

Help to Buy (Commonwealth Powers) Bill 2024

Explanatory Notes

Short title

The short title of the Bill is the Help to Buy (Commonwealth Powers) Bill 2024 (the Bill).

Policy objectives and the reasons for them

The Commonwealth Help to Buy scheme (Scheme) was announced in the 2022-23 Federal October Budget as part of the *Safer and More Affordable Housing* measure. It is a shared equity program that will assist low to middle income earners to purchase new or existing homes by accessing an equity contribution from the Australian Government.

The Scheme will be open to 10,000 eligible Australians each year and is expected to run for four years. Home buyers will need a minimum of 2 per cent deposit, with an equity contribution of up to 40 per cent of the purchase price for a new home and up to 30 per cent for an existing home. These shared equity arrangements will be administered and monitored by Housing Australia.

Through a joint media release on 17 August 2023 by the Prime Minister and Commonwealth Minister for Housing, Minister for Homelessness and Minister for Small Business, a public announcement was made at the National Cabinet that all states and territories agreed to progress legislation so that the Scheme can run nationally.

On 13 March 2024, the Minister for Housing, Local Government and Planning and Commonwealth Minister for Public Works, and Commonwealth Minister for Housing, Minister for Homelessness and Minister for Small Business announced Queensland will be the first state to progress legislation for the Scheme.

As the Australian Government has committed to Queensland being the first participating state in the Scheme, the policy objective of the Bill is to refer legislative power to the Commonwealth Parliament under section 51(xxxvii) of the Australian Constitution to enable the passage of the Commonwealth Help to Buy Bill 2023 (Commonwealth Bill) and support the constitutional basis to establish the Scheme. The Australian Government is seeking to establish the Scheme as early as possible in the second half of 2024 and has introduced this Bill on 30 November 2023.

Implementing the Scheme in Queensland is a key action in the pillar of 'Help first homeowners into the market' under the *Homes for Queenslanders* plan, and participating as the lead state will demonstrate substantial commitment and progress by Queensland on this action.

Furthermore, the Scheme will operate alongside and complement Queensland's Pathways Shared Equity Loan to assist vulnerable Queenslanders to own their homes, and Mortgage Relief Loan. The Pathways Shared Equity Loan assists tenants in government-owned housing to enter into a partnership with the Department of Housing, Local Government, Planning and Public Works to purchase a share in the property they are currently renting. The Mortgage Relief Loan provides short term help to people who are having difficulties with their home loan repayments due to unemployment, accident, illness, or other unexpected or unforeseen crisis. This loan is interest free with no application fees or ongoing charges, and can provide up to \$20,000, for repayment over ten years.

Achievement of policy objectives

The policy objective of referring legislative power to the Commonwealth Parliament under section 51(xxxvii) of the Australian Constitution to enable the passage of the Commonwealth Bill and support the constitutional basis to establish the Scheme, is achieved by the Bill.

This will be through a 'text-based' referral of power, and the advantage of a text-based referral over a broader subject-based referral is that the Queensland Parliament has the opportunity to consider the proposed Commonwealth Bill. It provides the greatest certainty regarding the extent of the Commonwealth Parliament's legislative power and presents the least risk to the sovereignty of the Queensland Parliament.

Alternative ways of achieving policy objectives

Legislation is the only way to achieve the policy objective.

Estimated cost for government implementation

The Australian Government has committed that there will be no financial impact to states and territories as the Scheme is fully funded by the Australian Government, including program administration which includes assessment of eligibility and compliance of the Scheme.

Consistency with fundamental legislative principles

The Bill has been drafted with consideration to fundamental legislative principles (FLP) as defined in section 4 of the *Legislative Standards Act 1992*. While the Bill is generally consistent with FLP, aspects of the Bill that raise relevant considerations of FLP are discussed in further detail below.

Does the Bill have sufficient regard to the institution of Parliament?

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament. This entails assessing whether the Bill respects the role and authority of the Parliament in its legislative process.

The enactment of the Commonwealth Bill will be supported by Queensland's referral of legislative power to the Commonwealth Parliament under section 51(xxxvii) of the Australian Constitution.

The Bill potentially breaches FLP in three ways:

- (1) By reducing the power of the Queensland Parliament by referring power to the Commonwealth Parliament;
- (2) By allowing the Governor to terminate one or more of the references, potentially diminishing Queensland Parliament's authority in legislative matters.
- (3) By amending the *Statutory Instruments Act 1992* (SI Act) to exclude a proclamation made under clause 5 (to terminate or revoke the termination of referral) from expiry, as it otherwise would after ten years as a subordinate legislation.

In reference to point (1), referring legislative power to the Commonwealth Parliament may be seen as eroding the sovereign power of the Queensland Parliament. However, this is balanced with a very specific and limited referral of powers to the Commonwealth.

