NATIONAL WELFARE RIGHTS NETWORK

Submission to Senate Community Affairs Legislation Committee

Social Services Legislation Amendment

(Miscellaneous Measures) Bill 2015

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Contents

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1 About NWRN

The National Welfare Rights Network (NWRN) is the peak community organisation in the area of social security law, policy and administration. We represent community legal centres and organisations whose role is to provide people with information, advice and representation about Australia's social security system.

NWRN member organisations operate in all states and territories of Australia. They are organisations which have community legal services and workers dedicated to social security issues. Their services are free and they are independent of Centrelink and government departments.

The NWRN also has as Associate Members the Central Australian Aboriginal Legal Aid Service (CAALAS) and the North Australian Aboriginal Justice Agency (NAAJA).

The NWRN develops policy about social security, family assistance and employment assistance based on the casework experience of its members. The Network provides submissions to government, advocates in the media and lobbies for improvements to Australia's social security system and for the rights of people who use the system.

2 Scope of this submission

This submission looks at two schedules:

- Schedule 1 – Special Benefit
- Schedule 2 – Family Tax Benefit

The measures in both schedules arise directly from NWRN advocacy. NWRN opposes the amendments in Schedule 1, but supports the amendments in Schedule 2.

PART A SCHEDULE 1 SPECIAL BENEFIT

3.1 Background to the Special Benefit measure

The Explanatory Memorandum describes the amendments in this bill as “minor housekeeping” that will “correct technical errors and clarify intended policy by removing minor ambiguities and anomalies”. We disagree with this assessment.

For several years, NWRN has been advocating to the Department of Social Services in relation to payment of special benefit in rare cases of extreme hardship that cannot be remedied by existing Income Maintenance Period (IMP) waiver provisions. The Department has, for several years, applied a policy of automatic rejection of special benefit claims, in a manner that fetters the special benefit provisions of the Act.

Our members have continued to assist clients to lodge a claim, where appropriate, and after automatic rejection at all stages of internal review, we have then represented clients on appeal to the relevant tribunal. Tribunals, applying the Act, have overturned the rejection of special benefit on

a number of occasions (on other occasions, given the high bar set by special benefit qualification criteria, the rejections were affirmed). The Department's response to our advocacy has been that they would nevertheless continue to apply their policy, with a view to legislating to remove qualification for special benefit during an IMP when convenient.

This is a bill that would give effect to a policy that has, in our opinion, been illegally applied for some time. It is not "minor housekeeping" but rather a decision to close of the "last resort" payment in our safety net which catches a very small number of deeply disadvantaged people. To understand the depth of this disadvantage, it is necessary to look at the poverty trap that IMPs can give rise to. This submission therefore begins with a background on IMPs and detailed case studies.

To understand why closing off special benefit is not merely giving effect to longstanding policy intent, we have provided some background on special benefit.

3.2 Overview of Income Maintenance Periods (IMPs)

The provisions for applying Income Maintenance Periods (IMPs) are found in the rate calculators for allowances and disability support pension. IMPs can be applied in situations where a person's employment has ceased or is continuing.

When a person receives leave or termination payments (such as redundancy, annual leave, sick leave, personal leave, maternity leave, long service leave, payments in lieu of notice or other termination payments), that income is "maintained" for a period which corresponds to the period that the payments relate to, thus creating an IMP. For most people, this will result in a zero rate during the IMP, although in cases where the person's wage was very low, the result may be that they retain entitlement to a part-rate during the IMP.

The vast majority of IMPs are short. In 2013-14, 101,152 IMPs were applied, and the average waiting period imposed was 27 days. However we understand that the true average may be longer, as we have been told that, for these figures, the DHS computer system counted each component as separate IMPs (so for example, a person who received one week Annual Leave and 5 weeks Long Service Leave would experience it as one continuous six-week IMP, but it would be recorded by DHS as two smaller IMPs. Depending on how many different types of leave are paid there may be more than two IMPs counted).

