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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE LEGISLATION AMENDMENT BILL (No. 1) 2009

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Defence Science and Personnel
the Hon Warren Snowdon MP)**

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GENERAL OUTLINE

The purpose of this Bill is to address two separate policy issues in relation to:

- a. the *Defence Act 1903* to introduce a discretionary Tactical Payment Scheme (TPS) to provide a new mechanism for making expeditious no-liability payments to persons adversely affected by Australian Defence Force (ADF) operations outside of Australia.

The scheme acknowledges that, in many areas in which the ADF operates financial compensation for collateral damage to property, injury, or loss of life is often a common expectation of local cultures. Recognition and respect for such customs is vital in building relationships with local communities, and enhances the safety and security of our deployed ADF personnel.

The TPS is a Defence specific, discretionary mechanism that does not preclude Defence from having recourse to the Act of Grace (AoG) provisions in the *Financial Management and Accountability Act 1997* (the FMA Act).

The scheme will allow for expeditious payments to be made in overseas operations and will operate independently from the AoG payments provisions and be managed and operated by Defence.

- b. the *Defence Home Ownership Assistance Scheme Act 2008* to:
 - remove an unintended windfall gain in the eligibility and entitlement of members who rejoined the ADF after a break in service prior to 1 July 2008;
 - provide greater reliability of the subsidy certificate as evidence to a home loan provider that subsidy is payable to a member by making the issue of a subsidy certificate conditional on a member having a service credit in the scheme;
 - ensure that only serving members who are buying a home for the first time have access to the subsidy lump sum payment option;
 - require that for lump sum subsidy to become payable in respect of an interest in land, the property must have been purchased subsequent to the giving of the subsidy certificate that is the basis for the lump sum requested;
 - clarify that subsidy may be payable either as a monthly payment or as a lump sum payment and monthly payment, and ensure that members who access the subsidy lump sum payment option retain sufficient service credit in the scheme to support on-going monthly subsidy payments;
 - ensure that the entitlement of subsidised borrowers who enter into a joint mortgage with a person who is not defined as a partner in the Act, is proportional to the subsidised borrowers' liability;
 - clarify the entitlements of subsidised borrowers who are partners and who are both parties in respect of the same loan, in order to provide for a consistent framework for shared liability; and

- enable delegation to the Scheme Administrator of the Secretary's function to provide written statements of reason for a decision that may be reviewable, including information about the affected person's rights.

Financial Impact statement

The amendments in the Bill will have no additional impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

Clause 1: Short title

1. This clause provides for the short title of the Act to be the *Defence Legislation Amendment Act (No.1) 2009*.

Clause 2: Commencement

2. This clause provides for the commencement provision for the Act. The commencement dates for specific provisions are included in the commencement information table.

Item 1 of the commencement table

3. This item provides that sections 1 to 3 (and anything in the Act not elsewhere covered by the table) commence on the day on which the Act receives the Royal Assent.

Item 2 of the commencement table

4. This item provides that Schedule 1 commences on the earlier of:
a) the 28th day after the day on which this Act receives the Royal Assent; and
b) 1 July 2009

Item 3 of the commencement table

5. This item provides that Schedule 2 commences on the 28 day after the day on which this Act receives the Royal Assent.

SCHEDULE 1 – TACTICAL PAYMENT SCHEME

Defence Act 1903

6. **Schedule 1** amends the *Defence Act 1903* to explicitly provide for a discretionary Tactical Payment Scheme for activities led by the Defence Force outside Australia.

Clause 1 - 123 H - Tactical payment scheme for activities of the Defence Force outside Australia

7. This clause inserts a new section 123H at the end of Part X of the Act to provide for the discretionary Tactical Payment Scheme (TPS) that will provide a means for making no-liability payments to persons affected by ADF activities outside Australia. An activity may include military action, operation, exercise or training undertaken during an overseas operation. This includes the full spectrum of operations that the ADF conducts.

8. The new provision gives the Minister power to authorise payments to a person who is not an Australian citizen, who may suffer loss, damage or injury outside Australia because of an incident that occurs in the course of activities of the ADF and the Minister considers it appropriate. Loss, damage or injury may be of an economic or non-economic nature.

9. A TPS payment cannot be made more than 12 months after the relevant incident. This is to ensure that payments are made close to the time of the incident and with the purpose of respecting local custom and maintaining support for ADF activities among the local community.

