

## **DisabilityCare Australia Fund Bill 2013**

*Introduced into the House of Representatives on 15 May 2013*

*Portfolio: Finance and Deregulation*

## **Family Trust Distribution Tax (Primary Liability Amendment (DisabilityCare Australia) Bill 2013**

## **Fringe Benefits Tax Amendment (DisabilityCare Australia) Bill 2013**

## **Income Tax (First Home Saver Accounts Misuse Tax) Amendment (DisabilityCare Australia) Bill 2013**

## **Income Tax (TFN Withholding Tax (ESS)) Amendment (DisabilityCare Australia) Bill 2013**

## **Income Tax Rates Amendment (DisabilityCare Australia) Bill 2013**

## **Medicare Levy Amendment (DisabilityCare Australia) Bill 2013**

## **Superannuation (Excess Concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013**

## **Superannuation (Excess Non-concessional Contributions Tax) Amendment (DisabilityCare Australia) Bill 2013**

## **Superannuation (Excess Untaxed Roll-over Amounts Tax) Amendment (DisabilityCare Australia) Bill 2013**

## **Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 1) Amendment (DisabilityCare Australia) Bill 2013**

## **Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 2) Amendment (DisabilityCare Australia) Bill 2013**

*Introduced into the House of Representatives on 15 May 2013*

*Portfolio: Treasury*

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## Summary of committee view

1.30 The committee intends to seek clarification as to whether the exclusion from access to the National Disability Insurance Scheme of New Zealand citizens who are long-term residents of Australia, and not protected SCV holders or permanent residents, is consistent with the right to non-discrimination and the right to social security.

## Overview

1.31 The Medicare Levy Amendment (DisabilityCare Australia) Bill 2013 sought to amend the *Medicare Levy Act 1986* to increase the Medicare levy rate to fund the National Disability Insurance Scheme (NDIS or DisabilityCare). Ten other bills introduced with this bill incorporated this change into other legislation that references the rate of the Medicare levy.

1.32 The DisabilityCare Australia Fund Bill 2013 sought to establish a special fund, the DisabilityCare Australia Fund, to house the revenue raised by the increase in the Medicare levy. The bill sets out the arrangements for the administration of the Fund, and made consequential amendments to other tax rates linked to the top marginal rate and Medicare levy.

1.33 All twelve bills<sup>16</sup> were introduced on 15 May 2013 and passed both Houses the next day.

## Compatibility with human rights

1.34 The DisabilityCare Australia Fund Bill 2013 was accompanied by an individual statement of compatibility which stated that the amendments 'do not engage any of the applicable rights or freedoms' and was therefore compatible with human rights.

1.35 The eleven other bills were accompanied by a single combined statement of compatibility that stated that the bills did not engage any human rights. The explanatory memorandum also dealt with all eleven bills in the one document, reflecting the relationship between the change proposed by the Medicare Levy Amendment (DisabilityCare Australia) Bill 2013 and the ten other bills which incorporated references to the rate of the Medicare levy. The effect of the individual bills is set out bill by bill in the explanatory memorandum.

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16 In addition to these twelve bills, the National Disability Insurance Scheme Legislation Amendment Bill 2013 was also introduced, see the committee's separate comments in relation to this bill.

### *Statements of compatibility*

1.36 The committee has indicated in its *Practice Note 1* that in general each bill introduced into the Parliament should be accompanied by a separate self-contained statement of compatibility. The purpose of this requirement is to ensure that the impact of each individual bill, including those that form part of an interrelated scheme or which appear to be merely consequential on the changes made by one bill, has been assessed for human rights compatibility.

1.37 In the present case, for example, the statement of compatibility for eleven of the bills notes that the purpose of increasing the Medicare levy is to fund the NDIS and that this will complement existing measures to remove discrimination against persons with disabilities in Australia. It does not mention promotion of the rights of persons with disabilities to participate in the life of the community on the basis of equality. The imposition of an additional Medicare levy set aside for the purpose of funding DisabilityCare is a measure intended to ensure the sustainability of the measures. Accordingly, the bills advance a wide range of rights, in particular those embodied in the Convention on the Rights of Persons with Disabilities, and the rights to equality and the equal enjoyment of rights without discrimination on the basis of disability under the other six treaties.