IMPs share the same waiver rules as other short term waiting periods such as the liquid assets waiting period (which is limited to 13 weeks).

Unlike the liquid assets waiting period some IMPs can be very long. Typically, the cases we run involve long IMPs, because the longer the IMP, the harder it can be to make the money last and find alternative means of support, and the more dire the consequences of not doing so. In the Detailed Case Study at section 3.4 of this submission, we give an example of an IMP that lasted from July 2013 to February 2017.

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There are a number of factors at play which, in our observation, come up time and time again in the reasons why people fall into poverty during an IMP.

Unfortunately, DHS will not be notified of a redundancy by an employer unless there are 15 or more people to be made redundant. This means that people who are made redundant or terminated individually (or in a group smaller than 15) will not be contacted by DHS to be warned of their waiting period, or be linked to other DHS supports such as its Financial Information Service. In the cases we see, it is not uncommon to find that it was only when they approach DHS after the money was spent that they are told, for the first time, that they cannot access social security payments due to an IMP.

Other common factors include:

- ill health or disability impacting capacity to make rational decisions;
- inability to re-enter the workforce (eg due to lack of skills diversity, health, disability and age discrimination);
- financial exploitation;
- poor financial literacy and/or inexperience managing large sums of money;
- pre-existing debt;
- lack of English or low educational attainment;
- difficulty adjusting to unemployment (sometimes coinciding with adjustment to new disability) both emotionally and financially;
- addictions;
- incorrect advice affecting decision making;
- failed investments;
- strong personal and cultural obligations to provide financially for extended family;
- emotional issues, such as depression and anxiety; and
- Social isolation.

The consequences of running out of money cannot be understated. It can lead to homelessness, social isolation, exacerbation of mental and physical illnesses, economic and social exclusion[1]. Being without money can be a barrier to participation in the paid work force. Many of these factors can be found in the detailed case study at section 3.4 of this submission. Additionally, the following de-identified case studies of people assisted by our members, illustrate these issues:

> **Tim** received a large redundancy. He was not advised of the length of his IMP and had never relied on social security before. He spent the money on a number of sensible items but had also developed a substance abuse problem after he had become addicted to painkillers. When he approached Centrelink he was informed that he would not be eligible for payments for 6 months. He and his partner separated after his money ran out and he became socially isolated. He became homeless and began sleeping in his car as he was not able to afford

[1] See also research commissioned by NWRN on the impact not being able to access entitlements generally Bell, Sue How Does the National Welfare Rights Network add value to clients? http://www.welfarerights.org.au/sites/default/files/field_shared_attachments/policy/Independent%20Report%20into%20Welfare%20Rights%20Services%202015%20SusanBellResearch.pdf

rent and was relying on charities for support. Although his waiting period has now ended, the impact of living for 6 months with no income was so severe that he remains homeless and carries significant debt.

Jane was unaware of her IMP and spent her termination payments extremely quickly. She was highly educated with a PHD, and had a long employment history, but her capacity to make rational spending decisions was undermined by her bi-polar mental illness and the emotional difficulty she was experiencing in adjusting to her disability and unemployment. She had worked and paid taxes all her life and never imagined that there would be no government support if she ran out of money. She says that she would have sought help managing her money if she had been told about the IMP.

John's Union told him he had to make his termination payments last 13 weeks (it appears the Union was confused and advised him only of the liquid asset waiting period). John duly made his payments last 13 weeks not realising he had an extremely long IMP. After the money ran out he was forced to live on whatever charity he could find for almost 9 months and became suicidal during that period.

In our experience, redundancy can be preceded by a period of leave without pay prior to the rejection of a workers compensation claim. We have observed that often people have accrued debts during their period of unpaid leave that they repay on receipt of their redundancy.

