Australian Government
Department of Finance

Department of Finance

Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation

Inquiry into the exemption of delegated legislation from parliamentary oversight

27 August 2020

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1. Introduction

1. The Department of Finance (Finance) welcomes the invitation by the Chair of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) to provide a written submission to the Committee's inquiry into the exemption of certain delegated legislation from disallowance. Finance supports the important role of the Parliament in providing oversight over Commonwealth legislation, and ensuring appropriate transparency and accountability to the people of Australia.

2. The large majority of delegated legislative instruments administered by Finance are subject to disallowance. This submission focuses on providing information regarding delegated legislative instruments administered by Finance which are not subject to disallowance.

3. Finance notes that the Committee has identified two classes of exempt delegated legislative instruments administered by Finance of particular interest to the inquiry:

   a. determinations made under Advance to the Finance Minister (AFM) provisions contained in annual Appropriations Acts; and

   b. investment mandates for the Australian Government's investment funds.

4. Information in relation to these two classes of exempt delegated legislative instruments is set out in sections 2 and 3 of this submission.

2. Advance to the Finance Minister

Overview

5. The AFM is a longstanding provision within annual Appropriation Acts that permits the Minister for Finance to allocate appropriations up to a limit set by Parliament, when satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in the current year. As such, an AFM is limited to the financial year of the Appropriation Act under which it is provided. Any unspent AFM lapses at the end of the relevant financial year.

6. The operation of the AFM was considered by the High Court in *Wilkie v Commonwealth*.[1] The High Court noted that the AFM is an appropriation, like other annual appropriations, that is created at the time the relevant annual Appropriation Act commences.

7. Further, the High Court noted "The power of the Finance Minister to make a determination under s 10(2) of *Appropriation Act No 1 2017-2018* is not a power to supplement the total amount that has otherwise been appropriated by Parliament. The power is rather a power to allocate the whole or some part of the amount of $295 million that is already appropriated by s 12 operating on s 10(3)."

[1] [2017] HCA 40

8. The High Court noted the limits on the Finance Minister when allocating the AFM included the need for there to be a legislatively determined purpose which has been approved by Parliament.[2]

Rationale for exemption from disallowance

9. Each time that the Parliament passes an Appropriation Bill which includes an AFM provision, the Parliament is agreeing to appropriate funds, not just as itemised in the Bill, but also to deal with urgent and unforeseen expenditure up to the amount set out under the AFM provision.

10. Further, in passing the Appropriation Bills, the Parliament agrees that an AFM allocation is a legislative instrument that is not subject to section 42 of the *Legislation Act 2003* (disallowance). This avoids the use of section 42 to frustrate the purpose of the AFM provisions, which is to provide additional appropriation for urgent expenditure. This is detailed in the relevant explanatory memorandum to the Bill (for example, paragraph 31 of the Explanatory Memorandum to *Appropriation Bill (No. 1) 2019-20*).

AFMs available in 2019-2020 and 2020-2021

11. Consistent with established practice, *Appropriation Act (No.1) 2019-2020* provided an AFM of $295 million for the ordinary annual services of government and *Appropriation Act (No. 2)* 2019-2020 provided an AFM of $380 million for the non-ordinary annual services of government (which may include, for example, major capital expenditure or payments to states, territories and local governments). This is detailed in the explanatory memoranda to these bills.

12. Further, consistent with established practice, *Appropriation Acts (Nos. 3 and 4) 2019-20* reset the AFM limits in *Appropriation Acts (Nos. 1 and 2) 2019-20,* by disregarding any allocations made before the commencement of these Acts. This has the effect of resetting the available balance of the AFM and is detailed in the explanatory memoranda to these bills.

13. In response to the emerging impact of the COVID-19 pandemic on Australia and following the 20 March 2020 decision of Government to defer the 2020-2021 Budget to 6 October 2020, Parliament passed three sets of extraordinary annual appropriation bills over March and April 2020.

    a. On 23 March 2020, the *Appropriation (Coronavirus Economic Response Package) Bills (Nos. 1 and 2) 2019-2020* were introduced and passed through both the House of Representatives and the Senate. These Acts provided funding to deliver key elements of the Government's COVID-19 economic and health response.