1.38 In addition to amending the *Medicare Levy Act 1986*, the accompanying bills amend other Acts, including legislation relating to superannuation contributions. Among other changes, the proposed amendments include increases in tax rates on excess concessional and non-concessional superannuation contributions. As the committee has previously noted, superannuation entitlements and their regulation may engage a variety of rights, including the right to social security and the right to an adequate standard of living, guaranteed by articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). While it may be that any impact on those rights that would result from the increase in tax rates in order to fund DisabilityCare would be readily justified, the statement of compatibility should have referred to the rights engaged by each bill (if any).

**1.39 The committee notes the need for statements of compatibility to address each bill specifically even where they form part of a related package of legislation.**

### *Adequate time for Parliamentary consideration of bills*

1.40 The committee considers there will be circumstances in which there is a need to pass uncontested legislation as a matter of urgency. Notwithstanding this, the committee has previously expressed concern about the introduction and passage of bills according to a timetable that does not allow a reasonable opportunity for the scrutiny of those bills for human rights compatibility. As the chair of the committee noted in his executive summary of the committee's *Fourth Report of 2013*:

The committee considers that the timetable for the consideration of legislation should allow sufficient time for the Parliament to examine draft legislation in some detail. The committee notes that article 25 of the International Covenant on Civil and Political Rights guarantees the rights of citizens to participate in government through their elected representatives. A fundamental premise of the *Human Rights (Parliamentary) Scrutiny Act 2011* is that the examination of draft legislation for human rights compatibility is an important component of the Australian Human Rights Framework, and that the role of the committee is not a purely formal one or intended to be primarily after-the-event commentary on legislation.<sup>17</sup>

### *Equality and non-discrimination*

1.41 The attention of the committee has been drawn to the interaction between the bill and earlier draft legislation considered by the committee, now enacted as the *National Disability Insurance Scheme Act 2013*. The issue has been raised whether excluding certain New Zealand citizens who are resident in Australia (but not permanent residents)<sup>18</sup> from accessing the National Disability Scheme (NDIS), even though they will be subject to the increased Medicare levy to help fund the Scheme, is compatible with human rights, in particular the rights to equality and non-discrimination and the right to social security.

1.42 As at 30 June 2012, an estimated 647,863 New Zealand citizens were present in Australia, most of whom are not permanent residents. Under the 1973 Trans-Tasman Travel Arrangement, New Zealand citizens are allowed to enter and reside indefinitely in Australia without being required to hold a permanent visa.<sup>19</sup> Since 1994 all non-citizens in Australia have been required to hold a visa. The Special Category visa (SCV), a temporary visa, was introduced for New Zealand citizens; which is automatically granted to all New Zealand citizens on entering Australia.<sup>20</sup>

1.43 In 2001, Australia and New Zealand concluded a new bilateral social security agreement<sup>21</sup> which coordinated the social security schemes of both countries.<sup>22</sup>

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17 PJCHR, *Fourth Report of 2013*, pp ix-x.

18 The position in relation to the immigration status and associated rights of New Zealand citizens in Australia is set out by the Department of Immigration and Citizenship (DIAC), in its Fact Sheet 17 – New Zealanders in Australia, <http://www.immi.gov.au/media/fact-sheets/17nz.htm>

19 Australian citizens enjoy the reciprocal right in relation to New Zealand.

20 See <http://www.immi.gov.au/media/fact-sheets/17nz.htm>

21 Agreement on Social Security between the Government of Australia and the Government of New Zealand, Canberra, 28 March 2001, [2002] ATS 12.

