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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

APPROPRIATION (CORONAVIRUS RESPONSE) BILL (NO. 2)
2021-2022

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Finance,
Senator the Honourable Simon Birmingham)

Table of Acronyms and Defined Terms

AAA	Actual Available Appropriation
AFM	Advance to the Finance Minister
AI Act	<i>Acts Interpretation Act 1901</i>
BA	Budget Appropriation
Commonwealth entity	An entity as defined in section 10 of the PGPA Act
corporate entity	A corporate Commonwealth entity or a Commonwealth company within the meaning of the PGPA Act
CRF	Consolidated Revenue Fund
Finance Minister	Minister for Finance
GST	Goods and Services Tax
non-corporate entities	Non-corporate Commonwealth entities as defined in the PGPA Act, or the High Court
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
portfolio statements	Portfolio Budget Statements and Portfolio Additional Estimates Statements

Appropriation (Coronavirus Response) (No. 2) Bill 2021-2022

General Outline

1 This Explanatory Memorandum accompanies the *Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022* (the Bill). The main purpose of the Bill is to propose appropriations from the Consolidated Revenue Fund (CRF) for the ordinary annual services of the Government. The Bill proposes additional appropriation to cover the cash flow requirements for Coronavirus response programs that need funding through February and March 2022. These Bills are necessary due to the significant impacts of the COVID-19 variants on the Australian community, for which funding is required before the usual time for Parliamentary passage of *Appropriation Bills (Nos. 3 and 4) 2021-2022*.

2 Appropriations for the ordinary annual services of the Government must be contained in a separate Bill from other appropriations in accordance with sections 53 and 54 of the *Australian Constitution* (the Constitution). Consequently, the Bill proposes appropriations that are not for the ordinary annual services of the Government.

3 This Explanatory Memorandum should be read in conjunction with the various 2021-22 Portfolio Budget Statements that accompanied the 2021-22 Budget. There have been no additional portfolio statements tabled since the 2021-22 Budget. The next set of portfolio statements will be tabled in support of *Appropriation Bills (Nos. 3 and 4) 2021-2022* when those Bills are introduced (the Portfolio Additional Estimates Statements), providing detailed information on all current appropriated funding of agencies.

Structure of the Bill

4 The Bill provides for the appropriation of specified amounts for expenditure by Australian Government entities, primarily being non-corporate Commonwealth entities (non-corporate entities) under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

5 Part 1 of the Bill deals with definitions, the interpretative role of the portfolio statements, and the concept of notional transactions. Part 2 of the Bill proposes appropriations to make payments of the amounts in Schedule 1 for State, ACT, NT and local government items (clause 7), administered items (clause 8), administered assets and liabilities items (clause 9), other departmental items (clause 10) and corporate entity items (clause 11). Part 3 of the Bill specifies the Advance to the Finance Minister (AFM) provision (clause 12).

6 Part 4 deals with credits to special accounts (clause 13), provides for amounts to be appropriated as necessary (clause 14) and specifies when the Bill is repealed (clause 15). In addition to the AFM provision in Part 3, clause 14 of the Bill recognises that the appropriations proposed in the Bill may also be varied by the PGPA Act.

Financial Impact

7 The Bill, if enacted, would appropriate the amounts specified in Schedule 1 as set out in section 6.

Statement of compatibility with human rights

1 The Bill seeks to appropriate money for services that are not considered to be the ordinary annual services of the Government.

2 Accordingly, the Bill performs an important constitutional function, by authorising the withdrawal of money from the CRF for the broad purposes identified in the Bill.

3 However, as the High Court has emphasised, beyond this, the Appropriation Acts do not ordinarily confer authority to engage in executive action. In particular, they do not ordinarily confer legal authority to spend. To the extent that any item of the Bill might be read as purporting to confer such authority, the Government does not rely on the item to provide it.

4 Given that the legal effect of Appropriation Bills is limited in this way, the Bill is not seen as engaging, or otherwise affecting, the rights or freedoms relevant to the *Human Rights (Parliamentary Scrutiny) Act 2011*.

5 Detailed information on the relevant appropriations, however, is contained in portfolio statements which are usually published twice a year (the next update will be in conjunction with *Appropriation Bills (Nos. 3 and 4) 2021-2022* (the Portfolio Additional Estimates Statements).