Further, the text-based referral gives the greatest regard to the institution of the Queensland Parliament as it allows Parliament to consider the proposed initial Commonwealth legislation and the types of matters to be referred to the Commonwealth Parliament.

The Bill is to be underpinned by an Intergovernmental Agreement, to which the Commonwealth and Queensland are to be parties, as well as other participating and cooperating States and Territories. This agreement proposes to establish a process for amending the Commonwealth Bill by setting out that any amendments proposed by the Commonwealth to the provisions of the scheduled text can proceed if there are no objections received by the Commonwealth from any parties to the Intergovernmental Agreement. The Intergovernmental Agreement would allow Queensland to object to any proposed amendments to the Commonwealth Bill. Consequently, any potential concerns about breaching FLP relating to the erosion of Queensland's sovereign power is justified as there would be robust protections in the Intergovernmental Agreement. Additionally, when enacted, section 46(1) of the Commonwealth Bill allows Queensland to object to proposed changes to regulations and other legislative instruments made under the Commonwealth Bill, except where certain Commonwealth regulations are made. This mechanism ensures a further protection of Queensland's interests in the legislative process.

In relation to point (2), clause 5 makes provision for Queensland to terminate one or more of the references by proclamation made by the Governor. This may be considered to be a "Henry VIII clause" because it allows the effect of the Bill once enacted to be varied or ended by subordinate legislation. However, the Bill places parliamentary oversight on this delegation of power to the Governor by declaring any such proclamation to be subordinate legislation under clause 5(6). This means that the proclamation must be tabled in the Legislative Assembly and may be disallowed by the Assembly (see sections 49 and 50 of the SI Act). The Bill can therefore be considered to have sufficient regard to the institution of Parliament, because Parliament will have the opportunity to disallow the Governor's proclamation. Further, the power of the Governor to terminate a reference does not affect the power of the Parliament, by legislation, to repeal the referral law and thereby terminate the references.

Clause 5 would adequately protect the State's interests in the event that Queensland no longer wishes the Commonwealth to have the power to legislate with respect to the referred matters. This approach is consistent with common practices in State reference legislation since 1952 and allows the operation of national schemes in Queensland, while also providing sufficient safeguards.

In relation to point (3), the Bill will amend Schedule 2A of the SI Act to exclude a proclamation made under clause 5 (to terminate or revoke the termination of referral) from expiry.

The FLP issue arises as subordinate legislation normally expires after ten years to ensure subdelegated provisions do not continue longer than ten years without returning to Parliament for review. However, in the context of the Bill, the amendment is justified because when a proclamation is made under clause 5, it has no ongoing impact other than to terminate or revoke the termination of referral. The Bill (when enacted) and the proclamation would remain on the statute book to clearly show the extent of Queensland's termination of referral. Furthermore, this amendment is justified given the potential longevity of the Scheme.

Consultation

The Department of Housing, Local Government, Planning and Public Works has consulted Commonwealth Treasury officials on the development of the Bill.

Targeted, time limited consultation on the Bill was undertaken through the Australasian Parliamentary Counsel's Committee, and with state policy officials.

The Commonwealth Bill primarily includes provisions relating to its constitutional basis and setting out the functions and powers of Housing Australia as the administrator. The details of how the Scheme will work will be contained in the Program Directions which will sit alongside the legislation. The Australian Government will outline its expectations of Housing Australia in the Program Directions, including scheme criteria.

The Australian Government is undertaking public consultation on the Program Directions, including with states and territories, lenders, industry bodies, regulators and the public. Feedback received through consultation will inform the final Program Directions.

On 18 April 2024, the Senate Economics Legislation Committee tabled its report on the Commonwealth Bill. It recommended that the Senate pass the Commonwealth Bill and the Help to Buy (Consequential Provisions) Bill 2023. Overall, submissions to the inquiry indicated broad support for the Commonwealth Bill and the establishment of the Scheme, viewing it as an ongoing commitment to assist low and middle income Australians in attaining home ownership. The report highlighted two key matters: the Scheme's potential positive contribution to housing policies targeting supply and ownership, and concerns regarding potential inflationary impacts.

Consistency with legislation of other jurisdictions

The Bill will be the first legislation referring legislative power to the Commonwealth Parliament under section 51(xxxvii) of the Australian Constitution.

At the National Cabinet in August 2023, all states and territories agreed to progress legislation so that Help to Buy can run nationally. Once the Commonwealth Bill passes, other states can similarly refer legislative power to the Commonwealth Parliament or adopt the Commonwealth legislation to enable the Scheme to operate in their jurisdiction. The Scheme will also operate in the territories from commencement of the Commonwealth Bill pursuant to section 122 of the Australian Constitution.

Notes on provisions

Part 1 Preliminary

Clause 1 provides that the short title of the Bill when it is enacted is the *Help to Buy (Commonwealth Powers) Act 2024*.