3.3 Background to Special Benefit

Special Benefit is a "last resort" income support payment that can be paid to certain people who are unable to receive any other income support payment but are in financial hardship and are unable to earn a sufficient livelihood for themselves and any dependents because of age, physical or mental disability or domestic circumstances or for any other reason.[2]

Qualification for Special Benefit is found in section 729 of the Social Security Act 1991. That section confers a broad discretion on the Secretary to determine qualification. Section 729(1) states "A person is qualified for a special benefit for a period if the Secretary determines, in accordance with subsection (2), that a special benefit should be granted to the person for the period". It is well settled that this is a very broad discretion.[3]

Subsection (2) sets out a number of circumstances in which special benefit cannot be paid, including where a person cannot be paid another income support payment as a result of certain penalties, eg for non-compliance with activity requirements.[4] The list of preclusions does not include situations where the person cannot be paid another income support payment as a result of an IMP.

The Federal Court has observed that the discretion is "*for the clear purpose of alleviating hardship or*

[2] See section 729 of the *Social Security Act 1991* (the Act)
[3] See *Re Te Velde and Director-General of Social Services [1981] AATA 87 at 39-41.*
[4] S729 of the Act

ameliorating what would otherwise be unnecessary harshness in the operation of the Act". [5]

The Act also sets out basic qualification requirements relating to residence and other matters. However, as special benefit is a discretionary payment, most of the remaining requirements for qualification are found in the Guide to Social Security Law. As a matter of law these departmental guidelines cannot fetter the broad discretion contained in the legislation, however in our experience, officers of the department will never depart from them in practice.

The guidelines ensure that only people in dire need are able to access special benefit and take into account the circumstances leading to the person's financial hardship and inability to earn a sufficient livelihood. For example it states:

> *"The person's circumstances must be carefully considered to determine whether their inability to earn a sufficient livelihood was unavoidable or reasonable or whether they have placed themselves in financial hardship by:*
>
> - *persevering with an unprofitable business venture,*
> - *spending their money on unnecessary items, or*
> - *disposing of money, by gifting or other means without adequate return.*
>
> *SpB should NOT be paid if the delegate believes the person could have avoided the situation of financial hardship."*[6]

It also requires consideration of all reasonable alternative means of support:

> *"A claim for SpB CANNOT be granted until all the domestic and social circumstances of the person are considered. In cases involving couples, the partner's circumstances must also be considered. Although it is not possible in all cases, if practical the person should try to make alternative arrangements to change the situation which has led to the need for income support.*
>
> *SpB should NOT be granted if the person:*
>
> - *is receiving, or able to receive support from other sources (see example 1), OR*
> - *has reasonable means readily available by which they can obtain support (see example 2), OR*
> - *has a partner who is engaged in a non-profit business or salary sacrifice scheme, and that scheme is the dominant reason for the person's hardship, OR*
> - *can obtain funds from a country of origin or another country where they have had a significant working life (see example 3)."*[7]

The guidelines also apply harsher means tests and rate deductions than exist for other payments. For example, the department will consider all 'in kind' support, and reduce special benefit on a dollar for dollar basis, for every dollar of equivalent 'in kind' support. If, for example, a person is being

[5] In Re *Secretary, Department of Social Security v Schofield [1992] FCA 360 at 19.*
[6] See *Guide to Social Security Law* at 3.7.1.30 http://guides.dss.gov.au/guide-social-security-law/3/7/1/30
[7] Ibid

given free accommodation, the value of this will reduce the person's special benefit (sometimes to zero). Applicants who are likely to need special benefit for less than three months must have liquid assets of less than the equivalent of a fortnight of income support and family assistance payment.

Even if it were, as the government suggests, just an oversight that income maintenance periods were not included in the s729(2) list of situations precluding payment of special benefit, there are compelling reasons not to amend the Act as this bill proposes, given the poverty trap that can ensue.

While we agree that ordinarily relief from an IMP should be assessed under the IMP waiver rules, the existence of those rules is not inconsistent with the policy intent behind special benefit which recognises that from time to time there are special circumstances under which a person should be paid income support *despite not meeting the usual requirements or exemptions contained under the Act*.