Following this, changes were made that meant that New Zealand citizens arriving in Australia after 26 February 2001 are not eligible for social security benefits unless they hold a permanent visa. Most of those resident in Australia before that date remained eligible for social security benefits (as they were defined as being a 'protected SCV holder').<sup>23</sup> Broadly speaking, the effect of the changes was to preserve the position of many New Zealand citizens who, in February 2001, were already resident in Australia to access various social security benefits, but to exclude access to benefits for those New Zealanders who arrived and became resident after the transitional period.

1.44 Before the 2001 changes, New Zealand citizens enjoyed a privileged position compared with other non-citizens in relation to the right to enter into and reside in Australia and to access certain social security benefits. New Zealand citizens continue to enjoy a privileged position insofar as the right to enter and reside in Australia when compared with other non-citizens. However, New Zealand citizens governed by the post-2001 arrangements must now apply for a permanent visa or citizenship in order to access certain benefits to which they would previously have been entitled by virtue of the fact of residence in Australia. A grant of permanent residence or citizenship is not automatic in the case of a New Zealand citizen, even one who is a long-time resident of Australia, and many will not qualify for an Australian permanent visa.

#### *Eligibility to participate in the National Disability Scheme*

1.45 In order to participate in the NDIS a person must satisfy the residence requirement set out in section 23 of the *National Disability Insurance Scheme Act 2013*, which is the same test as set out under the *Social Security Act 1991*. Thus, New Zealand citizens who are SCV holders and long-term residents of Australia, but who are not protected SCV holders (i.e. they were not resident before February 2001) or the holders of permanent visas, will not be eligible to participate in the NDIS.

1.46 At the same time, New Zealand citizens residing in Australia who are not protected SCV holders or holders of permanent visas fall within the definition of 'Australian resident' for the purposes of the *Health Insurance Act 1973*<sup>24</sup> meaning

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22 See the Joint Standing Committee on Treaties consideration of this treaty in its report: *Six Treaties Tabled on 23 May 2001*, Report 41, August 2001, paras 3.3-3.12.

23 Amendments were made to section 7 of the *Social Security Act 1991* to define an Australian resident as either an Australian citizen, permanent resident or a 'special category visa holder who is a protected SCV holder' A person is a protected SCV holder if the person was a New Zealand citizen (who was not a permanent resident) residing in Australia up to or on 26 February 2001.

24 See section 3 of the *Health Insurance Act 1973*.

they are eligible for Medicare and are also liable to pay the Medicare levy, including the increase in the Medicare levy imposed to finance the NDIS.

1.47 The exclusion of certain New Zealand residents in Australia from access to the NDIS raises a number of human rights concerns. These include issues of equal protection of the law and non-discrimination on the basis of nationality, national origin or immigration status<sup>25</sup> and the right to social security and its non-discriminatory enjoyment.<sup>26</sup>

#### *Equality and non-discrimination*

1.48 The eligibility criteria for participation in the NDIS involve differential treatment of New Zealand long-term residents compared to Australian citizens, permanent residents and holders of protected SCV holders. Apart from the category of New Zealand citizens who arrived before 2001 and are protected SCV holders, there appears to be no difference in the treatment of New Zealand citizens and citizens from other countries so far as eligibility for participation in the NDIS is concerned. The concern, however, in relation to New Zealand citizens is that, unlike other non-Australian citizens, they may stay in Australia indefinitely and so could live most of their lives here yet not be eligible to access the NDIS should they need it.

1.49 Article 1(2) of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides:

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

1.50 The committee notes that the UN Committee on the Elimination of Racial Discrimination (CERD Committee) has considered a complaint against Australia on this issue. The complainant claimed that the change in the entitlements of New Zealand residents of Australia who were not permanent residents or protected SCV holders resulting from the new definition of 'Australian resident' in the *Social Security Act 1991* involved a violation of the ICERD, as it involved discrimination on the basis of national origin.<sup>27</sup> The CERD Committee rejected the complaint, concluding:

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25 Each of these cases of differential treatment raises issues under the guarantees of non-discrimination contained in the human rights treaties, Non-discrimination is found in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 26 of the International Covenant on Civil and Political Rights (ICCPR), article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 2(1) of the Convention on the Rights of the Child (CRC).