10. The TPS is a Defence specific, discretionary mechanism that does not preclude Defence from having recourse to the Act of Grace provisions in the *Financial Management and Accountability Act 1997* (the FMA Act).

Clause 2 - 123 J Delegations in relation to the tactical payment scheme

11. This clause inserts section 123J which provides that the Minister may, in writing, delegate his powers under section 123H to enable expeditious payments to be made in theatres of operation. The Minister may delegate to the following persons:

- a) the Secretary;
- b) the Chief of Defence Force;
- c) a military officer in command of an activity of the Defence Force outside Australia. The officer in command of a deployed force will vary depending on the size of the operation and that officer may be at the Lieutenant Colonel (or equivalent) or higher; and
- d) an APS employee who holds, or performs the duties of, an APS 6 or higher and is intended for those who have been deployed to an overseas operation as the policy advisor to the officer in command of an activity outside Australia. Such employees may be required to make expeditious payments from time to time. The deployed policy advisor position is usually an APS 6 or higher depending on the operation. Currently the deployed policy advisor currently deployed to Afghanistan is an APS Executive Level 1.

12. Guidance for TPS payments for each operation will take into account the cultural and socio-economic circumstances of the local people and will be benchmarked against similar policies applied by coalition partners in theatre. In special circumstances, where TPS claims exceed the financial delegations or fall outside the guidance provided, such cases may be referred to the Secretary, CDF or the Minister for approval. Alternatively, an Act of Grace payment could be pursued.

13. The delegate must comply with any direction of the Minister in exercising their power under a delegation.

SCHEDULE 2 – Defence Home Ownership Assistance Scheme Act 2008

14. **Schedule 2** contains amendments to the *Defence Home Ownership Assistance Scheme Act 2008* to address a number of unintentional anomalies since the scheme come into effect on 1 July 2008. The *Defence Home Ownership Assistance Scheme Act 2008* (the DHOAS) provides for the payment of a subsidy on home loan interest, for members and former members of the Defence Force. Subsidy may be payable where an eligible person has a ‘service credit’ in the scheme, based on the period of effective service in the Defence Force, less a period of qualifying service and any period over which subsidy has previously been received. If the member or former member in receipt of a subsidy under the DHOAS dies, the subsidy may be passed to their surviving partner.

Part 1 – Rejoining members

15. This Part amends the Act to clarify when a person is eligible as a serving member or as a rejoining member and ensure that eligibility is assessed in the same way for all rejoining members, regardless of the dates on which they left and then rejoined the Defence Forces.

Clause 1 - Section 3 (Definition of effective service)

16. This clause amends the definition of effective service to expressly exclude service performed prior to a break in membership of the Defence Force of greater than five years. This definition operates whether the break occurred before, on or after the commencement of the DHOAS. This means that a person who again becomes a member of the Defence Force more than five years after they were last a member cannot have their prior service recognised as effective service for the purpose of establishing eligibility to or calculating a service credit in respect of the DHOAS. Service performed after again becoming a member of the Defence Force may be recognised as effective service in accordance with the *Defence Home Ownership Assistance Scheme Regulations 2008* (the Regulations). This measure operates in conjunction with the provisions in respect of the eligibility and entitlement of rejoining members and rejoining incapacitated members to support the retention focus of the scheme by providing an incentive for persons to maintain continuity of service and to rejoin the Defence Force after a break in service of no more than five years.

17. The clause also provides that service in the Defence Force may in any case be recognised as effective service in accordance with the Regulations. This allows the Regulations to further define what service is recognised as effective where that service has not been already excluded from being recognised by the definition of effective service in the Act.

Clause 2 - At the end of section 8 (after the note)

18. This clause inserts a new subsection (3) at the end of section 8 of the DHOAS. The new subsection makes clear that the general section dealing with

eligibility for serving members is not to apply to a member if that member is eligible under sections 10 or 11, which deal with rejoining incapacitated and rejoining members respectively. This statement makes clear that a person is not able to choose the kind of eligibility that will apply to them. Instead, when several types of eligibility appear to apply to a member, the member is expressly eligible under the section that most closely describes his or her circumstances. This means that the member becomes eligible for the benefit and incentive to serve that recognises the member's individual situation, because the member's eligibility and service credit is able to be assessed using the method that most closely corresponds to their circumstances.