The guidelines for granting the payment are extremely narrow compared to that of other income support payments and ensure that the mere fact of running out of money during an IMP will not entitle a person to special benefit, which is reserved only for those cases where the special circumstances of that case warrant payment and a departure from the general policy approach of requiring people to use their own resources before relying on the public purse.

3.4 Detailed case study –Special Benefit granted by Tribunal

The following is a case study of a recent matter in which the Social Security and Child Support Division of the Administrative Appeals Tribunal granted special benefit during an IMP.

Case study - RON

Ron received a termination payment of around $230,000 in July 2013. Although he had been granted a disability support pension it was not payable as he was required to serve an IMP to February 2017.

In March 2015, two years into his IMP, he lodged a claim for special benefit with the assistance of a welfare rights advocate. His claim was rejected by DHS one week later. Four months later an Authorised Review Officer affirmed the rejection and the next day he lodged an appeal against the decision with the Administrative Appeals Tribunal (the tribunal).

His welfare rights advocate provided a submission which attached reports by Liverpool Hospital's occupational therapist and social worker, a psychiatrist, and Mission Australia's Homelessness Outreach Prevention and Rapid Rehousing Service.

At the time of the hearing Ron was living in Liverpool Hospital, unable to be discharged because he was homeless and could not be placed in assisted housing without an income support payment. He had a range of health issues, which met the medical criteria for DSP and had been admitted with suicidal ideation. The hospital social worker was of the view that he had unresolved grief issues following the death of his mother with whom he had always lived, and was suffering low mood, lack of motivation and poor decision-making. She had been his only companion and since her death he had become socially isolated.

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He had worked for his employer for 28 years when he was made redundant in July 2013. At that time, he was still grieving the loss of his mother. He was unaware of the IMP. He invested in online businesses which failed. He did not have the skills to manage large sums of money. His occupational therapist assessed him as partially dependent for personal care and basic activities of daily living, medication management, shopping and housework and fully dependent for money management. After his mother's death the family home was sold and he used his share to put a deposit on a home unit. However, he was unable to service the loan, so sold the unit and rented. He had never rented before and had to pay 6 months' rent in advance. In March 2015 he was forcibly evicted. His occupational therapist explained that crisis accommodation was not suitable as it was not set up to support his physical needs.

He had applied for many jobs (via email/internet due to his mobility restrictions and inability to afford telephone calls) but was generally over qualified, underqualified or otherwise unsuitable.

His social worker liaised with his siblings, but was unable to secure any family assistance for him. Mission Australia were unable to accommodate him in shelters because he required disability/bariatric accessible accommodation. The psychiatric report corroborated the views of the other hospital health professionals.

The tribunal was satisfied that he had no reasonable means of support and was unable to earn a sufficient livelihood due to his health and homelessness. It noted his homelessness, isolation, unresolved grief and ongoing vulnerability to self-harm. While his spending had been unwise it needed to be considered in the context of his whole circumstances: his lack of awareness of the IMP, his impaired decision making capacity, his ongoing attempts to find work and absence of money management skills.

Ultimately, the tribunal was satisfied that in this case the intention of the discretion to provide a sufficient livelihood to a person with no other means of support outweighed the policy approach of not providing support to people who have not supported themselves.

If the amendments in this Bill are passed Ron would have remained unsupported for years and would have continued to take up a hospital bed, who knows for how long, as no alternative accommodation was available without ongoing financial resources.

3.5 Special benefit should not be removed unless IMPs are adequately reformed first

NWRN accepts the argument that proper reform of IMPs that effectively addresses poverty traps may obviate the need for access to special benefit. A review of IMP policy is warranted and should include consideration of:

- whether IMPs should continue to be applied to new claims;
- more appropriate waiver provisions, akin to those provided for compensation preclusion periods in s1184K; or
- changed administration to identify, and better support, people at risk.

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We deal with these below.

