

## PARLIAMENTARY COUNSEL

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

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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.

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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 department'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 \*] are to be made out of money appropriated by the Parliament.
- (#) Payments under [this section][section \*] 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, the note at the end of section 33 of the *Financial Management and Accountability Act 1997* states:

Note: 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 an Agency's annual appropriation, providing that it relates to some matter that has arisen in the course of its administration or otherwise relates to the Agency's outcomes.

5 Be aware that such notes may no longer be accurate following the decision in *Combet v Commonwealth* (2005) 224 CLR 494.

### ***Provisions used for other purposes***

6 However, provisions of the kind mentioned in paragraph 3 are not to be confused with provisions which, while textually similar, 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 statutory bodies; and

- provisions that indicate which body's appropriation is to be debited.

### **Funding of statutory bodies**

7 An example of a provision dealing with the funding of statutory bodies 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.

8 Provisions such as this affect the provision in the Appropriation Acts that deals with the Finance Minister's responsibilities in issuing amounts that have been appropriated under those Acts for the purposes of such bodies (see, for example, the template for this provision in subsections 10(1) and (3) of Appropriation Act (No. 2) 2007-2008 and note the circumstances as to when the Finance Minister may, or must, issue the amounts appropriated to the bodies).

### **Appropriation to be debited**

9 An example of a provision indicating which body's 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—AGS advice**

10 The Australian Government Solicitor has advised that the assumption that the CRF could not be appropriated except by express words to that effect is not always correct, and that 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 (see AGS advice provided by Guy Aitken and Leo Hardiman dated 4 June 2007 (07034669)).

11 The AGS advice indicated that while there is a legal risk that a payment provision might operate to effect an appropriation, the practical risk of an implied appropriation argument arising for consideration by a court is very low. This is because of the Commonwealth's standard practice of making provision in annual appropriations to cover payments if there is no standing appropriation.

12 The AGS advice concluded that it would be reasonable for OPC to 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—Future approach**

13 In future, 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 and Deregulation 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 (but note that this prohibition does not extend to provisions of the kind mentioned in paragraphs 6 to 9).

17 You should speak to FPC 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 11).

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