35UA(6), to be eligible for the Schoolkids Bonus. Existing paragraph 35UA(3)(d) only allows for ABSTUDY recipients undertaking secondary courses to be eligible for Schoolkids Bonus. Items 11, 19, 20, 23, 27, 30 and 37 make similar amendments to other sections of the FA Act so that the educational activity requirements are expanded to include primary education courses or those determined by the Minister through a legislative instrument as an eligible activity.

Item 6 amends paragraph 35UA(4)(a) of the FA Act to extend eligibility for the Schoolkids Bonus to payment nominees receiving Carer Payment or Parenting Payment on behalf of a student. Item 7 will repeal paragraph 35UA(4)(b) which requires the payment recipients referred to in subsection 35UA(4) of the Act to also be in receipt of the Pensioner Education Supplement. Pensioner Education Supplement is paid to those receiving payments such as Disability Support Pension, Carer Payment or Parenting Payment who are undertaking approved study. However, the definition of approved study is different from the relatively broad educational activity requirements being proposed for Schoolkids Bonus. Items 8, 9 and 12 are consequential amendments to items 6 and 7 ensuring the wording in the subsection reflects the changes.

Item 13 inserts proposed subsection 35UA(4A) into the FA Act, which will provide eligibility for the Schoolkids Bonus to individuals receiving Special Benefit on behalf of a student. The provision reflects the eligibility requirements for other payment types. Special Benefit is an income support payment paid to those in severe financial hardship who are unable to support themselves but who are ineligible for another payment type.

Item 14 amends the educational activity requirements specified at paragraph 35UA(5)(d) of the FA Act providing for those receiving an Education Allowance under the Veterans’ Children Education Scheme (VCES) to be eligible for Schoolkids Bonus. The amendments will broaden the requirement to ‘primary or secondary education’ and delink it from the definition of secondary education contained in the Social Security Act 1991 (SSA). The definition in social security law is different from that in schemes administered by the Department of Veterans’ Affairs and this amendment ensures that eligibility for the Schoolkids Bonus is not limited by any potential conflict in definitions of school attendance between the two Acts. Similar amendments are made by items 25, 41 and 44.

Item 16 is a consequential amendment to item 1 and includes a reference to current education period in the provisions outlining who qualifies as a relevant schoolkids bonus child at subparagraphs 35UB(2)(b)(i), (ii) and (iii) of the FA Act.

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Item 17 repeals and substitutes paragraph 35UD(1)(b) of the FA Act to clarify that the Schoolkids Bonus is payable for children first commencing primary education or another eligible activity on a day during the current education period. The existing paragraph 35UD(1)(b) only refers to participation in a course of primary education and does not make reference to any other eligible activities.

Item 29 inserts a proposed subparagraph 35UE(2)(c)(ia) into the FA Act to extend eligibility for the Schoolkids Bonus to some recipients of a living allowance under the Abstudy scheme who are under the age of 16, as long as they are considered ‘independent’ under the Abstudy scheme. The current age requirements preclude Abstudy recipients under the age of 16 from receiving the Schoolkids Bonus even if they are considered independent of their family or other forms of support.

Items 31, 32 and 33 amend subsection 35UE(3) of the FA Act to extend eligibility for the Schoolkids Bonus to recipients of Carer Payment, Parenting Payment and Special Benefit without requiring them to be in receipt of Pensioner Education Supplement, similar to items 6 and 13. Items 34, 35 and 38 are consequential to the amendments proposed by item 33 and ensure the wording in the subsection reflects the changes.

Section 47 of the FA Act provides that the Minister may determine, by legislative instrument, the circumstances in which an individual who completed secondary schooling in the previous education period for a bonus test day, is eligible for the schoolkids bonus for that bonus test day. Current subsection 47(3) contains certain age requirements, such that the Minister must not determine that an individual is eligible for the Schoolkids Bonus unless the individual is aged between 16 and 20.

Item 47 repeals and substitutes subsection 35UF(3) of the FA Act to remove any references to age requirements.

Item 49 defines the secondary study test in proposed section 35UI of the FA Act for individuals receiving Disability Support Pension, Carer Payment, Parenting Payment or Special Benefit. Meeting the secondary study test is one way for these payment recipients to meet the relevant educational activity requirements for the Schoolkids Bonus. The test is satisfied if the individual is undertaking full-time study in respect of a secondary course as defined at subsection 543A(2AB) of the SSA; or, if they are receiving a pensioner education supplement, undertaking study in respect of a course of education determined to be a secondary course under section 5D of the Student Assistance Act 1973.

Item 56 repeals subsection 65B(4) of the FA Act and replaces it with proposed subsections 65B(4)–(4B). Those subsections specify the different circumstances and educational activity requirements under which an individual can receive the secondary school amount of the Schoolkids Bonus in respect of a child under the age of 16. Item 59 repeals section 65E and replaces it with proposed sections 65E–65EB in a similar way to provide for the payment rates for individuals of different age who are eligible to receive the payment in their own right.

Item 60 amends the FA Admin Act by inserting a proposed subsection 221(5). This provision enables the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs to

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delegate powers relating to the Schoolkids Bonus to APS employees in the Department of Veterans’ Affairs (DVA) where eligibility for the bonus payment relates to payment of an Education Allowance under a scheme administered by DVA. Note that this item amends the FA Admin Act, not the FA Act as stated in the Explanatory Memorandum for the Bill.

Item 61 amends the SSA by adding ETR Payments made under the administrative scheme provided for under Part 2 of Schedule 1 of the Family Assistance and Other Legislation Amendment (Schoolkids Bonus Budget Measures) Act 2012 to the list of payments excluded from the definition of income in the SSA. While ETR Payments made under the FA Act were included in the list of payments exempt from the definition, an oversight was made to exclude ETR Payments made under the administration scheme provided for in the amending legislation.

Item 61 has retrospective effect as it commences on 27 May 2012. This was the day on which the relevant provisions of the Family Assistance and Other Legislation Amendment (Schoolkids Bonus Budget Measures) Act 2012 commenced.

Schedule 6—other amendments

Schedule 6 of the Bill makes minor, technical amendments to the FA Act, FA Admin Act and SSA.

For example, item 1 of Schedule 6 of the Bill repeals and substitutes subsection 84G(5) of the FA Act. At present the provision allows for the rounding up to 1 cent of a daily rate that before rounding is above nil and below half a cent. This has been deleted. The proposed subsection merely provides that the daily rate for the single income family supplement to be calculated by rounding up to the nearest cent (retrospectively from 1 July 2012).

Comment

The single income family supplement is a payment introduced as part of the Government’s Household Assistance Package. It is intended to provide ‘extra help to families with one primary earner, which will get less assistance through tax reforms than dual-income families will, to meet everyday expenses following the introduction of a carbon price’.

Financial implications

This Schedule is expected to have a negligible financial impact.

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