3.6 Some suggestions for reforming IMPs

3.6.1 Fairer treatment of termination and redundancy payments

Some options for reform that could be considered include:

- capping IMPs to align more equitably with Liquid Assets Waiting periods;
- differentiating between types of termination payments (eg, by length: different waiver provisions if an IMP would be longer than 13 weeks, or by payment type: different treatment of redundancies). Waiver is discussed in detail below.

3.6.2 Waiver provisions

We consider that, at least for long IMPs, the person should have access to the same waiver rules as are found in s1184K for compensation preclusion periods.

IMPs share the same waiver provisions as for other waiting periods such as the liquid assets waiting period. This is not such an issue for the majority of IMPs, which are very short in nature.

However, where a person is leaving an employer that they have been with for some time, long service leave and redundancy entitlements may result in an IMP that, in terms of its effect on the individual, is more akin to a compensation preclusion period. For these cases, the existing IMP waiver provisions are manifestly inadequate. **The current provisions for waiving or reducing an IMP are insufficient as they consider only the expenditure of the funds and do not consider the overall circumstances of the person.** There are also severe limitations on what will be waived on the grounds of "reasonable and unavoidable expenditure". For instance, "Reasonable costs of living" are limited to costs incurred in respect of that part of the period already served [8] and cannot exceed the equivalent of the fortnightly payment that would be payable if the IMP didn't apply. People are coming from employment and their fortnightly expenses can take some time to reduce, particularly where they are facing multiple challenges associated with loss of work. For example, a person's rent alone may exceed the maximum rate of Newstart (around $250 per week) until they are able to relocate. People in fixed-term tenancies may be required to pay the owner rent to compensate for loss until the property is re-let.

For the people who run out of money some months or years before the end of their IMPs we have observed first hand that the impact on the person is more like that of a compensation preclusion periods than other waiting periods.

We consider that, at least for long IMPs, the person should have access to the same waiver rules as are found in s1184K for compensation preclusion periods. This has been our position for some time. On 29 May 2014 NWRN wrote to DSS about IMP policy. While that letter was concerned about

[8] 19C(4)(a)

insufficient policy guidance on what constitutes "reasonable and unavoidable expenditure" we noted the need for broader reform of waiver provisions:

> *Although this letter is confined to issues about the guidance for current legislative criteria, we should point out that, at a larger level, we consider the current legislative criteria for reducing an IMP should be replaced with a general "special circumstances" provision. This is because IMPs, like compensation preclusion periods, may be very long (often a year or more), and a "special circumstances" discretion for IMPs is warranted, for the same reasons. The Department could then continue to pursue the closing off of special benefit to this class of people, as there would be no need of it.*

A "special circumstances" discretion like the one that exists for compensation preclusion periods is warranted, because in effect, IMPs are more like compensation preclusion periods than other waiting periods.

Under no circumstances should special benefit be closed off to people serving an income maintenance period unless, at a minimum, a waiver provision akin to that in s1184K is introduced.

3.6.3 Administration and other innovative solutions

NWRN considers that there are better options for addressing poverty traps caused by IMPs. We have commissioned research from the Australian National University to produce innovative solutions to address IMP and compensation related poverty. The ANU researchers, Peter Whiteford and Sue Regan, are looking at both preventative and remedial interventions. A research progress report is attached which outlines the interventions being explored.

NWRN continues to engage with both the Department of Social Services and the Department of Human Services on these issues with a view to finding administrative solutions to reduce this problem. NWRN has also engaged with the Fair Work Ombudsman, which resulted in changes being made to its website and termination templates.

There is a case to be made for amendment to the Fair Work Act. Unlike compensation recipients, who are notified that there will be a preclusion period prior to even receiving their compensation, people who receive termination payments are not be notified before they receive their termination payment. This is because the Social Security Act requires insurers and compensation payers to notify DHS when compensation will be paid[9]. There is an obligation on employers under the Fair Work Act to notify DHS of redundancies, but it doesn't apply if there are less than 15 people being made redundant[10]. This limits the ability of DHS to identify people who may be at risk of running out of money during an IMP. There is no other system in place to ensure that people know about an IMP before they receive their final payment from work and spend the money.