Clause 3 - Paragraphs 10(1)(b) and 11(c)

19. This clause omits the time limit "on or after 1 July 2008" that applied for the purpose of assessment of conditions for eligibility under sections 10 and 11 of the DHOAS. The time limit was originally included in order to emphasise the commencement date of the DHOAS but had the unintended effect of causing those who would otherwise be classed as rejoining incapacitated or rejoining members to seek eligibility as serving members under section 8 of the DHOAS, due to their break in service occurring before the commencement of the DHOAS. This amendment ensures that all rejoining members are assessed on the same basis.

Clause 4 - Application–rejoining members amendments

20. This clause provides a transitional arrangement for application of the amendments made by Part 1. It provides that the amendments made by this part apply in respect of a decision in respect of giving a subsidy certificates that is made on or after the commencement of the amendments, or the payment of subsidy during an entitlement period that relates to a subsidy certificate given on or after commencement. The measure has the effect of saving any rights or entitlement that was communicated by the decision to give or not to give a subsidy certificate before the commencement of the amendments. This means that any person who was given a certificate is able to rely on that assessment for the period that the subsidy certificate is in force and for any related entitlement period during which subsidy is payable. This ensures that the introduction of the measures do not have an arbitrary or unduly harsh impact on a person who has relied on an assessment of their accrued service credit provided under the DHOAS as it operated prior to commencement of the amendments.

Part 2 – Subsidy certificate and service credits

21. This Part amends the act to ensure that a subsidy certificate is more reliable as evidence to a home loan provider that subsidy is payable to a member, by making the issue and operation of a subsidy certificate conditional on a member having a service credit.

Clause 5 - Subsection 16(2)

22. This clause provides that the Secretary must give a subsidy certificate to an applicant if sections 17,18,19 or 20 applies in the case of an applicant, and the applicant has a service credit in their own right, or would have a service credit as a surviving partner of an eligible person if the subsidy certificate were issued. The effect of this clause is to prevent the giving of a subsidy certificate to a person if

subsidy cannot be payable to the person because he or she does not have a service credit.

Clause 6 - After subparagraph 22(b)(i)

23. This clause has the effect of making a subsidy certificate held by a person who is not a member of the Defence Force cease to be in force if the person no longer has a service credit. This ensures that the person cannot use the subsidy certificate to establish a subsidised loan, because subsidy cannot become payable where the person does not have a service credit. The effect is limited to persons who are not at the time members of the Defence Force, because such a person does not have a reasonable expectation of accruing a further service credit. The clause does not affect a subsidy certificate held by a member of the Defence Force, because such a person may have a reasonable expectation of accruing a further service credit through further service, even if he or she has no service credit at a particular time.

Clause 7 - Application—subsidy certificates and serving credits amendments

24. This clause provides a transitional arrangement for application of the amendments made by Part 2. This clause provides that the amendments made in this Part apply only in relation to a decision in respect of giving a subsidy certificate that is made on or after the commencement of the amendments and to subsidy certificates given on or after commencement. This has the effect of preventing retrospective application to decisions to give or not to give subsidy certificates made before commencement of the amendments, and provides a clear point of transition for the scheme administrator to begin applying the new criterion for giving a certificate. This also means that any subsidy certificate issued prior to commencement of the amendments remains in force, subject to the operation of the Act at the time that it was issued.

Part 3 - Subsidy lump sums

25. This Part provides that the subsidy lump sum option may only be taken in conjunction with monthly subsidy, and is only payable on the first residential property purchased while a member of the Defence Force. This Part clarifies the criteria for access to the lump sum option, consistent with the intent of this benefit to assist members of the Defence Force who are first home buyers.

Clause 8 - Section 26

26. This section is repealed and substituted with a new provision in relation to the form of subsidy being either a monthly subsidy or a both a monthly subsidy and a lump sum subsidy. A subsidy lump sum is only payable to a member of the Defence Force, and is only payable in relation to the first residential property bought while a member of the Defence Force.

