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Date introduced: 30 October 2012

House: House of Representatives

Portfolio: Finance and Deregulation

Commencement: On Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech for the Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013 and the links to the Bill, its Explanatory Memorandum and second reading speech for the Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013 can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bills

The purpose of the Bills is to provide funding for the implementation of the recommendations of the Report of the Expert Panel on Asylum Seekers (the Report), and to provide additional funding for the management of Irregular Maritime Arrivals (IMA).

The Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013 (the No. 1 Bill) seeks to appropriate $1.407 billion in operating appropriation (recurrent expenditure) to implement the measures recommended by the Report.

The Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013 (the No. 2 Bill) seeks to appropriate $267.980 million in non-operating appropriation (capital expenditure) also to implement the measures recommended by the Report.

The total amount of additional appropriation being sought is $1.675 billion.

Technical aspects

Sections 81 and 83 of the Australian Constitution

Section 81 of the Constitution provides that:


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All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund [CRF], to be appropriated for the purposes of the Commonwealth...²

Section 83 of the Constitution provides that no money may be withdrawn from the CRF ‘except under appropriation made by law’.

The effect of these two sections is that all monies received by the Commonwealth must be paid into the CRF, and must not be spent before there is an appropriation authorising specific expenditure.

Appropriations

Monies may be released from the CRF by two types of laws:

- annual appropriation Bills or
- special, sometimes called ‘standing’, appropriations contained in specific legislation.

Proposed laws appropriating monies may not originate in the Senate.³

Special, or standing, appropriations are expenditure authorised by particular Acts for particular purposes. An example of a special appropriation is the Tax Benefits A and B paid under the A New Tax System (Family Assistance) (Administration) Act 1999. They do not lapse each year.

The remainder of government expenditure is funded by annual appropriations. These Bills are both annual Appropriation Bills.

Importantly, Appropriation Acts do not create a source of power for the Commonwealth to spend money; they merely release that money from the CRF. The Commonwealth’s power to spend money must be found in other parts of the Constitution.⁴

The ‘ordinary’ versus ‘other’ annual services of government

Section 54 of the Constitution requires that there be a separate law appropriating funds for the ‘ordinary’ annual services, and that other matters must not be dealt with in such a Bill.⁵ There must be, therefore, separate annual Appropriation Bills for the ‘ordinary’ annual services, and for any ‘other’ annual services.

The distinction between ordinary and other annual services was set out in a ‘Compact’ between the Senate and the Government in 1965.⁶ The substance of the compact is reflected in the following 1977 resolution of the Senate:

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2. Constitution, section 81.
5. Constitution, section 54: ‘The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.’

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1. To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government.

2. That appropriations for expenditure on:
   (a) the construction of public works and buildings;
   (b) the acquisition of sites and buildings;
   (c) items of plant and equipment which are clearly definable as capital expenditure;
   (d) grants to the States under Section 96 of the *Constitution*; and
   (e) new policies not previously authorised by special legislation;

are not appropriations for the ordinary annual services of the government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate Appropriation Bill subject to amendment by the Senate.  

In 1999 the Compact was altered to reflect accrual accounting. The adjustments provided that:

   (i) items regarded as equity injections and loans be regarded as not part of ordinary annual services
   
   (ii) all appropriation items for continuing activities for which appropriations have been made in the past be regarded as part of ordinary annual services
   
   (iii) all appropriations for existing asset replacement be regarded as provision for depreciation and part of ordinary annual services.

Adherence to the compact has not always been strict, and the High Court has held that such disagreements between the Houses are not justiciable. That is, they are not appropriate disputes for determination by a court. Any disputes are to be determined between the Houses themselves.

### The Senate’s powers

Section 53 of the *Constitution* provides, among other things, that the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may, however, return to the House of Representatives any such proposed laws requesting, by message, the omission or amendment of any items or provisions therein.

However, the Senate may amend proposed laws appropriating revenue for purposes other than for the ordinary annual services of the Government, as long as it does not ‘increase any proposed charge or burden on the people’. Conceivably, the Senate could amend an appropriation Bill for the other

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annual services of government so as to, for example, redirect the proposed appropriation, or reduce the proposed appropriation to nil. The Senate may also request that, if new measures are included in a Bill for the ‘ordinary’ annual services of government, that the Bill be returned to the House with a message requesting those new measures be omitted from the Bill.11

Departmental and administered expenses

Australian Accounting Standard 1050 Administered Items requires that government agencies distinguish between revenues and expenses that they administer for the Government, and those over which they have some control.12 Generally, administered expenses are the costs of providing the programs that agencies run for the Government, while departmental expenses are the costs incurred in running agencies.

Appropriation Bills, therefore, distinguish between ‘administered’ expenses and ‘departmental’ expenses. Administered appropriation may only be used for the program or outcome that it is appropriated for, while departmental appropriation may be moved between different departmental activities.13

Background

On 28 June 2012 the Prime Minister and the Minister for Immigration and Citizenship announced14 that the Government would establish an expert advisory panel to consider options for ‘the best way forward for our nation in dealing with asylum seeker issues’. This followed months of political deadlock over how to best manage the issue of increasing numbers of asylum seekers arriving in Australia by boat, and the High Court’s decision in Plaintiff M70/2011 v Minister for Immigration and Citizenship15, which found the Immigration Minister’s declaration of Malaysia as a ‘third country’ for processing of asylum seekers under the Migration Act 1958 was invalid.

