

Australian Business Securitisation Fund Bill 2019

Division/Agency: Financial System Division

Topic: Constitutional head of power for recouping funds

Reference: Hansard page 40 (15 March 2019)

Senator KETTER: My question goes to whether or not there is, I guess, a constitutional head of power on recouping funds if they're loaned out to private businesses. Do you have an answer for that, Mr Tease?

Mr Tease: Our legislation about the investment process is constructed around a number of heads of power to allow the AOFM to make the investments. As to the recoupment, I would have to take that on notice and discuss that with our legal team, if that's okay with you.

Senator KETTER: So that's not clearly spelt out anywhere?

Mr Tease: Well, it may be embedded in the heads of power that are in the legislation. I would just have to confirm it with our Law Design Office.

Answer:

As outlined on page 12 of the Explanatory Memorandum to the Australian Business Securitisation Fund Bill 2019 (the Bill), section 18 of the Bill provides certainty that the Minister (or eligible delegates) cannot perform functions that exceed the Commonwealth's legislative power under the Constitution.

The Bill expressly enables the Minister to exercise powers or perform functions under the Bill only for purposes related to specific constitutional powers. The Minister's powers can only be exercised:

- in relation to trade or commerce:
 - between Australia and places outside Australia; or
 - among the States; or
 - within a Territory, between a State and a Territory or between two Territories; or
 - with respect to a Territory; or
- with respect to the implied power of the Parliament to make laws with respect to nationhood; or
- with respect to the executive power of the Commonwealth.

Section 12 of the Bill provides the Minister with the power to make investments in authorised debt securities. Inseparable to the Minister's powers to make investments is the ability to recoup funds, including:

- investment income;
- capital returned on matured investments; or
- the sale of debt securities.

More specifically, section 14 of the Bill provides that income derived from an investment of the Fund will be credited to the Australian Business Securitisation Fund Special Account (the Account). In addition, if an investment in a debt security matures and the Minister elects to not re-invest in the same entity, the returned capital will be credited to the Account.

Section 14 also provides that the proceeds of the realisation of an investment will be credited to the Account. This provision would be applicable if there was a decision to wind-up the Fund while the Fund held debt securities.

Section 16 of the Bill allows the Minister to make a direction that a specified amount is to be debited from the Account, and therefore returned to the Commonwealth's consolidated revenue fund.