

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

Section 65 of the FF(SP) Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 32B of the FF(SP) Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

The *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for the Government to make pandemic leave disaster payment grants (pandemic payments) to eligible individuals who are unable to earn income while under a direction to self-isolate or quarantine as a result of the coronavirus known as COVID-19. Pandemic payments will be administered by Services Australia on behalf of the Department of Home Affairs, which is responsible for the policy that governs disaster payments in relation to natural and non-natural events which occur both in Australia and offshore.

On 3 August 2020, the Prime Minister, the Hon Scott Morrison MP, announced the establishment of pandemic payments in recognition that the COVID-19 pandemic is a disaster. Pandemic payments of \$1,500 per person will be available for eligible workers in Victoria, with the model developed for Victoria to provide the framework for Commonwealth assistance to other jurisdictions, should the need arise. The payments aim to help workers, including guardians and carers, self-isolate while contagious or potentially contagious to avoid community transmission and prevent further cases of COVID-19.

It is appropriate to include this program in the *Financial Framework (Supplementary Powers) Regulations 1997* as government spending on the program will be time limited and not

recurrent, and has a limited purpose and expenditure criteria, such as eligibility, which will be clearly described in the grant opportunity guidelines for the program.

Details of the Regulations are set out at Attachment A. A Statement of Compatibility with Human Rights is at Attachment B.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Home Affairs.

A regulation impact statement is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

Details of the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

Section 4 – Schedules

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedule to the Regulations.

Schedule 1 – Amendments

Financial Framework (Supplementary Powers) Regulations 1997

Item 1 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds a new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an initiative that will be administered by the Department of Home Affairs (the department).

New **table item 434** establishes legislative authority for the Government to make pandemic leave disaster payment grants (pandemic payments) to eligible individuals who are unable to earn income while under a direction to self-isolate or quarantine as a result of the coronavirus known as COVID-19. Pandemic payments will be administered by Services Australia on behalf of the Department of Home Affairs, which is responsible for the policy that governs disaster payments in relation to natural and non-natural events which occur both in Australia and offshore.

On 3 August 2020, the Prime Minister, the Hon Scott Morrison MP, announced the establishment of pandemic payments in recognition that the COVID-19 pandemic is a disaster. Pandemic payments of \$1,500 per person will be available for eligible workers in Victoria, with the model developed for Victoria to provide the framework for Commonwealth assistance to other jurisdictions, should the need arise. The payments aim to help workers, including guardians and carers, self-isolate while contagious or potentially contagious to avoid community transmission and prevent further cases of COVID-19.

Eligibility criteria for pandemic payments will be similar to those applying to workers who access the Victorian Government's Coronavirus (COVID-19) Worker Support Payment. Only one pandemic payment can be made in relation to a 14 day period or part thereof. The payment will be exempt from all Australian Government means testing arrangements. The payment is taxable.

It is intended a person will qualify for the pandemic payment if:

- the person is at least 17 years old and resides in Victoria;
- the person has exhausted all sick leave entitlements, including any special pandemic sick leave or will exhaust those entitlements during the 14 day period; and
- the person has been instructed by the Victorian Department of Health and Human Services to self-isolate or quarantine as a result of COVID-19, a close contact with a person diagnosed with COVID-19, or caring for a person who is required to self-isolate or quarantine.

Persons already in receipt of other Commonwealth income support payments, including JobKeeper and JobSeeker payments, would be ineligible for pandemic payments. Further information about the grant program, including eligibility criteria, will be set out in the grant opportunity guidelines.

Pandemic payments will be administered as demand driven (eligibility based) grants by Services Australia on behalf of the Australian Government and the Victorian Government and paid directly to eligible persons following successful lodgement of a claim by telephone, mail or fax. The program will initially run from 5 August 2020 to 4 February 2021.

The department, in consultation with Services Australia, will prepare grant opportunity guidelines that will set out how the program will operate. Grants will be administered in accordance with the *Commonwealth Grants Rules and Guidelines 2017* (the CGRGs) and the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act). Information about the grant program, including the guidelines, will be published on GrantConnect (www.grants.gov.au).

Decisions about Commonwealth expenditure in connection with pandemic payments will be made by a delegate of the Secretary of the department. The decisions of the delegate are final in all matters, including the approval of the grants, the grant funding amount to be awarded, and the terms and conditions of the grant.

Independent merits review is not considered suitable for decisions made in connection with pandemic payments as such decisions are automatic or mandatory in nature. The decision to make a payment by an official of Services Australia will be very limited and procedural. For example, to be eligible for the payment persons must be directed by the Victorian Department of Health and Human Services to remain in isolation as a quarantine measure.

