

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Health and Aged Care Measures No. 2) Regulations 2024*

The *Financial Framework (Supplementary Powers) Act 1997* (the FFSP 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 FFSP 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 Principal Regulations are exempt from sunseting under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunseting regime under the *Legislation Act 2003*, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties (particularly those extending beyond 10 years), as well as the Commonwealth's legislative authority to continue making, varying or administering arrangements, grants and programs.

Additionally, the Principal Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. To ensure that the Principal Regulations continue to reflect government priorities and remain up to date, the Principal Regulations are subject to periodic review to identify and repeal items that are redundant or no longer required.

Section 32B of the FFSP 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. Section 32D of the FFSP Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the FFSP Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Section 65 of the FFSP 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.

The *Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 2) Regulations 2024* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Aged Care Workforce Bonus Payment (the Bonus Payment) which is administered by the Department of Health and Aged Care.

The Bonus Payment forms part of the Australian Government's continued commitment to the COVID-19 Response Package to support the ageing and aged care sector. The Bonus Payment was announced in the 2022-23 Budget as an extension of the terminated Aged Care Workforce Retention Payment to recognise the commitment of aged care workers who supported some of Australia's most vulnerable people.

Employers applied for the payment on behalf of workers and paid the bonus in their normal payroll process. Employers were made up of aged care providers, self-employed applicants and labour hire organisations (providers).

The Bonus Payment is currently allocated funding of up to \$1.0 million in 2023-24 to support additional payments to providers who have under claimed on behalf of their workers.

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 registration on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has occurred with the Department of Health and Aged Care.

A regulatory impact analysis 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 and Aged Care Measures No. 2) Regulations 2024*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 2) Regulations 2024*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration 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 one new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity to be administered by the Department of Health and Aged Care (the department).

Item 663 - Aged Care Workforce Bonus Payment

New **table item 663** establishes legislative authority for government spending on the Aged Care Workforce Bonus Payment program (the program), which aims to assist in the retention of the aged care workforce, both in residential aged care and home care environment.

The program forms part of a broader COVID-19 Response Package totalling \$458.1 million announced by the Australian Government in the 2022-23 Budget to support older Australians in the aged care sector with managing the impacts of the COVID-19 pandemic.

The program is an extension of the Aged Care Workforce Retention Payment (Retention Payment), which closed on 31 May 2021. Processing for the Retention Payment was ongoing for a longer period and leading to a fourth (bonus) payment under the program since June 2020. The objective of the Retention Payment was to retain aged care workers both in

the residential aged care environment and the home care environment who are supporting and protecting some of Australia's most vulnerable citizens during COVID-19.

The program provided a bonus payment of up to \$800 per worker to eligible aged care workers who provide direct support care services for clients of government approved home care package providers or residential aged care facilities.

The bonus payment is paid in two instalments of up to \$400 each to care and support workers in government subsidised home care and to direct care workers, food preparation workers and cleaners in government subsidised residential care. Home care workers received a maximum of \$600.

Employers applied for the grant payment on behalf of workers and paid the bonus in their normal payroll process. The round opened on 1 March 2022 and closed on 22 April 2022. The department continued to process variations to 30 June 2023.

Eligible applicants include Australian Government funded:

- approved residential aged care providers;
- approved home care package providers;
- state and local government approved residential aged care and/or home care providers;
- multipurpose service providers;
- providers delivering aged care services under the Commonwealth National Aboriginal and Torres Strait Islander Flexible Aged Care Program; and
- agencies or brokers employing eligible staff who are contracted to provide services for the above organisations.

To be eligible for an instalment under the grant program, eligible employees must be employed on one, or both, of the census dates:

- 28 February 2022 – instalment payment 1, and
- 28 April 2022 – instalment payment 2.

Workers may qualify for either one, or both instalments of up to \$400 each for residential care workers, and \$300 each for home care workers.

Total payment if worker is eligible for both payments:

- Tier 1 payments for workers who work between 3 and 15 hours in a week received \$400 for Residential Aged Care (RAC) workers and \$300 for Home Care (HC) Workers.
- Tier 2 payments for workers who work more than 15 and up to 30 hours per week received \$640 for RAC workers and \$480 for HC Workers.
- Tier 2 payments for workers who work more than 30 hours per week is \$800 for RAC workers and \$600 for HC Workers.

The amount of the instalment is prorated based on the maximum number of hours worked in a week within the four weeks prior to the census date/s.

The first instalment was half of the calculated bonus. If the worker was employed on the second census date, they would receive the second instalment of that bonus amount unless

they have increased their working hours during the four weeks prior to the second census date. If their hours have increased, they are entitled to the second instalment of the higher bonus payment.

Funding amount and arrangements, merits review and consultation

Current funding of up to \$1.0 million in 2023-24 for the item will come from Program 3.2: Aged Care Services, which is part of Outcome 3. Details are set out in the *Portfolio Additional Estimates Statements 2023-24, Health and Aged Care Portfolio* page 60.

Funding for the program was provided through a demand driven grant opportunity. The grant is administered in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants, Rules and Guidelines 2017*.