However, none of these changes alone could obviate the need to retain special benefit as a last resort safety net for people.

[9] See sections 1182 to 1184E. DHS will first issue a notice to the insurer.
[10] See section 530 of the Fair Work Act 2009

3.7 Schedule 1 - Conclusion and recommendation

This measure is not merely "housekeeping" or a technical amendment.

The current provisions for waiving or reducing an IMP are insufficient as they are inflexible and consider only the expenditure of the funds and do not consider the overall circumstances of the person.

Problems with the design of IMPs has resulted in a poverty trap. The poverty that ensues is absolute. While other reforms to IMP rules and administration are called for, removal of access to special benefit in the absence of other reform would be a grave mistake.

Special benefit is paid to very few people during IMPs. It is a safety net and the cost to the public purse is very small. The cost to the community of removing special benefit, in terms of health and welfare services, economic and social exclusion is significantly higher. In the case example of Ron, lack of ongoing financial support resulted in over $800 per day in hospital costs alone and one less hospital bed being available.

Retaining special benefit for people serving an IMP is not inconsistent with the policy behind special benefit which recognises that from time to time there are special circumstances for payment of income support despite a person not meeting the usual requirements or exemptions that attach to mainstream payments.

We recommend that:

1. Schedule 1 be rejected in its entirety;
2. The government undertake a review of IMP laws, policy and administration; and
3. The government engage broadly in its review, but particularly with the NWRN on the suggestions for reform posed in this submission and in the ANU research paper soon to be published.

PART B – SCHEDULE 2 FAMILY TAX BENEFIT

4.1 Background to Schedule 2

Family Tax Benefit by instalments

Family tax benefit (**FTB**) may be paid as a lump sum at the end of the financial year or by fortnightly instalments throughout the year. A person must estimate their annual adjusted taxable income in order to be paid by instalments.[11]

Where a person is eligible to be paid FTB by fortnightly instalments, s 16 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) (**the Administration Act**) obliges the Secretary to

[11] Adjusted taxable income is defined in Schedule 3, clause 2 of the Administration Act. It is essentially a person's taxable income plus any tax free pension or benefit and a number of other items, less any child maintenance paid.

make a determination of the rate they are eligible to be paid at using the FTB rate calculator in Schedule 1 to the Administration Act. If the person's circumstances change in a way that affects their rate (for instance, a change in their taxable income or the amount of care they have of a child), then the Secretary may make a fresh determination of the rate they are eligible to be paid at.

The reconciliation process and review under s 105 of the Administration Act

At or after the end of the financial year, there is a "reconciliation" process, the legal basis for which is the Secretary's own-motion power to review earlier decisions in relation to FTB under s 105 of the Administration Act.

In the case of the "reconciliation" process, a review under s 105 is in substance a review of the person's entitlement to FTB for that year, including the determination of their rate of payment. It may result in a decision that a person has received the correct amount for that year, too much (in which case a debt arises) or too little (in which case the person may be entitled to a "top up").

In the ordinary course, the outcome of the s 105 review is also balanced against the person's entitlement to the FTB Part A and Part B supplements (**the supplements**). For instance, if the person is found to have been overpaid, the amount of the overpayment is offset against their entitlement to the supplements.

The reconciliation process – limitations on payment of the supplements until the reconciliation time occurs

Part 3, Division 1, Subdivision D of the Administration Act deals with entitlement to supplements.

Section 32A, in effect, bars payment of the supplements unless the person has satisfied the FTB reconciliation conditions applicable to the relevant financial year (or part). In short, its purpose is to withhold the supplements until the end of the year, so that they can then be taken into account in the reconciliation process (including to offset any debt the person may have incurred if they underestimated their income for the year).

The reconciliation conditions are not met until one of the applicable "reconciliation times" has occurred.[12] These times are set out in ss 32C to 32Q, each of which apply depending on the person's circumstances.