The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 3.8 to 3.11 of the guide, *What decisions should be subject to merit review?*).

The audit process undertaken by the Australian National Audit Office also provides a mechanism to review government spending decisions and report any concerns to the Parliament. Judicial review may also be available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Australian Constitution.

Administrative accountability for this program will be achieved by ensuring that:

- the process of allocating funds is fair;
- the criteria for funding are made clear; and
- decisions are made objectively.

Consultation has been undertaken between the Prime Minister and the Premier of Victoria in relation to the administration of pandemic payments. The department also consulted extensively with Services Australia, which has administrative responsibility for the delivery of other government disaster related payments to the community.

Funding details of pandemic payments will be included in the 2020-21 Budget and the Portfolio Budget Statements 2020-21 for the Home Affairs Portfolio. Funding will come from Program 1.10: Australian Government Disaster Financial Support Payments, which is part of Outcome 1.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the quarantine power (section 51(ix));
- the aliens power (section 51(xix));
- the external affairs power (section 51(xxix));
- the executive power and the express incidental power (sections 61 and 51(xxxix)), including the nationhood aspect; and
- the territories power (section 122).

Quarantine power

Section 51(ix) of the Constitution empowers the Parliament to make laws with respect to quarantine.

The payments will provide financial assistance to individuals who are unable to earn income because they are required to self-isolate or quarantine or are caring for a person who is required to self-isolate or quarantine as a result of COVID-19.

Aliens power

Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to ‘naturalization and aliens’.

The payments will be made to persons, including all visa holders who are entitled to work in Australia, who are unable to work because they are directed to self-isolate or quarantine in relation to COVID-19, do not have a paid leave entitlement to cover this circumstance and are not eligible for another income support payment.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to ‘external affairs’. The external affairs power supports legislation implementing Australia’s obligations under international treaties to which it is a party.

Australia has obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 2 of the ICESCR requires States Parties to take steps to progressively realise the rights recognised within it. Article 12 of the ICESCR states, in part:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [...]
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; [...].

The payments introduced by this measure are targeted at those who are unable to work because of quarantine or self-isolation requirements and who do not have an entitlement to paid sick leave or another means of income support for the period of those requirements. The primary aim of this measure is to promote public health by ensuring that economic pressure is not a reason for persons to break COVID-19 isolation requirements and risk spreading the virus to others. This measure therefore promotes the right to health.

Executive power and express incidental power, including the nationhood aspect

The express incidental power in section 51(xxxix) of the Constitution empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested in the Parliament, the executive or the courts by the Constitution. Section 61 of the Constitution supports activities that are peculiarly adapted to the government of a nation and cannot be carried out for the benefit of the nation otherwise than by the Commonwealth.

The Commonwealth may enter into financial arrangements with states and territories in relation to pandemic payments for persons who are eligible for this payment, in light of the widespread and national impact of the national disaster occasioned by COVID-19 across various industries.

Territories power

Section 122 of the Constitution empowers the Parliament to ‘make laws for the government of any territory’.

The Commonwealth may enter into financial arrangements with territories in relation to pandemic payments for persons who are eligible for this payment, in light of the widespread and national impact of COVID-19 across various industries, as required.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the FF(SP) Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

The *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for the Government to make pandemic leave disaster payment grants (pandemic payments) to eligible individuals who are unable to earn income while under a direction to self-isolate or quarantine as a result of the coronavirus known as COVID-19. Pandemic payments will be administered by Services Australia on behalf of the Department of Home Affairs, which is responsible for the policy that governs disaster payments in relation to natural and non-natural events which occur both in Australia and offshore.

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Human rights implications

This disallowable legislative instrument engages the following rights:

- the right to health in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the right to an adequate standard of living in Article 11 of the ICESCR.

Right to health

Article 12 of the ICESCR states, in part:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [...]
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; [...].

The payments introduced by this measure are targeted at those who are unable to work because of quarantine or isolation requirements and who do not have an entitlement to paid sick leave or another means of income support for the period of those requirements. The primary aim of this measure is to promote public health by ensuring that economic pressure is not a reason for persons to break COVID-19 isolation requirements and risk spreading the virus to others. This measure therefore promotes the right to health.

Right to an adequate standard of living

Article 11(1) of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. [...]

Similarly, this measure assists in promoting the right to an adequate standard of living for those persons who are unable to work because of quarantine or isolation requirements and who do not have an entitlement to paid sick leave or another means of income support for the period of those requirements.

Conclusion

This disallowable legislative instrument is compatible with human rights as it promotes the realisation of human rights.

**Senator the Hon Mathias Cormann
Minister for Finance**