26 Under article 9 and 2(2) of the ICESCR.

27 *D F v Australia*, Communication No. 39/2006, CERD/C/72/D/39/2006 (3 March 2008).

The provisions of the 2001 Act put New Zealand citizens on a more equal footing with other non-citizens, and they can apply on the same terms for a permanent resident's visa or Australian citizenship, the receipt of either of which would bring them within the definition of "Australian resident" for the purposes of receiving the benefits in question. In this context, the Committee notes that the petitioner has neither argued nor demonstrated that the implementation of the Act of 2001 itself results in distinctions based on national origin. He has failed to show that his national origin would be an impediment to receiving a permanent resident's visa or Australian citizenship, that the majority of visa holders are non-citizens of national origins different to himself, or indeed that he has been refused such a visa on the grounds of his national origin. For these reasons, the Committee concludes that the Act in question does not make any distinctions based on national origin and thus finds no violation of either article 5 (e)(iv) or 2(1)(a) of the Convention.<sup>28</sup>

1.51 This decision focused on differential treatment claimed to be based on national origin, which falls within the scope of the ICERD. However, differential treatment based on immigration status or nationality<sup>29</sup> may also constitute discrimination under international law under a number of other human rights treaties,<sup>30</sup> and possibly also ICERD. As the CERD Committee commented in its 2005 concluding observations on Australia's reports under the ICERD:

differential treatment based on citizenship or immigration status would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim.<sup>31</sup>

### *Right to social security*

1.52 The UN Committee on Economic Social and Cultural Rights has noted in relation to the right to social security:

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28 See *D F v Australia*, Communication No. 39/2006, CERD/C/72/D/39/2006 (3 March 2008), para 7.2. The CERD Committee considered a similar case and reached the same conclusion in *D R v Australia*, Communication No 39/2006, CERD/C/72/D/39/2006 (3 March 2008).

29 See also *Faulkner v ACE Insurance Limited* [2011] NSWADT 36 (23 February 2011), in which the NSW Administrative Decisions Tribunal held that a refusal to provide insurance services to a New Zealand resident of Australia who was not a permanent resident or protected SCV holder constituted indirect discrimination on the ground of nationality under the NSW *Anti Discrimination Act 1977* (NSW).

30 Under the ICCPR, ICESCR, and CRC.

31 CERD, *Concluding observations on the thirteenth and fourteenth periodic reports of Australia*, CERD/C/AUS/CO/14, para 24 (2005).

9. The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.

...

24. Qualifying conditions for benefits must be reasonable, proportionate and transparent.

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36. Article 2, paragraph 2, prohibits discrimination on grounds of nationality and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country....

37. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.<sup>32</sup>

1.53 The committee considers that the exclusion of New Zealand citizens who are long-term residents in Australia and who are not protected SCV holders, permanent residents or Australian citizens, from access to the NDIS, raises issues of compatibility with the enjoyment of the right to social security and the right to non-discrimination in the enjoyment of that right, in particular as that exclusion affects New Zealand citizens who have been long-term residents of Australia.

1.54 The committee recognises that article 4 of the ICESCR permits limitations on the enjoyment of the right to social security but notes that article permits only

such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

1.55 The committee considers that it is not apparent from the NDIS Act and accompanying explanatory materials why the exclusion of certain categories of New Zealand residents is a justified limitation on the enjoyment of the right to social security.

**1.56 The committee intends to write to the Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform to seek clarification as to whether the exclusion from access to the NDIS of New Zealand**

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32 CESCR, General Comment No 9, paras 9, 24, 36-37 (2008).



**citizens who are long-term residents of Australia, and not protected SCV holders or permanent residents, is consistent with right to non-discrimination and the right to social security.**