Clause 9 - Paragraph 34(1)(f)

27. This clause adds two criteria for approval of a lump sum payment. The first new criterion is that the Secretary must be satisfied that there is a reasonable expectation that subsidy will be payable to the subsidised borrower for a specified period depending upon whether the borrower is a member of the Permanent Forces or the Reserves. The effect of this measure is to ensure that an applicant for the lump sum must have sufficient service credit that, in addition to payment of the lump sum,

he or she is able to be paid monthly subsidy until a further service credit may be accrued to allow monthly subsidy to continue.

28. The second criterion added is that subsection (2) of section 34, relating to previous ownership of residential property, must not apply in relation to the person applying for the lump sum.

Clause 10 - Subsection 34(2)

29. This clause prevents a person from being paid a lump sum subsidy if, while a member of the Defence Force, he or she individually or with a partner has previously purchased a residential property, whether or not the person occupied the property. This clause does not apply if the property purchased is the one in relation to which the lump sum subsidy is sought, and the purchase occurred after the person was issued with the subsidy certificate that provides the basis for the request for payment of a lump sum. This has the effect of preventing payment of the lump sum to persons who have previously purchased a residential property for investment purposes, as well as those who have previously bought a home that they have occupied.

Clause 11 - Application–subsidy lump sum amendments

30. This clause provides that the amendments apply to a request for the payment of a lump sum made on or after the day that the amendments commence. This makes the application of the amendments prospective, and prevents the amendments from applying retrospectively in relation to request for a lump sum subsidy made before the commencement of the amendments.

Part 4: Shared liability

31. This Part sets out a range of amendments that set out the way that subsidy entitlements are assessed and paid when there is more than one person with an interest in the land in relation to which subsidy becomes payable. The amendments provide additional detail about how shared ownership and liability for a loan can affect a person's entitlement under the DHOAS.

Clause 12 - Section 3

32. This clause inserts a definition of *loan limit*, providing that the term has the meaning given in section 51, as affected by sections 51A, 51B and 51C, which have been added by the amendments in this Part.

Clause 13 - Paragraph 28(4)(c)

33. This clause substitutes a new paragraph 28(4)(c) to the DHOAS. The new paragraph omits the mention of partners, and so contemplates that subsidy entitlements relating to two subsidised borrowers may extend to any situation where there are two borrowers, regardless of the nature of the relationship between the borrowers. The amendment also inserts a note to act as a signpost at the end of the paragraph, to alert readers to the special rules about subsidy entitlements that may apply for multiple subsidised borrowers.

Clause 14 - Subsection 51(1)

34. This clause adds words to the subsection to make clear that the subsidy is that which is payable to a subsidised borrower.

Clause 15 - Paragraph 51(1)(a)

35. This clause adds words to the paragraph to make clear that the capital amount referred to is that which is owed by a subsidised borrower.

Clause 16 - Paragraph 51(1)(b)

36. This clause repeals the paragraph and substitutes a new paragraph to make clear that the loan limit referred to is that which applies to the subsidised borrower, as applicable from time to time during the entitlement period. This links the entitlement to subsidy clearly to the individual subsidised borrower rather than to the loan, and recognises that the subsidised borrower's loan limit may vary over time as a result of the changes in the borrower's length of service or eligibility.

Clause 17 - At the end of subsection 51(1)

37. This clause inserts a note at the end of subsection 51(1) to alert the reader that special rules under sections 51A, 51B and 51C may affect the loan capital if a subsidised borrower and another person are liable in respect to the same loan. Sections 51A and 51B cover persons who are liable for the same loan and who are partners. Section 51C covers persons who are jointly and severally liable for the same loan and who are not partners.

Clause 18 - Subsection 51(2)

38. This clause omits words in subsection 51(2) and substitutes new words, to make clear that the loan limit referred to is that which applies in respect of an individual subsidised borrower.

Clause 19 - Subsections 51(4) and (5)

39. This clause repeals subsections 51(4) and (5). The matters covered by these subsections are now covered by sections 51A and 51B, which are inserted under clause 20.

Clause 20 - After section 51

40. This clause inserts the new sections 51A, 51B and 51C after section 51. These sections clarify the treatment of loans for which both a subsidised borrower and another person are liable, whether or not the other person is the subsidised borrower's partner and whether or not the other person is also a subsidised borrower.

41. Section 51 describes the effects where a subsidised borrower and his or her partner are both parties to the same loan. This section applies whether the partners are jointly and severally liable, or individually liable. The table at subsection 51(2) specifies the treatment of the capital amount owing on the loan and the subsidised borrower's loan limit.