Clause 2 defines certain terms used in the Bill.

Part 2 Reference of matters to Commonwealth Parliament

Clause 3 deals with the three types of referred matters in the Bill:

- referred primary provisions (provisions of the Commonwealth Help to Buy Act as enacted in the terms, or substantially in the terms, set out in Schedule 1, except part 2, divisions 2 and 3; and sections 24(1)(a)(ii), 25(3)(b) and (c), and 38);
- referred residual provisions (provisions of the Commonwealth Help to Buy Act as enacted in the terms, or substantially in the terms, set out in Schedule 1, except part 2, divisions 1 and 3; and sections 24(1)(a)(i), 25(3)(a) and (c), and 38);
- amendment matters (future amendments to the Commonwealth Help to Buy Act with respect to the matters set out in s 3(6), subject to the exclusions at s 3(2)).

Subclause (1) provides for the referral of the referred primary provisions, referred residual provisions and amendment matters to the Commonwealth Parliament.

Subclause (2) provides that the reference of amendment matters does not including making laws that would have the effect of:

- giving Housing Australia, after Queensland stops being a participating State, the function or power of entering into shared equity arrangements that relate to residential property in Queensland; or
- removing or overriding a provision that requires the approval of Queensland before certain things are done, or sections 41, 41A and 42 of the Commonwealth Help to Buy Act.

Subclause (3) clarifies that the reference of the matters in subclause (1) only has effect to the extent that the matters are not already included in the legislative powers of the Commonwealth Parliament, and are included in the legislative powers of the Queensland Parliament.

Subclause (4) clarifies that the operation of each paragraph of subclause (1) is not affected by the other paragraphs.

Subclause (5) provides that the reference of the referred primary provisions, referred residual provisions and amendment matters commences on assent and ends at the end of the day fixed by the Governor under cl 5 as the day on which the reference is to terminate.

Clause 4 clarifies the intent of the Queensland Parliament regarding future amendments to the Commonwealth Help to Buy Act following the commencement of the Bill.

It is the intent of the Queensland Parliament that the Commonwealth Help to Buy Act may be amended by a Commonwealth Act, the operation of which is based on legislative power that the Commonwealth Parliament has apart from under the amendment reference. The Commonwealth Help to Buy Act may also be amended by an instrument made under such a law, or under the Help to Buy Act.

Clause 5 sets out the process for Queensland to terminate a reference made under clause 3 to the Commonwealth Parliament.

Subclause (1) provides that the Governor may, by proclamation, fix an expiry day on which one or more of the references in cl 3 are to terminate. The Governor may fix a date on which:

- the primary text reference is to terminate (which would have the result that Queensland would become a cooperating State, if the residual text reference and amendment reference are not also terminated); or
- the residual text reference is to terminate (which would have the result that Queensland would become a withdrawn State); or
- the amendment reference is to terminate (which would have the result that Queensland would become a withdrawn State).

Subclause (2) allows the Governor to revoke a proclamation made under subclause (1) through a subsequent proclamation (the revoking proclamation).

Subclause (3) provides that a revoking proclamation made under subclause (2) only has effect if it is notified before the expiry day fixed in the proclamation made under subclause (1).

Subclause (4) provides that if a revoking proclamation made under subclause (2) has effect, the revoked proclamation under subclause (1) is taken to never have been notified.

Subclause (5) clarifies that the revocation of a proclamation made under subclause (1) does not prevent notification of a further proclamation under subclause (1).

Subclause (6) provides that a proclamation made under subclause (1) or (2) is subordinate legislation. This has the practical effect that the proclamation must be tabled in, and may be disallowed by, the Legislative Assembly.

Part 3 Miscellaneous

Clause 6 allows the Governor to make regulations under this Act.

Part 4 Amendment of Acts

Clause 7 provides that division 1 amends this Bill after its enactment.

Clause 8 amends the long title of the Bill after its enactment.

Clause 9 provides that division 2 amends the *Statutory Instruments Act 1992*.

Clause 10 inserts into schedule 2A ‘a proclamation under the *Help to Buy (Commonwealth Powers) Act 2024*’. The effect of this amendment is that part 7 of the *Statutory Instruments*

Act, which provides for the automatic expiry of subordinate legislation, will not apply to a proclamation made under this Bill.

Schedule 1 Scheduled text of the proposed Bill for a Commonwealth Act

Schedule 1 contains the proposed text of the Commonwealth legislation that is to be enacted in reliance on the matters referred to the Commonwealth Parliament in clause 3 of this Bill.

The proposed text of Schedule 1 includes Commonwealth amendments that are intended to strengthen the clarity and intent of clause 42. The Commonwealth has agreed to pursue parliamentary amendments to the Commonwealth Bill currently before the Senate to support passage of the Bill.

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