Information about the grant payment is available on the GrantConnect website (www.grants.gov.au), and the grant will be administered by the Community Grants Hub within the Department of Social Services. A delegate of the Secretary of the department (Senior Executive Service officer Band 1) with relevant knowledge and skills, under the *Financial Framework (Supplementary Powers) Act 1997*, will be responsible for approving Commonwealth funding.

The department intends to complete the audit of the program. Where potential under claimed amounts by providers on behalf of their workers are identified, the providers are entitled to lodge a variation to receive additional funds to pay eligible workers the correct amount. The department intends to pay the under claimed amounts to providers.

Funding decisions in relation to grants payment are not suitable for independent merits review as decisions relate to the allocation of a finite resource from which all potential claims for a share of the funding cannot be met. Overturning any original decision will affect any party who has been allocated funding. 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 4.15 of the guide, *What decisions should be subject to merit review?*).

Furthermore, the right to receive a payment for the correct amount under the program will depend on the provider having already applied for a payment, the audit the department intends on completing identifying the relevant provider who has under claimed, and the relevant provider lodging an amendment to receive the correct amount.

The right to review under section 75(v) of the Constitution and review under section 39B of the *Judiciary Act 1903* may be available. Where appropriate, persons affected by spending decisions would also have recourse to the Commonwealth Ombudsman.

The program is an extension of the Retention Payment with no material change to the funding objective. The department consider it is unnecessary to conduct further consultation.

Statement of relevant constitutional considerations

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 social welfare power (section 51(xxiiiA));
- the race power (section 51(xxvi));
- the external affairs power (section 51(xxix)); and
- the Territories power (section 122).

Social welfare power

The social welfare power in section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to the provision of certain social welfare benefits including sickness and hospital benefits. The program is directed at ensuring that Commonwealth funded sickness benefits in the form of aged care services continue to be delivered to recipients by encouraging retention of aged care workers.

Race power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’. The program includes payments that are aimed at ensuring the continued provision of residential care and home care under the National Aboriginal and Torres Strait Islander Flexible Aged Care Program which would confer benefits on First Nations persons.

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 international obligations under treaties to which it is a party.

Australia is a party to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 12(1) of the ICESCR recognises the ‘right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. Article 2 requires each State Party to ‘take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization’ of this right ‘by all appropriate means, including particularly the adoption of legislative measures’.

The steps to be taken by States Parties to achieve full realisation of the right to health are specified in Article 12(2) and include steps necessary for:

- (a) the prevention, treatment and control of epidemic, endemic, occupational and other diseases (Article 12(2)(c)); and
- (b) the creation of conditions which would assure to all medical service and medical attention in the event of sickness (Article 12(2)(d)).

The program provides payments to ensure the availability of the aged care workforce, including clinical and allied health workers, and by doing so the payments assure medical service in the event of sickness.

Territories power

Section 122 of the Constitution empowers the Parliament to ‘make laws for the government of any territory’. The program includes payments to residential aged care providers and home care package providers in the territories.

Statement of Compatibility with Human Rights

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

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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 FFSP Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal 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 Principal Regulations specify the arrangements, grants and programs. The powers in the FFSP 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 and Aged Care Measures No. 2) Regulations 2024* amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Aged Care Workforce Bonus Payment (the program). The program is administered by the Department of Health and Aged Care.

The program forms part of a broader COVID-19 Response Package totalling \$458.1 million announced by the Australian Government in the 2022-23 Budget to support older Australians in the aged care sector with managing the impacts of the COVID-19 pandemic.

The program is an extension of the Aged Care Workforce Retention Payment (Retention Payment), which closed on 31 May 2021. Processing for the Retention Payment was ongoing for a longer period and leading to a fourth (bonus) payment under the program since June 2020. The program continued to assist in the retention and attraction of aged care workers both in the residential aged care and home care environments, who were supporting and protecting some of Australia's most vulnerable citizens during the pandemic.

Employers applied for the grant on behalf of workers and paid the bonus in their normal payroll process. Employers are made up of aged care providers, self-employed applicants, and labour hire organisations (providers).

The program is currently allocated funding of up to \$1.0 million in 2023-24 to support additional payments to providers who have under claimed on behalf of their workers.

Human rights implications

This disallowable legislative instrument engages the following right:

- the right of everyone to the enjoyment of the highest attainable standard of physical and mental health – Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2.

Article 2 of the ICESCR requires each State Party to ‘take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization’ of this right ‘by all appropriate means, including particularly the adoption of legislative measures’.

Right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Article 12(1) of the ICESCR recognises the ‘right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. The steps to be taken by State Parties to achieve full realisation of the right to health are specified in Article 12(2) and include steps necessary for:

- the prevention, treatment and control of epidemic, endemic, occupational and other diseases (Article 12(2)(c)); and
- the creation of conditions which would assure to all medical service and medical attention in the event of sickness (Article 12(2)(d)).

The program provides payments to ensure the availability of the aged care workforce, including clinical and allied health workers, and by doing so the payments assure medical service, in both aged care and home care settings, in the event of sickness. This disallowable legislative instrument is compatible with human rights, specifically the ICESCR, because it will promote the right to the enjoyment of the highest attainable standard of physical and mental health.

Conclusion

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

**Senator the Hon Katy Gallagher
Minister for Finance**