Notes on clauses

Part 1—Preliminary

Clause 1—Short title

1 Clause 1 specifies that the short title of the Bill, once enacted, will be the *Appropriation (Coronavirus Response) Act (No. 2) 2021-2022*.

Clause 2—Commencement

2 Clause 2 provides for the Bill to commence as an Act on the day of the Royal Assent.

Clause 3—Definitions

3 Clause 3 defines the key terms used in the Bill, such as “administered item”, “non-corporate entity”, and “State, ACT, NT and local government item”.

Clause 4—Portfolio statements

4 Clause 4 declares that the portfolio statements are relevant documents under paragraph 15AB(2)(g) of the *Acts Interpretation Act 1901* (AI Act) which provides for material to be considered in the interpretation of an Act if the material is declared by the Act to be relevant material for the purposes of section 15AB of the AI Act.

5 The purpose of the portfolio statements is to provide information on the proposed allocation of resources to Government outcomes by Commonwealth entities within each portfolio. The term “portfolio statements” is defined in the Bill, at clause 3, to mean the Portfolio Budget Statements (that accompanied the Appropriation Bills tabled at the last Budget). There have been no additional portfolio statements tabled since the last Budget. The next set of portfolio statements will be tabled in support of *Appropriations Bills (Nos. 3 and 4) 2021-2022* (the Portfolio Additional Estimates Statements), providing detailed information of all current appropriated funding of agencies.

Clause 5—Notional transactions between entities that are part of the Commonwealth

6 Clause 5 provides that notional transactions between non-corporate entities are to be treated as if they are real transactions. Notional transactions, therefore, require the debiting of an appropriation made by Parliament. The payments of the amounts in Schedule 1 from one non-corporate entity to another do not require, in a constitutional sense, an appropriation, because both non-corporate entities operate within the CRF. For reasons of financial discipline and transparency, the practice has arisen for these payments between non-corporate entities to be treated as though they required an appropriation, and to debit an appropriation when such notional payments are made. This is consistent with section 76 of the PGPA Act.

7 When a non-corporate entity makes a payment, whether to another non-corporate entity or another part of the same non-corporate entity (such as a different “business unit” within the entity), it is to be treated as a “real” payment. This means that the appropriation made by Parliament is extinguished by the amount of the notional payment, even though no payment is actually made from the CRF. Similarly, a notional receipt in such a situation is to be treated by the receiving non-corporate entity (where relevant) as if it were a real receipt. This does not mean every internal transfer of public money involves a notional payment and receipt.

Part 2—Appropriation items

Clause 6—Summary of appropriations

8 Clause 6 sets out the total of the appropriations in Schedule 1 of the Bill. The amounts in Schedule 1 may be increased by a determination under clause 12 (AFM).

9 The amounts in Schedule 1 of the Bill may be adjusted further in accordance with sections 74 to 75 of the PGPA Act. Specifically:

- Section 74 of the PGPA Act, when read with Rule 27 of the *Public Governance, Performance and Accountability Rule 2014*, permits non-corporate entities to retain certain types of receipts by adding them to their most recent departmental item or other type of appropriation in an Appropriation Act when prescribed.
- Appropriations may be adjusted by amounts recoverable by a non-corporate entity from the Australian Taxation Office for Goods and Services Tax (GST), in accordance with section 74A of the PGPA Act. The amounts specified in Schedule 1 exclude recoverable GST. The appropriations shown represent the net amount that Parliament is asked to allocate to particular purposes.
- Section 74A has the effect of increasing an appropriation by the amount of the GST qualifying amount arising from payments in respect of the appropriation. As a result, there is sufficient appropriation for payments under an appropriation item, provided that the amount of those payments, less the amount of recoverable GST, can be met from the initial amount shown against the item in Schedule 1. Section 74A also applies to notional transactions between and within non-corporate entities.
- Items may be adjusted to take into account the transfer of functions between non-corporate entities, in accordance with section 75 of the PGPA Act. It is possible that adjustments under section 75 may result in new items and/or outcomes being created in an Appropriation Act.

10 Additionally, the Finance Minister manages the payment from items in the Bill by non-corporate entities using a discretionary power under section 51 of the PGPA Act. Section 51 allows the Finance Minister to manage the timing and the

amount of appropriated money to be made available to a Commonwealth entity (an entity as defined in section 10 of the PGPA Act), except as required by law.