42. Item 1 of the table provides that where both partners are subsidised borrowers, then each is taken to owe 50 percent of the total capital amount owing and each is taken to have a loan limit that is the average of their individual loan limits that would apply if each were a sole borrower. This will allow the partners together to maximise the amount of subsidy payable in respect of loan for which they are both

liable, and simplifies the administration of benefits for partners who are both subsidised borrowers by providing clarity the individual entitlement of each person.

43. Item 2 of the table provides that where both partners are parties to a loan, but only one is a subsidised borrower with respect to that loan, the subsidised borrower is taken to be liable for the whole amount of the loan and that his or her loan limit applies with respect to determining the capital amount on which subsidy is payable.

44. Section 51B provides that where item 1 of the table at subsection 51A(2) applies to partners who are subsidised borrowers in respect of the same loan, this item continues to apply where one of the subsidised borrowers dies and his or her subsidy entitlement passes to the surviving borrower through the operation of sections 60 or 61. The section provides for the surviving borrower's entitlement in his or her own right to be calculated under item 1 of the table at subsection 51A(2), as if the deceased borrower were still alive. The note to the section identifies that the entitlement transferred from the deceased borrower applies to the surviving partner in accordance with sections 64 and 65. These sections allow that the surviving borrower, in his or her entitlement as a surviving partner, is to be treated in the same way as the deceased partner, as if the deceased partner had not died, and notwithstanding entitlement to subsidy in his or her own right. This allows the benefit transferred from the deceased partner to continue to be calculated under item 1 of the table at subsection 51A(2). The surviving partner may thus be paid subsidy both in his or her own right and as a surviving partner, as if the deceased partner had not died.

45. Section 51C provides for the calculation of entitlement where a subsidised borrower is jointly and severally liable for a subsidised loan with another person who is not his or her partner. In such a case, the subsidised borrower is taken to be liable for 50 percent of the capital amount owing on the first authorisation day for subsidy, and to have the loan limit that applies to him or her under subsection 51(2). This section operates whether the other party to the loan is a subsidised borrower or not, and prevents the indirect use of subsidy from the subsidised borrower for the benefit of a person who is not entitled or who has a separate entitlement in his or her own right.

46. Note 1 to section 51C advises that if liability is shared between partners, this circumstance is covered by sections 51A and 51B.

47. Note 2 to section 51C advises that if the subsidised borrower and another person are liable individually in respect of a subsidised loan, then the subsidised borrower's entitlement is calculated in accordance with section 51, on the basis of the amount that the subsidised borrower actually owes.

Clause 21 - Application-shared liability amendments

48. This clause provides a transitional arrangement for application of the amendments made by Part 4. The clause provides that the amendments apply only in relation to payments made in respect of an entitlement period that starts after commencement. This ensures that subsidised borrowers who are partners do not have to change an apportionment of subsidy made under administrative arrangements that applied prior to the commencement of the amendments. This also ensures that a member who was assessed as eligible as a sole subsidised borrower under section 51

without regard to the shared nature of their interest and liability is not required to repay an amount of subsidy paid to them in the period before the amendments commence.

Part 5 – Delegations

49. This section provides for delegations to senior employees of the authorised Commonwealth contractor.

Clause 22 - Paragraph 81(2)(a)

50. This clause omits the reference to section 73 from paragraph 81(2)(a), which limits the ability of the Secretary to delegate powers relating to review of decisions to an employee of the authorised Commonwealth contractor (the scheme administrator). Section 73 requires the Secretary to give to affected persons notice in writing of the making of a reviewable decision and the person's right to have the decision reviewed. The notice must include reasons for the decision. It is appropriate that this notice is given by the Secretary's delegate who has made the reviewable decision and is best placed to provide the reasons for the decision. As most reviewable decisions are made by the Secretary's delegate employed by the authorised Commonwealth contractor, this power should also be delegable to those persons.

Clause 23 - Transitional – delegations amendments

51. This clause provides a transitional arrangement for application of the amendments made by Part 5. The clause provides that the amendments apply only in relation to delegations given on or after commencement. The clause also saves all delegations given before commencement, so that these delegations remain in force and do not have to be given again as a result of the amendments.