Section 32C applies, for example, where a person is required to lodge a tax return and the applicable reconciliation time is when an assessment is made by the ATO. However, in effect, it sets an outer limit for the reconciliation time as it provides that the tax return must be lodged before the end of the financial year following the relevant year or within a further year if there are special circumstances that prevented lodgement earlier.[13]

Section 32D applies a similar rule to 32C where a person was partnered throughout the year, and their partner was required to lodge a tax return.

[12] Section 32B, Administration Act.
[13] This is the combined effect of subs (3) and subs (4).

Section 32J deals with circumstances where a person is not required to lodge a tax return. Section 32J(2) provides that the relevant reconciliation time is when the person advises the Secretary of their adjusted taxable income or the Secretary is satisfied that their adjusted taxable income can be worked out without advice from the person.[14]

Once the applicable reconciliation time occurs, a review is conducted under s 105 of the Administration Act and the supplements are now payable. Although review under s 105 is discretionary, s 105A of the Administration Act mandates review in certain circumstances. Broadly, these are where the person did not receive the supplements because of the bar in s 32A but that the reconciliation time has now occurred.

The date of effect of a determination under s 105 – s 107 and the impact of the AAT decision in de Jager

In some cases, the reconciliation time provisions in ss 32C to 32Q impose what is in effect a time limit. For instance, ss 32C and 32D in effect require the person to lodge a tax return no later than the end of the second financial year after the relevant year.

In other cases, however, no outer time limit is set. Section 32J, applicable to people not required to lodge a tax return, does not itself set any time before which the reconciliation time (and consequent s 105 review) must occur.

However, s 107 of the Administration Act deals generally with the "date of effect" of s 105 decisions and s 107(1) deals with review in the case of payment of instalments, where that review may result in a "top up" of payments. It provides in effect that if the review is not conducted within 52 weeks of the earlier decision, then the date of effect can be no earlier than the first day of the financial year following the relevant FTB year.

The Secretary has always interpreted this as preventing payment of any "top up" including supplements to a person who received FTB by instalments and did not advise regarding their need to lodge a tax return by the end of the following financial year.

The position was never in fact so clear for a number of reasons. First, if s 107 applied to all s 105 reviews, it would appear to have the effect of imposing a stricter time limit than that imposed by some of the reconciliation time provisions (especially ss 32C and 32D, which allow in effect two full financial years to lodge a tax return, provided there are special circumstances). Second, the language of "date of effect", borrowed from social security law, is not apt to describe the reconciliation process or entitlement to supplements.

That said, on its face s 107 applies generally to all s 105 reviews, including those mandated by s 105A in relation to payment of supplements.

[14] Sections 32M and 32N deal with circumstances where a person has income not normally included in a tax return or maintenance income. They are similar to s 32J for the same underlying rationale – normally the Secretary will need to be advised about this income, rather than from a tax return.

The reality is that the situation was left unclear when Subdivision D was inserted into the Administration Act, possibly due to the inadvertence of the drafters to the interaction of the new Subdivision with s 107.[15]

Section 109E(1) raises similar interpretive issues regarding the date of effect of reviews initiated by the person, not the Secretary.

In *de Jager* the AAT expressly acknowledged that the Secretary's view of the meaning of the legislation was available, but ultimately preferred a different interpretation, throwing the Secretary's view of the matter into doubt.[16] Despite this, the Secretary chose not to pursue an appeal to the Federal Court.

In *de Jager* the AAT decided that s 107 did not apply to reviews mandated by s 105A, which includes reviews in relation to payment of supplements once the reconciliation time is met.

The effect of this interpretation appears to be that:

- For individuals and couples required to lodge a tax return, they have one year to do so or a further year if special circumstances prevented them lodging their return in the first year (ss 32C and 32D);

- For individuals and couples not required to lodge a tax return, there is no time limit for doing so (as there is no applicable time limit in Subdivision D and, on the AAT's view, s 107(1) does not apply).