Clause 7—State, ACT, NT and local government items

11 Clause 7 provides administered appropriations for financial assistance to the States, ACT, NT and local governments. State, ACT, NT and local government items are appropriated separately for each outcome, making it clear what the funding is intended to achieve. The amount specified in Schedule 1 for an outcome may be applied by a non-corporate entity for the purpose of making payments to any of the States, ACT, NT or local government authorities for the purpose of achieving that outcome.

12 Clause 7 delegates Parliament’s power under section 96 of the Constitution to impose terms and conditions on payments of financial assistance to the States. These payments are usually made pursuant to eligibility rules and conditions established by the Government or Parliament.

13 Additional information on payments to the States, Territories and local government can be found in the portfolio statements of the relevant entities. These documents can be found at www.budget.gov.au.

Clause 8—Administered items

14 Subclause 8(1) provides for the appropriation of new administered outcome amounts to be applied by a non-corporate entity for the purpose of contributing to the outcome for a non-corporate entity. An “administered item” is defined in clause 3 to be an amount set out in Schedule 1 opposite an outcome for a non-corporate entity under the heading “New Administered Outcomes”. As with administered items in the *Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022*, New Administered Outcomes are appropriated separately for outcomes, making it clear what the funding is intended to achieve.

15 The purposes for which each administered item can be spent are further set out in subclause 8(2). Subclause 8(2) provides that where the portfolio statements indicate a particular activity is in respect of a particular outcome, then expenditure on that activity is taken to be expenditure for the purpose of contributing to achieving that outcome.

16 New Administered Outcomes are those administered by a non-corporate entity on behalf of the Government (e.g. certain grants, benefits and transfer payments). These payments are usually made pursuant to eligibility rules and conditions established by the Government or the Parliament. Specifically, administered items are tied to outcomes (departmental items are not).

17 New Administered Outcomes are typically proposed when a non-corporate entity's outcomes are changed to reflect new program objectives, strategies and/or activities; and/or

- a non-corporate entity seeks administered operating appropriations for the first time (including existing non-corporate entities that have received departmental operating appropriations in the past); and/or
- annual administered operating appropriations are proposed for the first time, for programs previously funded by special appropriations.

Clause 9—Administered assets and liabilities items

18 Clause 9 provides amounts in Schedule 1 to acquire administered assets, enhance existing administered assets and/or discharge administered liabilities relating to activities administered by non-corporate entities on behalf of the Government. Administered assets and liabilities appropriations are provided for functions managed by a non-corporate entity on behalf of the Government. Administered assets and liabilities items can be applied for any outcomes of the non-corporate entity in Schedule 1 of the Bill, Schedule 1 of the *Appropriation Act (No. 1) 2021-2022*.

Clause 10—Other departmental items

19 Clause 10 appropriates departmental non-operating appropriations in the form of equity injections, over which the non-corporate entity also exercises control. This clause provides that the amount specified in other departmental items for a non-corporate entity may be applied for the departmental expenditure of the entity. For example, “equity injections” can be provided to non-corporate entities to enable investment in assets to facilitate departmental activities and for Designated Collecting Institutions to purchase heritage and cultural assets.

20 Other departmental items are not expressed in terms of a particular financial year. For example, equity injection appropriations provide funding to meet the cost expected to be incurred in the Budget year to acquire a new asset, however, for a number of reasons, some part of the appropriation might not be required until a later financial year. Other departmental items are available until they are spent, or the Act through which they were appropriated is repealed. Annual Appropriation Acts have a lifespan of up to three years after which they automatically repeal.

Clause 11—Corporate entity items

21 Clause 11 provides for appropriations of money for corporate entities to be paid from the CRF by the relevant Department. Clause 11 provides that payments for corporate entities must be used for the purposes of those entities.

22 A “corporate entity” is defined in clause 3 to be a corporate Commonwealth entity or a Commonwealth company within the meaning of the PGPA Act. Many corporate entities receive funding from appropriations. However, these entities are legally separate from the Commonwealth, and as a result, do not debit appropriations or make payments from the CRF.

23 Corporate entity payments are initiated by requests to the relevant portfolio Departments from the corporate entity. The Finance Minister manages appropriations for corporate entities through a discretionary power to control the timing and amount made available under section 51 of the PGPA Act, except as required by law. Corporate entities hold the amounts paid to them on their own account.

