

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. 1) Regulations 2021*

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. 1) Regulations 2021* (the Regulations) amend table item 434 ‘Coronavirus economic response – pandemic leave disaster payments’ in Part 4 of Schedule 1AB to the Principal Regulations. This table item provides legislative authority for the Government to make pandemic leave disaster payment grants (pandemic payments) to eligible individuals who are, or were, unable to earn income because they are, or have been, required to remain in isolation as a quarantine measure, or are caring, or cared, for a person required to remain in isolation as a quarantine measure, as a result of the coronavirus known as COVID-19.

The pandemic payments of \$1,500 per person are currently available to eligible workers in all Australian states and territories. Services Australia administers the pandemic payments 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 occurring 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. 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.

The amendments to table item 434 address technical scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) with respect to setting out the scope and details of the program in a disallowable legislative instrument, rather than in the grant opportunity guidelines, which would provide parliamentary oversight of important aspects of the program such as eligibility criteria for the pandemic payments.

The amendments to table item 434 include additional details on the eligibility criteria for the pandemic payments, including that a person eligible for the payment:

- is an Australian citizen, Australian permanent resident or holder of a temporary visa that allows that person to work in Australia; and
- is aged 17 years or over; and
- does not have appropriate leave entitlements; and
- is, or was, unable to earn income because that person is, or was, required to isolate for a period as a quarantine measure, or is caring for, or cared for, a person who has been required to isolate as a quarantine measure, due to COVID-19; and
- during that period is, or was, in Australia and is not receiving, or has not received, income support payments or certain other Commonwealth payments, and payments under the jobkeeper scheme.

This explanatory statement for the Regulations also directly refers to the comprehensive information on the pandemic payments in the Pandemic Leave Disaster Payment Guidelines (available on the GrantConnect website), and provides greater detail on the reasons why limited consultation was undertaken in relation to the development of the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020*, which inserted table item 434 in Part 4 of Schedule 1AB to the Principal Regulations. This implements the Minister for Finance's undertaking made in response to the Committee's correspondence dated 12 November 2020. This correspondence and the Minister's response will be published on the Committee's website.

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, the Attorney-General's Department and Services Australia.

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. 1) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2021*.

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 – Part 4 of Schedule 1AB (table item 434, column headed “Objective(s)”)

Item 1 amends the objective of **table item 434** in Part 4 of Schedule 1AB by providing additional details on the eligibility criteria for the pandemic payments. This table item provides legislative authority for the Government to make pandemic payments to eligible individuals who are, or were, unable to earn income because they are, or have been, required to remain in isolation as a quarantine measure, or are caring, or cared, for a person required to remain in isolation as a quarantine measure, as a result of the coronavirus known as COVID-19. The pandemic payments are administered by Services Australia on behalf of the Department of Home Affairs (the department), which is responsible for the policy that governs disaster payments in relation to natural and non-natural events occurring both in Australia and offshore.

On 3 August 2020, the Prime Minister, the Hon Scott Morrison MP, announced the establishment of pandemic payments in Victoria in recognition that the COVID-19 pandemic is a disaster. Subsequently, the Prime Minister invited all states and territories to collaborate with the Australian Government to deliver the payments. The payments of \$1,500 per person are currently available to eligible workers in all Australian states and territories. 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. More information on how to access the pandemic payments is available on the Services Australia website at www.servicesaustralia.gov.au/individuals/services/centrelink/pandemic-leave-disaster-payment.

The amendments to table item 434 address technical scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) with respect to setting out the scope and details of the program in a disallowable legislative instrument, rather than in the grant opportunity guidelines, which would provide parliamentary oversight of important aspects of the program such as eligibility criteria for the pandemic payments.

The amendments to table item 434 include additional details on the eligibility criteria for the pandemic payments. Precise eligibility criteria are set out in the Pandemic Leave Disaster Payment Guidelines, which are available on the GrantConnect website. As of the time of making these amendments to table item 434, a person qualifies for the pandemic payment if:

- a) the person is an Australian citizen, Australian permanent resident or holder of a temporary visa who has the right to work in Australia; and
- b) the person is at least 17 years old; and
- c) during the period of self-isolation or quarantine or caring for someone in isolation or quarantine, the person resides or resided in Australia; and
- d) the person is, or was, unable to attend work as a result of:
 1. being informed by a health official to self-isolate or quarantine at home because;
 - i. they have tested positive with COVID-19; or
 - ii. they are the close contact of a person who has tested positive with COVID-19; or;
 2. being informed by a health official that a child aged 16 years or under in the person's care needs, or needed, to self-isolate or quarantine at home because;
 - i. they have tested positive with COVID-19; or
 - ii. they are the close contact of a person who has tested positive with COVID-19; or;
 3. caring, or having to care, for someone who has tested positive with COVID-19; and
- e) the person would have worked;
 1. during the period of self-isolation or quarantine if they had not been informed that they should self-isolate or quarantine; or
 2. during the period of caring for someone who has tested positive for COVID-19; and
- f) during the period of self-isolation or quarantine or caring for someone in isolation or quarantine, the person must not be receiving income support payments or certain other Commonwealth payments (as described below); and
- g) during the period of self-isolation or quarantine or caring for someone in isolation or quarantine, an entity must not be receiving jobkeeper payment for the person under section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*; and
- h) the person must not have received or applied to receive the equivalent state worker support payment for the same 14 day period; and
- i) the person must have insufficient sick leave entitlements including any special pandemic sick leave, or will exhaust those entitlements, during the 14 day period.

A person cannot qualify for the pandemic payment if they are receiving one of the following income support payments or certain other Commonwealth payments:

- a) an age pension; or
- b) a disability support pension; or
- c) a carer payment; or
- d) a parenting payment; or
- e) a youth allowance; or
- f) an austudy payment; or
- g) a jobseeker payment; or
- h) parental leave pay; or
- i) dad and partner pay; or
- j) service pension; or
- k) income support supplement; or
- l) special benefit; or
- m) ABSTUDY living allowance; or
- n) partner allowance; or
- o) bereavement allowance; or
- p) widow allowance; or
- q) farm household allowance.

For clarity, the reference to income support payments is a general term and does not have the same meaning as defined in the *Social Security Act 1991*.

There are no associated eligible grant activities. Proof of expenditure of the grant is not required. The payment is exempt from all Australian Government means testing arrangements. The payment is taxable.

Claimants are required to complete an application by telephone or by submitting a completed claim form by fax to Services Australia. A claim will be assessed by Services Australia against the eligibility criteria before making payment and claimants will be notified by letter if their claim has been granted or rejected. If the assessment process identifies unintentional errors in an application, the claimant may be contacted to correct or explain the information. Where requested, a claimant may also need to provide evidence of meeting the eligibility criteria for the payment. There is no written grant agreement for the payment.

Pandemic payments are administered as demand driven (eligibility based) grants by Services Australia and paid directly to eligible persons. The program commenced on 5 August 2020 and will end when determined by participating governments. The Australian Government does not propose to nominate an end date for the pandemic payments at this stage, given the ongoing uncertainty with COVID-19, in particular given outbreaks can occur at any stage.

The pandemic payments play an important role in encouraging workers to quarantine by preventing and mitigating the financial hardship associated with being unable to attend work. The response to the outbreaks in Victoria and South Australia has demonstrated the benefits of getting close contacts into quarantine quickly. The payments encourage people to quarantine, because they know they will be financially supported while they are not working.

Having the pandemic payments readily available when they are required is vital to preventing the spread of the virus in workplaces, and the community more broadly, and makes them a

key element of the national health response. As such, the pandemic payments are intended to operate while the risk of workplace and community transmission continues in Australia.

A review of the ongoing need for the pandemic payments will be undertaken by the end of March 2021, taking into account medical advice and the health response. The review will explore options for introducing the pandemic payments into primary legislation while considering the broader context of the overall suite of disaster support payments. It would be preferable that the pandemic payments remain available as a grant program authorised through table item 434 in Part 4 of Schedule 1AB, while primary legislation is considered to provide critical financial support and promote compliance with health directions, in the event of localised community transmission. If the review determines that the program is no longer required due to extended periods of low community transmission or the availability of a vaccine, table item 434 will be repealed.

Grants are administered in accordance with the *Commonwealth Grants Rules and Guidelines 2017* and the *Public Governance, Performance and Accountability Act 2013*. Information about the grant program, including the guidelines, are published on GrantConnect at www.grants.gov.au (refer Grant Opportunity ID GO4491).

Decisions about Commonwealth expenditure in connection with the pandemic payments are made by a Services Australia delegate of the Secretary of the department. The aggregated information on the number of claims granted and the total expenditure will be published on GrantConnect. Individual claimants will not be identified.