Former chief of the Australian Defence Force, Air Chief Marshall Angus Houston was appointed to lead the panel, which also comprised Professor Michael L’Estrange, Director of the National Security College at the Australian National University, and refugee expert Paris Aristotle, Director of the Victorian Foundation for Survivors of Torture Inc. The panel’s terms of reference16 were to provide advice to government on policy options available to prevent asylum seekers from embarking on boat journeys to Australia.


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The Report\textsuperscript{17} was released on Monday 13 August 2012. It made 22 recommendations on the policy options available to prevent asylum seekers from travelling to Australia by boat. Key recommendations included:

- an increase in Australia’s humanitarian quota to 20 000 per year (from the current 13 750 per year) with consideration being given to a further increase to 27 000 in five years’ time
- the removal of family sponsorship arrangements under the Special Humanitarian Program for IMAs, with IMAs instead required to sponsor family through the family stream of the migration program, which should be increased by 4000 places per annum
- the introduction of legislation to ‘support the transfer of people to regional processing arrangements .... as a matter of urgency’
- the establishment of processing capacity in Nauru and Papua New Guinea as soon as practicable and
- building further on the Government’s planned transfer arrangement with Malaysia, with a focus on strengthening standards, safeguards and accountability.

The Report provided estimated costs associated with its recommendations, which had been developed following discussion with the Department of Finance and Deregulation. In relation to some of the key recommendations, the Report estimated that\textsuperscript{18}:

- an increase in the Humanitarian Program from its current level of 13 750 places per annum to 20 000 places per annum would cost in the order of $1.4 billion over the forward estimates
- an increase in the Family Migration stream of the Migration Program of 4000 places per annum would cost in the order of $0.8 billion over the forward estimates
- the full establishment and operation of a regional processing capacity in Nauru accommodating up to 1500 people would cost between $1.2 billion to $1.4 billion over the forward estimates, including capital costs in the order of $300 million and
- the full establishment and operation of a regional processing capacity in PNG (such as on Manus Island) accommodating up to 600 people would cost in the order of $0.9 billion over the forward estimates, including capital costs in the order of $230 million.

**Committee consideration**

The Senate Selection of Bills Committee resolved not to refer these Bills to a committee.\textsuperscript{19}

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\textsuperscript{18} Ibid., p. 143.


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Policy position of non-government parties/independents

While the Coalition has been generally critical of the Government’s approach to the issues around asylum seekers, it has indicated it will support these Bills. The Shadow Immigration Minister, Scott Morrison, said during the debate in the House:

the coalition is not going to be standing in the way of this, because, regardless of how aggrieved we feel about the serious policy failure of this government on our borders—which happens every single day, as more than one boat arrives every single day—these bills are going to have to be paid.20

The Greens have opposed the Government’s approach to the Report, however, it is not clear whether they will support or oppose these Bills.

Financial implications

In the 2012–13 Mid-Year Economic and Fiscal Outlook21, the Government announced a range of budget measures aimed at implementing the recommendations of the Report, which are being funded through these Bills.

According to the Minister’s second reading speech:

This includes $110.6 million for Houston report measures, including $92.043 million to increase the humanitarian program by an additional 6,250 places to 20,000 per annum from 2012-2013; $8.181 million to increase the family reunion stream of the permanent migration program by 4,000 places; and $10 million to fund capacity-building initiatives in regional countries. It also includes $1.296 billion to meet expenses arising from the management of higher levels of irregular maritime arrivals and the operational expenses associated with the implementation of the expert panel’s recommendations to establish regional processing centres on Nauru and Manus Island. This includes a $186 million accrual from 2011-2012.

While the Bill’s title refers to ‘implementation of the report of the expert panel on asylum seekers’, it does not appropriate funding solely for this purpose. It also includes significant funding ‘to meet expenses arising from the management of higher levels of irregular maritime arrivals’.

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Breakdown of appropriations

<table>
<thead>
<tr>
<th>Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013</th>
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</thead>
<tbody>
<tr>
<td><strong>Outcome 1</strong> Managed migration through visas granted for permanent settlement, work, study, tourism, working holidays or other specialised activities in Australia, regulation, research and migration policy advice and program design</td>
</tr>
<tr>
<td>The increase, by 4000 places, in the family stream of the migration program to compensate for the removal of family removal rights under the Special Humanitarian program, as recommended by the Expert panel, would fall under this outcome.</td>
</tr>
<tr>
<td>$1,507,000 departmental</td>
</tr>
</tbody>
</table>

| **Outcome 2** Protection, resettlement and temporary safe haven for refugees and people in humanitarian need through partnering with international agencies; assessing humanitarian visa applications; and refugee and humanitarian policy advice and program design |
| The processing of additional humanitarian visas associated with the increase in the humanitarian program from 13,750 to 20,000 places annually, as recommended by the Expert Panel, would fall under this outcome. |
| $17,293,000 departmental | $2,018,000 administered | $19,311,000 total |