24 Subclause 11(2) provides that if a corporate entity is subject to another Act that requires amounts appropriated by Parliament for the purposes of that entity to be paid to the entity, then the full amount of the corporate entity payment must be paid to the entity.

25 The purpose of subclause 11(2) is to clarify that subclause 11(1) is not intended to qualify any obligations in other legislation regulating a corporate entity, where that other legislation requires the Commonwealth to pay the full amount appropriated for the purposes of the entity.

26 In addition to the annual appropriations, some corporate entities may also receive public money from related entities such as a portfolio Department and from special appropriations managed by those Departments. Many corporate entities also receive funds from external sources.

Part 3—Advance to the Finance Minister

Clause 12—Advance to the Finance Minister

27 Clause 12 of the Bill enables the Finance Minister to allocate additional amounts for items when satisfied that there is an urgent need for expenditure and the existing appropriation in the current year, is not provided for, or is insufficiently provided for. The allocated amount is referred to as the Advance to the Finance Minister (AFM).

28 The intent of this provision is to provide the Finance Minister with capacity to allocate additional amounts for COVID-19 expenditures that were not contemplated when preparing the current Bill.

29 This contingency will be statutorily limited to Coronavirus-related matters only. This is consistent with a commitment previously provided for the *Appropriation (Coronavirus Economic Response Package) Acts (Nos. 1 and 2) 2019-20*.

30 A \$5 billion quantum is set across *Appropriation (Coronavirus Response) Bills (Nos. 1 and 2) 2021-2022*, for future unforeseen and unavoidable COVID-19

exigencies. This total is similar in value to the materialised Coronavirus pressures that have received specific program funding in the Bills. Allocations from this provision will be subject to the same scrutiny and accountability provisions as have applied to other AFM provisions during the pandemic (outlined at paragraph 42 below).

31 The AFM is split in the usual proportions across the pair of Bills (40 per cent in Bill 1 and 60 per cent in Bill 2). Accordingly *Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022* provides for \$3 billion of the \$5 billion total.

32 The Finance Minister will only consider issuing an amount under subclause 12(1) if satisfied there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in Schedule 1, because of an omission or understatement, or because of unforeseen circumstances. An AFM determination can only be made in the current year, that is up until 30 June 2022.

33 Subclause 12(2) enables the Finance Minister to make a determination to allocate an amount from the AFM to an existing item in Schedule 1, to a new item not already in Schedule 1, or to a new outcome.

34 Subclause 12(3) provides that a determination made under subclause 12(2) must relate to expenditure for the purposes of responding to circumstances relating to the coronavirus known as COVID-19.

35 Subclause 12(4) provides that the total amount that can be determined under the AFM provision in the Bill, once enacted, is \$3,000 million.

36 If the amount allocated from the AFM is not fully spent by 30 June 2022, any remaining balance will cease to be available to an entity on 1 July 2022.

37 Subclause 12(5) provides that a determination under subclause 12(2) is a legislative instrument, which must be tabled in Parliament. It is not subject to section 42 (disallowance) of the *Legislation Act 2003* as this would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure. Further, an AFM is not subject to Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003*; legislative instruments enabled by the Bill, once enacted, automatically repeal when the Act itself repeals (see clause 13).

Effect of an AFM Determination

38 An AFM determination does not authorise expenditure on a particular purpose. It increases an existing multi-purpose line item appropriation (departmental or administered) in the Appropriation Act that covers expenditure on a range of different programs.

Why AFM Determinations are exempt from Disallowance

39 While the disallowance of a determination will not invalidate expenditure that has already been made in reliance upon it. However, it will leave entities

short of the funds that they need to carry out their other ordinarily budgeted expenditure in what remains of a financial year.

40 Disallowance of an AFM determination would reduce an entity's appropriation to its original level. Yet the urgent expenditure it has already undertaken validly prior to a disallowance, in reliance upon the determination, would count towards the newly reduced appropriation. The reason why this occurs is because an AFM determination does not authorise expenditure on a particular purpose. It increases an existing multi-purpose line item appropriation (departmental or administered) in the Appropriation Act that covers expenditure on a range of different programs. If a House disallows the determination it reverses the increase and impairs the funding remaining for other programs that are unrelated to the AFM.

