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## Financial Framework Legislation Amendment Bill (No. 2) 2013

*Portfolio: Finance*

*Introduced: House of Representatives, 13 March 2013*

### **Purpose**

2.33 The Financial Framework Legislation Amendment Bill (No. 2) 2013 (the bill) sought to:

- amend the *Financial Management and Accountability Act 1997* (FMA Act) to allow the Commonwealth to form or participate in the formation of companies (including transitional provisions in relation to existing Commonwealth companies and to validate the Commonwealth's role in forming or acquiring shares in existing Commonwealth companies);<sup>1</sup>
- amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to include decisions made under the proposed amendment to the FMA Act in the relevant schedule of decisions not subject to review under that Act, given the policy nature of such decisions;
- amend the *Social Security Act 1991* (in relation to payments made under the Australian Government Disaster Recovery Payments scheme);
- amend the *Judges' Pensions Act 1968* and the *Remuneration Tribunal Act 1973* to establish a 'recoverable payments' framework for dealing with administrative overpayments, and to address instances where the relevant agency makes payments that are not consistent with the requirements or pre-conditions imposed by legislation; and
- provide for the transfer of realised capital losses from the Military Superannuation and Benefits Fund (MSBF) to the ARIA Investments Trust following the transfer of assets that occurred in May 2012. This is to ensure that losses do not remain with the MSBF, given that they cannot be used to offset future capital gains of the fund (as all of the fund's assets have been transferred to the ARIA Investments Trust).

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1 This measure is identified as following from the High Court's decision in *Williams v Commonwealth* [2012] HCA 23, which considered the limits of the Commonwealth's executive power. The explanatory memorandum (EM) states that the proposed amendments 'are designed to put beyond any argument the capacity of the Executive Government to form or participate in the formation of companies' (p. 5).

## **Background**

2.34 The committee reported on the bill in its *Fourth Report of 2013* and subsequently in its *First Report of the 44th Parliament*.

2.35 The bill was subsequently passed by the Parliament and received Royal Assent on 28 May 2013.

## **Committee view on compatibility**

### ***Right to fair hearing***

#### *Exclusion of right to review*

2.36 The committee sought clarification from the Minister for Finance as to:

- whether the decisions will be subject to judicial review, for instance, under the *Administrative Decisions (Judicial Review) Act 1977*; and
- if so, whether this encompasses review of the facts.

## **Minister's response**

You have asked for clarification of amendments made by the FFLA Bill to the *Social Security Act 1991* (Social Security Act) regarding payments made under the Australian Government Disaster Recovery Payments scheme (the scheme). It is first necessary to explain the background to these amendments, and the context of the FFLA Bill in general.

The amendments to the Social Security Act were designed to address potential inconsistencies with section 83 of the Australian Constitution, which sets out the rules for payments of money made by the Commonwealth. In summary, no money is to be drawn from the consolidated revenue fund except under an appropriation, made by the Parliament for a specified purpose.

An appropriation specifies the purpose(s) for which money may be spent, and associated legislation, including regulations, may specify conditions under which payments are to be made. For example, who is entitled to be paid and how much in specific circumstances. Drawing money from the consolidated revenue fund beyond the scope of the appropriation's purpose constitutes a breach of section 83.

In 2012, the Australian National Audit Office (ANAO) raised with Finance that it had identified potential inconsistencies with section 83 of the Constitution across a range of Commonwealth payments being made by Departments and agencies. The ANAO asked Finance to work with all Departments and agencies to ensure they addressed any further section 83 issues. The majority of issues subsequently identified required amendments to legislation and the previous Finance Minister offered FFLA

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Bills as a mechanism for Departments and agencies to make the necessary amendments.

While these amendments were made through a FFLA Bill, put to the Parliament by the previous Finance Minister, the policy substance of the amendment to the Social Security Act was requested by the then Attorney-General.

The intention of the amendments was to ensure that in disaster situations, recovery payments would be able to be made even where the qualification requirements of the scheme could not be satisfied. For example, during the Victorian bushfires, many people were unable to provide evidence of identity as required due to the nature of the disaster. The amendments sought to ensure that recovery funds would be able to be made in an emergency, while an administrative recovery framework would be in place should incorrect payments be discovered at a later date.

The recoverable payment provisions were excluded from merits review under the *Social Security(Administration) Act 1999* because the associated arrangements only relate to payments that are later found not to meet the qualification requirements under the Social Security Act. These provisions provide a mechanism for the Department to recover payments that are ineligible at law and do not go to matters of eligibility, merit or quantum. Importantly, external merits review would be available under Part 4 of the *Social Security (Administration) Act 1999* for decisions that determine qualification to a payment made under section 1061 K of the Social Security Act.

Judicial review would also be available for all decisions made under the scheme, including decisions to recover a payment. This would include judicial review under the *Administrative Decisions (Judicial Review) Act 1977* or section 75(v) of the Constitution. In such an instance, the court would examine the lawfulness of the relevant administrative decision, potentially including a review of the facts to determine the legality of the decision.

On the basis of the availability of these review mechanisms, I do not consider that human rights have been impinged by the amendments to the Social Security Act.<sup>2</sup>

## Committee response

**2.37 The committee thanks the Minister for Finance for his response and has concluded its examination of this bill.**

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2 See Appendix 2, Letter from Senator the Hon Mathias Cormann, Minister for Finance, to Senator Dean Smith, 28 May 2014.