Independent merits review is not considered suitable for decisions made in connection with the pandemic payments as such decisions are automatic or mandatory in nature. The discretion available to an official of Services Australia when making a decision will be very limited and the decision making process is procedural. For example, to be eligible for the payment a person must be directed by a health official in the relevant jurisdiction to remain in isolation as a quarantine measure. Further, the pandemic payments are being administered in a beneficial way to promote compliance with health objectives and ensure financial support is available. Self-declaration is the primary method of a person demonstrating they have met the eligibility criteria. For example, a person must make a self-declaration that they have exhausted any leave entitlements.

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?*).

Decisions to reject a person's claim for a pandemic payment are subject to review processes within Services Australia at a claimant's request. Details of the review process are provided in the letter to the claimant. Claimants can request that a Services Australia Subject Matter Expert (SME) review a claim decision in the first instance. If claimants disagree with the outcome of the SME review, they can request a further review by a Services Australia Authorised Review Officer. Services Australia may seek input from the department at any point in this process prior to finalising the review. The internal review process in Services Australia provides a robust means of addressing errors that might occur in the decision making process. Given these are beneficial and not complex decisions, the internal review process conducted by Services Australia provides an effective means of efficiently arriving at the preferable decision.

As set out in the grant opportunity guidelines, the pandemic payments are subject to the department's complaints process and oversight by the Commonwealth Ombudsman.

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.

If primary legislation is pursued, the Government will also consider the appropriateness of the pandemic payments being subject to independent merits review by the Administrative Appeals Tribunal.

At the time of the development of the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020*, which inserted table item 434 in Part 4 of Schedule 1AB, consultation was undertaken between the Prime Minister and the Premier of Victoria in relation to the administration of pandemic payments. The pandemic payments mirror the Victorian Government's worker support payment with eligibility criteria developed based on existing cases and feedback to the Victorian Government from stakeholders. The department also consulted extensively with Services Australia, which has administrative responsibility for the delivery of other government disaster related payments to the community. There was a need to implement the payment quickly in order to promote compliance with public health directives to reduce the spread of COVID-19. Furthermore, the payment, being a benefit paid to individuals, imposes no regulatory burden on businesses therefore broader consultation was not required in this instance.

Funding of \$34.3 million in 2020-21 for one-off payments of \$1,500 to eligible workers in states and territories that have agreed to partner with the Commonwealth under the Pandemic Leave Disaster Payment arrangements was included in the 2020-21 Budget under the measure 'COVID-19 Response Package – Pandemic Leave Disaster Payment'. Details are set out in *Budget 2020-21, Budget Measures, Budget Paper No. 2 2020-21* at page 107.

Funding for this item comes from Program 1.10: Australian Government Disaster Financial Support Payments, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2020-21, Budget Related Paper No. 1.8, Home Affairs Portfolio* at pages 19, 21 and 33.

There is no effective cap on the expenditure as payments are demand driven. However, any further funding is subject to the Government decision (and parliamentary scrutiny through the Budget process).

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, or were, unable to earn income because they are, or were, required to self-isolate or quarantine or are caring, or cared, for a person who is, or was, 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, or were, unable to work because they are, or were, 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, or were, 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. 1) Regulations 2021

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. 1) Regulations 2021* (the Regulations) amend table item 434 ‘Coronavirus economic response – pandemic leave disaster payments’ in Part 4 of Schedule 1AB to the FF(SP) Regulations. This table item provides legislative authority for the Government to make pandemic leave disaster payment grants (pandemic payments) to eligible individuals who are, or were, unable to earn income because they are, or have been, required to remain in isolation as a quarantine measure, or are caring, or cared, for a person required to remain in isolation as a quarantine measure, as a result of the coronavirus known as COVID-19.

The pandemic payments of \$1,500 per person are currently available to eligible workers in all Australian states and territories. Services Australia administers the pandemic payments 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 occurring both in Australia and offshore.

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The amendments to table item 434 include additional details on the eligibility criteria for the pandemic payments, including that a person eligible for the payment:

- is an Australian citizen, Australian permanent resident or holder of a temporary visa that allows that person to work in Australia; and
- is aged 17 years or over; and
- does not have appropriate leave entitlements; and
- is, or was, unable to earn income because that person is, or was, required to isolate for a period as a quarantine measure, or is caring for, or cared for, a person who has been required to isolate as a quarantine measure, due to COVID-19; and
- during that period is, or was, in Australia and is not receiving, or has not received, income support payments or certain other Commonwealth payments, and payments under the jobkeeper scheme.

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), read with Article 2; and
- the right to an adequate standard of living in Article 11 of the ICESCR.

Right to 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 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, or were, 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, or were, 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 Simon Birmingham
Minister for Finance**