

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Health Measures No. 6) 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 (Health Measures No. 6) Regulations 2020* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for the Home Care Transition Fund to provide financial assistance to certain home care providers during transition from being paid the government home care subsidy in advance to being paid in arrears (the program).

As announced in the 2019-20 Budget, the Government is implementing reforms to improve payment administration arrangements for home care packages to address stakeholder concerns regarding unspent funds and align home care arrangements with other government programs such as the National Disability Insurance Scheme.

The Government subsidises organisations to provide comprehensive home based care to improve the quality of life of older Australians and help them remain active and connected to their communities. Currently, home care providers are paid the subsidy in advance at the start of each month. The new payment administration arrangements will be implemented in two phases. Phase 1 will change payment of the subsidy to be made in arrears at the end of each month. Phase 2 will involve arrears payment being made based on invoices for actual services provided rather than automatically paying the full subsidy.

The program will provide grants to approved home care providers who are deemed as being most at risk of becoming insolvent as a result of moving to the new payment arrangements, to support them during the transition period.

Total funding of \$5.3 million over two years from 2020-21 will be available for the program (including grant funds of \$5 million and the associated administration costs).

The *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1) Bill 2020* and the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020* will support the implementation of the new payment arrangements. Government spending on the program is dependent on these bills passing through the Parliament and the legislative changes taking effect. The Regulations need to be made prior to the expected commencement of Phase 1 in February 2021 because the final advance payment will be made in December 2020, and the transitional support needs to be established prior to Phase 1 commencing.

Noting that the Federal Executive Council meetings for 2021 are scheduled to re-commence in February 2021 which coincides with the expected timing for Phase 1 of the program, the Regulations were made at the last Federal Executive Council meeting in 2020, prior to the changes to the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* taking effect. However, the Government will not undertake any spending on the program until these legislative changes are in place. In the event that these legislative changes do not pass through the Parliament, table item 458 will be repealed as soon as practicable.

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 Health.

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 (Health Measures No. 6) Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) 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 activity that will be administered by the Department of Health (the department).

New **table item 458** establishes legislative authority for the Home Care Transition Fund to provide financial assistance to certain home care providers during transition from being paid the government home care subsidy in advance to being paid in arrears (the program).

The Government recognises that older people want to remain living in their own home for as long as possible and may need to receive care to do so. The Government subsidises organisations to provide comprehensive home based care to improve the quality of life of older Australians and help them remain active and connected to their communities. This involves the payment of subsidy to approved providers for the provision of home care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health.

The Home Care Packages Program ensures access to care that is affordable by, and appropriate to, the needs of those who require it. Under the Program, home consumers are allocated a level 1, 2, 3 or 4 home care package depending on their assessed needs, with level 1 having the lowest dollar value and level 4 the highest. Once a package becomes available, consumers enter an agreement with a home care provider to receive care and

services under their package. Home care providers are paid a consumer's full entitlement to government subsidy. The current home care basic subsidy rates are available at www.health.gov.au/resources/publications/schedule-of-subsidies-and-supplements-for-aged-care. Home care recipients may also be entitled to additional supplements on top of their daily subsidy.

Currently, home care providers are paid the full amount of government subsidy (that is, the amount of funding for the package level minus any income tested care fees) at the start of each month, based on the number of care recipients in care. This is paid to the provider regardless of the care and services actually provided to the home care recipient. Any amount that is not spent on care and services for the home care recipient in that month, is then held by the provider and reported in their monthly statement to their care recipients. These unspent funds are available for use by the home care recipient in the future when their care needs change.

As announced in the 2019-20 Budget, the Government is implementing reforms to improve payment administration arrangements for home care packages to address stakeholder concerns regarding unspent funds and align home care arrangements with other government programs such as the National Disability Insurance Scheme. These reforms involve changes to the payment of home care subsidy from being made in advance to being made in arrears.

These reforms will simplify home care subsidy payment arrangements, provide better transparency over the use of funds for home care, remove the requirement for home care approved providers to hold and manage unspent Commonwealth funds and reduce the burden on approved providers when apportioning unspent funds when a home care recipient leaves their service.

Services Australia will commence holding, on behalf of care recipients, any unspent Commonwealth subsidy that may start to accumulate, instead of it being held by the approved provider. Providers will still be responsible for managing consumer contributions toward their home care package as per the current arrangements. The unspent subsidy will be available for drawdown by the provider after the care recipient has received the services. These reforms also protect a care recipient's unspent funds in the event that a provider finds itself in financial difficulty.