4.2 NWRN position on the bill

Whether correct or not, the decision in *de Jager* highlighted the potential for the law to operate more harshly on the most vulnerable FTB recipients, those also in receipt of income support under social security law due to their low incomes.

This group of people are more at risk of confusion about what they need to do to be paid supplements (as outlined above). As they are most likely not to need to lodge a tax return, they were subject to a strict 52 week time limit, on the Secretary's approach before *de Jager*. Whereas recipients of FTB who do need to lodge a tax return (and are therefore likely to be better off on average) have at least the possibility of an additional year in special circumstances.

In our view, the position for income support recipients receiving FTB as well should be at least as beneficial as for those on higher incomes. That is, the position should be that they have at least one year, and an additional year in special circumstances (although that rule would need to be framed differently, as the existing rule refers specifically to special circumstances preventing lodgment of a tax return).

[15] Inserted by *Family Assistance Legislation Amendment (More Help for Families – Increased Payments) Act 2004* (Cth).
[16] At [4].

NWRN supports Schedule 2. It will align the treatment of people who are not required to lodge a tax return with people who are required to lodge a tax return. That is, it puts people who receive FTB by fortnightly instalments on the same footing as people with other sources of income who are required to lodge a tax return. All FTB recipients will have, in practice, a 52 week time limit, with a further 52 week extension in special circumstances.

However, we also advocate the need for improvements in administration, not simply a legislative response. This is outlined in the next section.

4.3 NWRN position on administration

The system is complex, especially for people receiving income support and FTB, and there is room for improvement in Centrelink's administrative processes to minimise the chance a person will miss out on their correct entitlements.

As should be apparent from the foregoing analysis, the rules governing the FTB reconciliation process are exceptionally complex. They are difficult to navigate even for lawyers, including lawyers who specialise in this area.

Although on the whole the FTB process works well, it is ironically more likely to be confusing and for that confusion to have adverse consequences for recipients most in need of the support it provides, namely recipients of FTB who are also reliant on an income support payment.

Fundamentally, the potential for confusion arises from the fact that income support recipients are already obliged to update Centrelink about their income, often on a fortnightly basis. The problem is that the definition of income under the *Social Security Act 1991* (Cth) is different from the concept of adjusted taxable income used for FTB purposes.[17] In many cases where a person has little or no income (and fairly straightforward financial arrangements) the information they provide about their income for the purpose of their Centrelink payment may show that their adjusted taxable income is the same, this may not always be the case.

The end result may be that a person who receives both an income support payment and FTB may believe that they have already advised Centrelink what it needs to know to work out their FTB payment, not appreciating the administrative complexity that arises from the fact that social security and family assistance use different definitions of income and systems of administration. Their confusion may be compounded by the fact that Centrelink is the agency paying them both payments on a fortnightly basis.

In our experience, such confusion is not uncommon.

Centrelink do a reasonable job of reminding people of the need to lodge a tax return within a year of the relevant FTB year or to tell them if they are not required to lodge a return. It uses letters and, increasingly, SMS.

[17] Apart from the definition of parental income for the purpose of paying Youth Allowance which is now closely aligned with that used for FTB purposes (and will be even more closely aligned, once changes are made to the assessment of child support payments).

But again, the same group of vulnerable people are the ones more likely to fail to understand the importance of the information in those letters and SMSs.

There is room for administrative improvement here. For one thing, there is often a regular review of a person's circumstances close to the end of the financial year or start of the next year, it is not unreasonable to build in the relevant questions about income and tax returns into these reviews (especially for a person who has received income support payments and FTB for that year, and who is therefore likely to be able to readily answer those questions).

4.4 Schedule 2 - Conclusion and recommendation

This bill will align the treatment of people who are not required to lodge a tax return with people who are required to lodge a tax return. For this reason, NWRN supports Schedule 2.

We recommend:

- That Schedule 2 be supported;
- That the government review its administrative processes with a view to minimising confusion about time limits causing underpayment.

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