

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.12 Provisions that make the Commonwealth liable to make a payment

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC for Bills and the PLC for instruments.

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Part 1—Background

Payment provisions to be supported by an appropriation

1 Provisions are often drafted that make the Commonwealth liable to make a payment (*payment provisions*). For that payment to be made, it will need to be supported by an appropriation of the Consolidated Revenue Fund (*CRF*).

The appropriation must be express

2 For many years OPC has operated on the assumption that the CRF could not be appropriated except by express words to that effect. This meant that for the payment to be supported by an appropriation, the payment provision or another provision would need to expressly appropriate the CRF for the purpose of making that payment (a *standing appropriation*) or the payment would need to be covered by an administered item or a departmental item in a Commonwealth body's annual appropriation.

Provisions used solely to negate an implied appropriation

3 Despite this assumption, drafters sometimes included provisions along the following lines to make it clear that a payment provision was not itself an implied appropriation, but that a separate appropriation of the CRF would be required before payments could be made:

- (#) Payments under [*this section*][*section X*] are to be made out of money appropriated by the Parliament.
- (#) Payments under [*this section*][*section X*] are to be made out of money appropriated by the Parliament for the purposes of [*this section*][*that section*].

4 The inclusion of these provisions has led to confusion, as some Departments have mistakenly interpreted them as effecting an appropriation of the CRF themselves. In some cases these provisions have been replaced with notes. For example, note 2 at the end of subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013* states:

Note 2: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against a non-corporate Commonwealth entity's annual appropriation, providing that it relates to some matter that has arisen in the course of the administration of the entity.

Provisions used for other purposes

5 However, provisions of the kind mentioned in paragraph 3 are not to be confused with provisions that perform a function that is different from (or in addition to) negating an implied appropriation. Two examples of these kinds of provisions are:

- provisions that deal with the funding of Commonwealth bodies; and
- provisions that indicate which appropriation is to be debited.

Funding of Commonwealth bodies

6 An example of a provision dealing with the funding of a Commonwealth body is subsection 57(1) of the *Tourism Australia Act 2004*, which provides:

- (1) There is payable to Tourism Australia such money as is appropriated by the Parliament for the purposes of Tourism Australia.

7 This provision affects the Finance Minister's responsibilities under section 51 of the *Public Governance, Performance and Accountability Act 2013* in issuing amounts that have been appropriated under the Annual Appropriation Acts for the purposes of the body. In particular, it results in the Finance Minister being required to issue the full amount appropriated for the purposes of the body because, for the purposes of paragraph 51(2)(a) of the *Public Governance, Performance and Accountability Act 2013*, it is a law requiring payment of the appropriated amount. Without a provision of this kind, the Finance Minister would otherwise have a discretion about whether to issue the full amount appropriated to the body.

Appropriation to be debited

8 Sometimes more than one appropriation may be available to support a payment provision and the policy is to require that a particular appropriation is to be debited for the payments.

9 An example of a provision indicating which appropriation is to be debited is subsection 251(7) of the *Airports Act 1996*, which provides:

- (7) A payment under subsection (4) or (5) is to be made out of amounts appropriated by the Parliament for the purposes of the designated agency in relation to the notice.

Part 2—Appropriations other than by express words

10 The assumption that the CRF could not be appropriated except by express words to that effect is not always correct, and a court might, in some circumstances, conclude that a payment provision operates to effect an appropriation, despite a lack of express reference to appropriation of the CRF.

11 However, the practical risk of such an implied appropriation argument arising for consideration by a court is very low. This is because, in preparing the Annual Appropriation Acts, the Commonwealth's standard practice is to ensure that an appropriation is included to cover each payment provision that is not covered by a standing appropriation.

12 You may continue to proceed on the basis that:

- (a) a payment provision does not, of itself, constitute an appropriation of the CRF; and
- (b) a payment provision would not, of itself, enliven section 56 of the Constitution.

Part 3—Approach

13 If you are drafting a payment provision, you should ask your instructors what will be the relevant appropriation that covers the payment.

14 If the payment is to be covered by a standing appropriation, you should check whether the payment will be covered by an existing standing appropriation. If there is no existing

standing appropriation that covers the payment, you should ask your instructors to consult the Department of Finance on whether it is appropriate to include a new standing appropriation to cover the payment (standing appropriations need to be referred to that Department under Drafting Direction 4.2). You should also advise your instructors of concerns expressed by the Senate Scrutiny of Bills Committee about standing appropriations (see Drafting Direction 4.1).

15 If the payment is not to be covered by a standing appropriation, you should advise your instructors to ensure that the annual appropriation for their portfolio covers the payment. If your instructors are relying on an administered item, expenditure for the purposes of making the payment will need to fall within the terms of a particular outcome mentioned in connection with that appropriation. If they are relying on a departmental item, expenditure for the purposes of making the payment will need to constitute departmental expenditure.

16 You should not include provisions of the kind mentioned in paragraph 3 solely for the purposes of negating an implied appropriation. However, if you consider it would be helpful to include a provision for that purpose and you have spoken with First Parliamentary Counsel, the following provision should be used:

(#) Payments under [*this section*][*section X*] are to be made out of money appropriated by the Parliament by another Act [*for the purposes of ...*].

Note: The other Act will usually be an Annual Appropriation Act.

17 This provision includes a reference to another Act to make it clear that it is another Act, and not this provision, that provides the appropriation for the payments.

18 You should speak to First Parliamentary Counsel before including a note along the lines of that mentioned in paragraph 4. If such a note is included, you should ensure that it accurately reflects the circumstances in which a payment may be debited against an annual appropriation (see paragraph 15).

19 In future, if you are including provisions of the kind mentioned in paragraphs 5 to 9 and it is intended that another Act (e.g. an Annual Appropriation Act) will provide the appropriation, then, for the same reasons as referred to in paragraph 17, it will be helpful to include a reference to the other Act. For example:

(#) There is payable to [*the body*] such money as is appropriated by the Parliament by another Act for the purposes of [*the body*].

(#) A payment under [*this section*] is to be made out of amounts appropriated by the Parliament by another Act for the purposes of [*specify purposes*].

Part 4—Special or standing appropriations

Background

20 In its Fourteenth Report of 2005, the Senate Scrutiny of Bills Committee stated the following:

In a report on the financial management of special (standing) appropriations in November 2004, the Australian National Audit Office found widespread illegalities and lack of accountability and control in the management of these appropriations.

More than half of the appropriations were not properly reported by departments and agencies in their annual financial statements. [...]

The executive government is empowered to spend money only in accordance with an appropriation under section 83 of the Constitution. The use of standing appropriations limits accountability and scrutiny by denying the Parliament the opportunity to approve expenditure through its annual appropriations processes.

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The committee has therefore determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions (1)(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

In accordance with its usual practice, the committee will look to the explanatory memorandum to the bill for an explanation of the reason for the standing appropriation. Where circumstances warrant, the committee will also seek from the responsible minister an explanation justifying the inclusion of the provision and the exclusion of the appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process.

Advising instructors

21 If you include a "special" or "standing" appropriation provision in a Bill, you should alert your instructors to that report and advise your instructors to address the matters raised in that report in the explanatory memorandum.

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 6 of 2004.