The *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1) Bill 2020* and the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020* make amendments to the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997* to support implementation of the new payment arrangements. Government expenditure on the program is dependent on these bills passing through the Parliament and the legislative changes taking effect.

Improving payment arrangements in home care involves two implementation phases:

- Phase 1 changes payment of subsidies and supplements to being made in arrears, rather than subsidy paid at the start of each month; and
- Phase 2 makes arrears payments being based on invoices for actual services provided, rather than automatically paying the full subsidy. At the start of Phase 2, the Government (through Services Australia) will also commence holding unspent care recipients' subsidy. This will be available for drawdown by the provider after the care recipient has received the services.

Phase 1 will commence in February 2021, subject to the passage of the relevant legislation. From this date, providers will no longer receive an advance payment (based on the number of care recipients in care) but will receive their full actual entitlement (based on the actual number of care recipients in the service during February 2021) when they lodge their claims through Services Australia at the end of each month. Providers will not receive payment for the month of February in advance and will therefore be providing services for one month without receiving any subsidy during this period.

Phase 2 will commence in September 2021, subject to the passage of the relevant legislation. From this date, providers will continue to be paid home care subsidies and supplements in arrears, but payment will be based on the dollar amount of actual care and services delivered to individual home care recipients in the previous month. Services Australia will notionally hold unspent Commonwealth funds on behalf of home care recipients, until they are required in future. Providers can voluntarily opt in to return unspent funds held at the start of Phase 2 during a six month window (September 2021 to February 2022).

The Aged Care Financing Authority (ACFA) found in their 2019 report *Consideration of the Financial Impact on Home Care Providers as a Result of Changes in Payment Arrangements* that most providers will be able to manage transition to new arrangements, either through the amount of unspent funds that they hold, or through support from related entities or external financing. ACFA found that smaller, rural and remote providers in thinner markets, and with minimal other sources of revenue will find the transition more difficult.

The Government will provide grants to certain home care providers to assist them to transition from being paid government subsidy in advance to being paid in arrears for services provided. The providers in this target group are smaller providers operating predominantly in rural and remote areas, including those servicing Aboriginal and Torres Strait Islander home care recipients, facing additional challenges in providing services, and much more likely to find it harder to manage the transition. These providers are unlikely to have other major sources of revenue and are more vulnerable to the changes while providers operating more than one service are more likely to have more sophisticated administrative and business practices.

The purpose of the grant opportunity is to provide financial assistance to eligible approved home care providers who are deemed as being most at risk of becoming insolvent, as a result of moving to the new payment arrangements. The department will identify and contact eligible home care providers.

The objectives of the grant are to assist with cash flow management, and administrative, systems and operational costs in the lead-up to the Phase 1 and Phase 2 changes.

The intended outcomes of the grant are to:

- assist in maintaining approved provider viability and service delivery during the Phase 1 and Phase 2 changes; and
- ensure continuity of home care for consumers during the Phase 1 and Phase 2 changes.

Grant funding to home care providers may support:

- day-to-day business operations;

- change management, including professional advice;
- systems enhancement and equipment purchases;
- additional staff costs, including training; and
- financing costs (such as interest and fees on an overdraft).

Grants will be awarded through a closed, non-competitive selection process administered by the Community Grants Hub, in accordance with applicable requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2017*.

Applications will be assessed against the eligibility and assessment criteria in the grant opportunity guidelines, which will outline the objectives and outcomes of the government funding and the deliverables. Only those organisations listed in the grant opportunity guidelines will be able to apply. The prospective grantees will be assessed individually against criteria and not against other grantees.

To be eligible for funding under this grant opportunity, the home care provider will need to:

- be listed in the grant opportunity guidelines (this list will include small home care providers in rural and remote areas, who have greater difficulty in transitioning to the new payment arrangements and are in thin markets meaning that care recipients would have few alternatives if their provider was not able to provide services); and
- have less than a prescribed amount of unspent funds (for example, three months).

Following assessment of the application on its merit, a delegate of the Secretary of the department will make the final decision to approve funding. The delegate will consider whether the grant represents an efficient, effective, ethical and economical use of Commonwealth resources, and whether any specific requirements need to be imposed as a condition of funding.

The decision of the delegate is final in all matters, including the:

- approval of the grant;
- the grant funding amount to be awarded; and
- the terms and conditions of the grant.

The grant opportunity guidelines and information about the grants awarded will be available on the departmental website at www.health.gov.au and GrantConnect at www.grants.gov.au.