| **Outcome 4** Lawful stay of visa holders and access to citizenship rights for eligible people through promotion of visa compliance responsibilities, status resolution, citizenship acquisition integrity, case management, removal and detention, and policy advice and program design |
| This outcome includes Program 4.3 Offshore Asylum Seeker Management, which provides for the detention and care of all irregular maritime arrivals (IMAs), and Program 4.6 Refugee Status Determination for Offshore Entry Persons. Thus the additional funding required to meet expenses associated with higher levels of IMAs, as referred to by the Minister in his second reading speech, falls under this outcome. |
| It also includes Program 4.5 Regional Cooperation and Associated Activities, so funding for offshore processing in Nauru and Papua New Guinea, as recommended by the Expert Panel, would also fall under this outcome, as would any other regional engagement on asylum and people smuggling issues, such as with Malaysia and Indonesia. |
| $121,034,000 departmental | $1,185,344,000 administered | $1,306,378,000 total |

| **Outcome 5** Equitable economic and social participation of migrants and refugees, supported through settlement services, including English language training; refugee settlement; case coordination; translation services; and settlement |

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Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 1) 2012-2013

<table>
<thead>
<tr>
<th>Policy advice and program design</th>
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<tbody>
<tr>
<td>This outcome covers settlement services for humanitarian entrants, which will require a funding boost to manage increased demand for services due to the significant increase in the humanitarian program, as recommended by the Expert Panel.</td>
</tr>
</tbody>
</table>

| $6,313,000 departmental |
| $73,493,000 administered |
| $79,806,000 total |

Appropriation (Implementation of the Report of the Expert Panel on Asylum Seekers) Bill (No. 2) 2012-2013

<table>
<thead>
<tr>
<th>Capital</th>
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<td>This Bill appropriates $267 million in capital funding to establish processing centres on Nauru and Manus Island, as recommended by the Expert Panel.</td>
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</table>

<table>
<thead>
<tr>
<th>Capital</th>
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<tbody>
<tr>
<td>It also provides $600,000 equity injections for settlement services. This is to cover costs associated with the increase in the humanitarian program from 13,750 to 20,000 places annually, and the resulting increased demand on settlement services.</td>
</tr>
</tbody>
</table>

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.22

As appropriations merely authorise the release of monies from the CRF23, these Bills do not directly impact upon human rights. However, the policies and programs that are to receive funding from these appropriation Bills have been strongly criticised by some commentators on human rights grounds.

Key issues and provisions

Adherence with constitutional requirements

Expenditure in relation to the management of asylum seekers is clearly within the power of the Commonwealth. For example, subsection 51(xix) of the Constitution grants legislative power to the Commonwealth with respect to ‘naturalization and aliens’ and subsection 51(xxix) grants legislative power to the Commonwealth with respect to ‘external affairs’.

The No.1 Bill asserts, however, that all the proposed expenditure the subject of appropriations falls within the ordinary annual services of government. While measures such as the additional places under the various visa categories might be characterised as a continuation of the ordinary annual activities of the Commonwealth, other measures—such as the ongoing cost of running the Regional...

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22. Statements of Compatibility with Human Rights can be found in the ‘Outline’ of the Explanatory Memoranda to the Bills.
Processing Centres for Irregular Maritime Arrivals in Nauru and Papua New Guinea—appear to be new measures that cannot be characterised as falling within existing, or ordinary, activities of government. By placing new expenditures in the No. 1 Bill, the Government has prevented those expenditures being fully scrutinised by the Senate.

Arguably, any expenditure relating to new measures—not merely the continuation of existing measures—should be in a Bill dealing with the other annual services of government, such as the No. 2 Bill, so that they may be scrutinised, and if necessary amended, by the Senate.

Key provisions

Clause 4 of both the No. 1 and No. 2 Bills provide that the Portfolio Budget Statement accompanying the Bill may be used to interpret the Bills.

Part 2 of both the No. 1 and No. 2 Bills outline the appropriation from the consolidated revenue fund. Schedule 1 of both Bills provides for how the appropriation is to be allocated to outcomes or functions. Clause 6 of both the Bills sets out the total amount appropriated: being $1 407 002 000 for the No. 1 Bill, and $267 980 000 for the No. 2 Bill. Clauses 7 and 8 of both Bills require that the monies appropriated for departmental items be used for departmental items and monies appropriated for administered items be used for administered items.

Part 3 of both Bills provides a mechanism for the Finance Minister to reduce the amount appropriated. This mechanism effectively allows the Finance Minister to retain any monies that have been appropriated but that are no longer required due to reductions in the program costs or changes in government priorities.

Part 4 of both Bills provides for two technical matters. Firstly, they ensure that if an appropriation is made for purposes that are covered by a Special Account, then the Special Account is replenished by the same amount as the appropriation: clause 11 in the No. 1 Bill and clause 10 in the No. 2 Bill. Secondly, they contain the provisions formally appropriating monies from the CRF: clause 12 in the No. 1 Bill and clause 11 in the No. 2 Bill.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.