41 Accordingly a disallowance would leave the entity with a shortfall in the appropriation available to fund the ongoing expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act. Because of the unavoidable collateral damage that a disallowance of an AFM would cause to the routine operations of Government, there is a bipartisan consensus that AFMs should be exempt from disallowance.

Accountability and Transparency Arrangements for AFM Determinations

42 Recent extraordinary AFM provisions have been supported by strong accountability and transparency arrangements including:

- (a) registration of each AFM determination with an explanatory statement on the Federal Register of Legislation (at legislation.gov.au);
- (b) a media release by the Minister for Finance in weeks when AFMs are issued;
- (c) a commitment for the Minister for Finance to seek the concurrence of the Shadow Minister for Finance, on behalf of the Opposition, for any proposed AFM allocation over \$1 billion;
- (d) an Annual Report on AFM allocations tabled in Parliament; and
- (e) subsequent assurance reviews of those Annual Reports by the Australian National Audit Office (ANAO) on an annual basis.

43 These measures will continue throughout the remainder of 2021-2022, consistent with the arrangements that have applied to other AFMs during the Coronavirus pandemic.

Part 4 – Miscellaneous

Clause 13—Crediting amounts to special accounts

44 Clause 13 provides that if the purpose of an item in Schedule 1 is also the purpose of a special account (regardless of whether the item expressly refers to the special account), then amounts may be debited against the appropriation for that item and credited to the special account. Special accounts may be established under the PGPA Act by a determination of the Finance Minister (section 78) that is disallowable by Parliament or by another Act (sections 79 and 80). The determination or Act that establishes the special account will specify the purposes of the special account.

Clause 14—Appropriation of the Consolidated Revenue Fund

45 Clause 15 provides that the CRF is appropriated as necessary for the purposes of the Bill. Significantly, this clause means that there is an appropriation in law when the Act commences. That is, the appropriations are not made or brought into existence just before they are paid, but when the Act commences. This clause indicates that the amounts appropriated may be affected by the PGPA Act, in particular sections 74 to 75 (see clause 6), after the Act commences.

Clause 15—Repeal of this Act

46 Clause 16 specifies that the Bill, once enacted, will repeal at the start of 1 July 2024.

Schedule 1—Services for which money is appropriated

47 Schedule 1 specifies the appropriations proposed for the other than ordinary annual services of the Government. Schedule 1 contains a summary table which lists the total amounts for each portfolio. A separate summary table is included for each portfolio, with other tables detailing the appropriations for each Commonwealth entity. More details about the appropriations in Schedule 1 are contained in the portfolio statements and the second reading speech for the Bill.

48 Schedule 1 includes, for information purposes, the amount appropriated in the *Appropriation Act (No. 2) 2021-2022* which is printed in italics and labelled as “Budget Appropriation (italic figures) – 2021-2022”, and a figure for the previous financial year labelled “Actual Available Appropriation (light figures) – 2020-2021”. The Budget Appropriation (BA) and Actual Available Appropriation (AAA) are estimates that do not affect the amount available at law. These figures provide a comparison with the proposed appropriations.

49 The BA and AAA are calculated for each item by adding the amounts appropriated in the relevant financial year’s annual Appropriation Acts, plus any AFMs, and any adjustments under sections 51 and 75 of the PGPA Act. In some instances, the figures may also be affected by limits applied administratively by the Department of Finance. In addition, where an entity’s outcome structure has

changed since the last Appropriation Act, only ongoing outcomes may be shown in the Bill.

Decisions included in the Bill

50 *Appropriation (Coronavirus Response) Bill (No. 1 2021-2022 (Bill 1) and Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022 (Bill 2) (the Bills)* seek authority from the Parliament for additional appropriations to cover the cash flow requirements for Coronavirus response program through February and March 2022, to address significant pressures arising from COVID-19 variants. The Bills address pressures that have to be met in the first quarter of 2022, before the usual timing for Parliamentary passage of *Appropriation Bills (Nos. 3 and 4) 2021-2022*.

51 The Bill proposes appropriations totalling \$2.048 billion. The Bill will provide additional appropriations to the Department of Health for further purchases through the National Medical stockpile of Personal Protective Equipment and Rapid Antigen Tests to support the COVID-19 emergency response.