Funding decisions made in connection with the program are not considered suitable for independent merits review, as these decisions relate to the provision of one-off funding to certain service providers for the purposes of transitional support, over other service providers. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.19 of the guide, *What decisions should be subject to merit review?*).

Regardless of this grant opportunity, all home care providers can apply for the Business Advisory Service provided by PricewaterhouseCoopers on behalf of the Government, to assist them to prepare for and manage transition to the new payment arrangements. The Business Advisory Service is a program that provides residential and home care providers with access to independent accounting and business advisory services to help review and

assess their operations, and provides advice on financial strategies to support their business. Services under the Business Advisory Service are currently available until 30 June 2021.

In October 2019, the Minister for Aged Care and Senior Australians, Senator the Hon Richard Colbeck, asked ACFA to examine the potential impact on home care providers of the changes to payment arrangements. ACFA consulted with the relevant industry experts, providers, software vendors and Services Australia.

ACFA's report concluded that the vast majority of home care providers would manage these changes without government assistance. However, smaller providers operating in very thin markets in rural and remote areas, who are already under financial pressure, may struggle as a result of the changes. ACFA's report suggested that transitional support should be considered for providers operating in thin markets, especially those servicing care recipients in rural and remote locations. A copy of ACFA's report can be accessed at www.health.gov.au/resources/publications/consideration-of-the-financial-impact-on-home-care-providers-as-a-result-of-changes-in-payment-arrangements.

Funding of \$21 million to delay the implementation of new payment arrangements was included in the 2020-21 Budget under the measure 'Ageing and Aged Care' for a period of four years commencing in 2020-21. This includes funding for transition support to providers of \$5.3 million over two years from 2020-21. Details are set out in *Budget 2020-21, Budget Measures, Budget Paper No. 2 2020-21* at pages 90 to 91.

Funding for the item will come from Program 6.2: Aged Care Services, which is part of Outcome 6. Details are set out in the *Portfolio Budget Statements 2020-21, Budget Related Paper No. 1.7, Health Portfolio* at page 118.

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 bankruptcy and insolvency power (section 51(xvii)); and
- the power with respect to the provision of sickness benefits (section 51(xxiiiA)).

Bankruptcy and insolvency power

Section 51(xvii) of the Constitution empowers the Parliament to make laws with respect to 'bankruptcy and insolvency'.

The program will provide direct financial assistance to home care providers who might suffer cash flow issues as a result of the changes to the payments of the home care subsidies.

Social welfare power

The social welfare power in section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to 'sickness benefits' and extends to matters incidental to those benefits.

The proposed payments to home care providers will ensure the continuation of sickness benefits to recipients after the transition to the new payment period, rather than become insolvent during the transition.

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 (Health Measures No. 6) 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 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 (Health Measures No. 6) Regulations 2020* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for the Home Care Transition Fund to provide financial assistance to certain home care providers during transition from being paid the home care subsidy in advance to being paid in arrears (the program). The Department of Health has responsibility for the program.

As announced in the 2019-20 Budget, the Government is implementing reforms to improve payment administration arrangements for home care packages to address stakeholder concerns regarding unspent funds and align home care arrangements with other government programs such as the National Disability Insurance Scheme.

The Government subsidises organisations to provide comprehensive home based care to improve the quality of life of older Australians and help them remain active and connected to their communities. Currently, home care providers are paid the subsidy in advance at the start of each month. The new payment administration arrangements will be implemented in two phases. Phase 1 will change payment of the subsidy to be made in arrears at the end of each month. Phase 2 will involve arrears payment being made based on invoices for actual services provided rather than automatically paying the full subsidy.

The program will provide grants to approved home care providers who are deemed as being most at risk of becoming insolvent as a result of moving to the new payment arrangements, to support them during the transition period.

Total funding of \$5.3 million over two years from 2020-21 will be available for the program (including grant funds of \$5 million and the associated administration costs).

Human rights implications

This disallowable legislative instrument engages the following rights:

- the right to an adequate standard of living (Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2 of the ICESCR);
- the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12 of the ICESCR, read with Article 2 of the ICESCR);
- the right to choice for persons with disabilities (Article 3 of the *Convention on the Rights of Persons with Disabilities* (CRPD), read with Article 4 of the CRPD);
- the rights of equality and non-discrimination (Article 5 of the CRPD, read with Article 4 of the CRPD);
- the right to health without discrimination on the basis of disability (Article 25 of the CRPD, read with Article 4 of the CRPD); and
- the right to an adequate standard of living and social protection (Article 28 of the CRPD, read with Article 4 of the CRPD).

The Government recognises that older people want to remain living in their own home for as long as possible and may need to receive care to do so. As such, the Government subsidises home care packages to provide comprehensive home based care that can improve the quality of life of older Australians and help them remain active and connected to their communities.

The Home Care Packages Program ensures access to care that is affordable by, and appropriate to, the needs of people who require it. This involves the payment of subsidy to approved providers for the provision of care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health.

This disallowable legislative instrument (and financial assistance that it enables) supports the new payment arrangements, which will be implemented by the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 1) Bill 2020* and the *Aged Care Legislation Amendment (Improved Home Care Payment Administration No. 2) Bill 2020*, subject to these bills passing through the Parliament and the legislative changes taking effect. The bills make amendments to the *Aged Care Act 1997* and the *Aged Care (Transitional Provisions) Act 1997*.

The measures in the bills improve financial accountability and allow for better transparency over the actual use of funds for home care service delivery by requiring approved providers to report to the Commonwealth the cost of care and services delivered to the home care recipient each month in order for the subsidies to be paid to the approved provider. The bills will also allow the Commonwealth to retain the Commonwealth subsidy that may be in excess of the services provided, to be drawn down in future.

This disallowable legislative instrument authorises financial assistance to be given to certain providers enabling them to continue to provide vital services to vulnerable Australians as home care providers transition to the new payment arrangements. The instrument will also assist in ensuring that vulnerable older Australians continue to receive vital services during the transition to more accountable and transparent home care payment arrangements.

In doing so, this disallowable legislative instrument positively engages the rights set out in Articles 11 and 12 of the ICESCR, read with Article 2 of the ICESCR, and Articles 3, 5, 25 and 28 of the CRPD, read with Article 4 of the CRPD.

Article 11(1) of the ICESCR recognises ‘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’. Article 12 of the ICESCR recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. Article 2 of the ICESCR requires States Parties to take steps to progressively achieve the full realisation of the rights recognised in the ICESCR by all appropriate means.

Article 3 of the CRPD refers to the general principles of the Convention, including ‘respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons’ and ‘full and effective participation and inclusion in society’. Article 5 of the CRPD requires States Parties to recognise ‘that all persons are equal before and under the law and are entitled without discrimination to the equal protection and equal benefit of the law’. Article 25 of the CRPD recognises that ‘persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability’. Article 28 of the CRPD recognises ‘the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions...’

Article 4(1) of the CRPD requires States Parties ‘to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability’. Article 4(2) of the CRPD requires each State Party ‘to take measures to the maximum of its available resources ... with a view to achieving progressively the full realization of these rights...’

The Home Care Packages Program positively engages the rights of persons with disabilities in Articles 25 and 28 of the CRPD by providing genuine consumer direction of care. Improving the home care payment administration arrangements by introducing more transparency over the actual use of home care subsidy further engages these rights. The bills reform the payment administration arrangements for home care packages and strengthen the integrity of the Home Care Packages Program. Strengthening the Program, as facilitated by the bills, leads to an improvement in the lives of older Australians, including those with disabilities.

This disallowable legislative instrument promotes the rights of equality and non-discrimination in Article 5 of the CRPD by improving the financial accountability of, and allowing for better transparency over, the actual use of the subsidies paid to provide care and services to those who need them, regardless of race, culture, language, gender, economic circumstances or geographic location.

The bills will not affect the eligibility of home care recipients for home care subsidy or the amount of home care subsidy payable for eligible home care recipients, and ensure that the supply of home care remains GST-free.

The Aged Care Financing Authority (ACFA) reported that the vast majority of providers will be able to transition to the improved payment arrangements due to substantial unspent funds

held and/or a larger or broader business base. However, parts of the sector, particularly smaller, independent, rural and remote providers, are likely to find it harder to manage the transition. As such, the program will ensure smaller providers in thinner markets that may experience cash flow problems and have minimal other means of assistance, are not adversely impacted by the bills, and in turn will protect the rights of home care recipients in their care.

This disallowable legislative instrument enables financial assistance to be given to providers in rural and remote areas, which will assist in enabling them to continue to provide vital services to vulnerable Australians as home care providers transition to the new payment arrangements and the benefits that they bring.

Conclusion

This disallowable legislative instrument is compatible with human rights because it promotes the protection of human rights.

**Senator the Hon Simon Birmingham
Minister for Finance**