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[2] *Wilkie v Commonwealth* [2017] HCA 40 at (93) "The restrictions legislatively imposed on the application of the Advance to the Finance Minister have been no less stringent in the nearly two decades since the enactment of Appropriation Act No 1 1999-2000 than they were in the century before. Neither in this century nor the last has the standard legislative provision for the Advance to the Finance Minister contravened the constitutional requirement that an appropriation be for a legislatively determined purpose."
At (94). "To appropriate by s 12 of Appropriation Act No 1 2017-2018 the amount specified in s 10(3) to be applied, relevantly under s 7, in accordance with a direction under s 10(2) if the precondition in s 10(1) is met is to appropriate that amount for a purpose which Parliament has lawfully determined may be carried out."

   i. Given the unique and evolving nature of the COVID-19 pandemic and the associated uncertainty around the Government's necessary response, Parliament supported extraordinary AFM provisions of $2 billion across these Acts.

b. In parallel, given the deferment of the 2020-2021 Budget and to ensure funding for the ongoing business of Government from 1 July 2020, *Supply Bills (Nos. 1 and 2) 2020-2021* and *Supply (Parliamentary Departments) Bill (No. 1) 2020-2021* were also introduced and passed by Parliament on 23 March 2020.

   i. Through these Bills, AFM provisions of $40 billion were made available to Government for the 2020-2021 financial year.

c. On 8 April 2020, to provide further urgently needed funding for the Government's COVID-19 response in 2019-20, Parliament passed *Appropriation Bills (Nos. 5 and 6) 2019-2020*. Additional AFM provisions totalling $40 billion for 2019-20 were also made available across these Acts, with any allocations against these AFM provisions reducing the AFM available under the 2020-21 Supply Acts.

AFMs issued in 2019-20 and 2020-21 year-to-date

14. In 2019-2020, the AFM was used to allocate $1,974 million from total AFM provisions of $42,975 million across *Appropriation Acts (Nos. 1 to 6) 2019-2020* and *Appropriation (Coronavirus Economic Response Package) Acts (Nos. 1 and 2) 2019-2020*. These allocations supported the urgent procurement of masks and other emergency medical or emergency health equipment for the National Medical Stockpile and for ensuring Australia's fuel security obligations – both ongoing activities of government.

Table 1: AFM Allocations – 2019-2020

No.	Appropriation Source	Entity	Purpose	Amount ($m)	Allocation Date
1	*Appropriation Act (No. 2) 2019-2020*	Department of Health	Procurement of masks and other emergency medical or emergency health equipment for the National Medical Stockpile	100.0	4/03/2020
2	*Appropriation Act (No. 2) 2019-2020*	Department of Health	Procurement of masks and other emergency medical or emergency health equipment for the National Medical Stockpile	200.0	9/03/2020
3	*Appropriation (Coronavirus Economic Response Package) Act (No. 2) 2019-2020*	Department of Health	Procurement of masks and other emergency medical or emergency health equipment	800.0	3/04/2020
4	*Appropriation (Coronavirus Economic Response Package) Act (No. 2) 2019-2020*	Department of Health	Procurement of masks and other emergency medical or emergency health equipment	400.0	9/04/2020
5	*Appropriation Act (No. 2) 2019-2020*	Department of Health	Procurement of masks and other emergency medical or emergency health equipment	380.0	9/04/2020

6	*Appropriation Act (No. 1) 2019-2020*	Department of Industry, Science, Energy and Resources	Lease costs of storage in the United States Strategic Petroleum Reserve for purchases of oil stocks	2.5	23/04/2020
7	*Appropriation Act (No. 6) 2019-2020*	Department of Industry, Science, Energy and Resources	Purchase of oil stocks	91.5	23/04/2020

15. In the 2020-2021 financial year to 27 August 2020, the AFM has been used to allocate $480.1 million from total AFM provisions of $39,908.5 million across *Supply Acts (Nos. 1 and 2) 2020-2021*. These allocations supported Local Road and Community Infrastructure activities and continued support for Australian exporters through the International Freight Assistance Mechanism.

No.	Appropriation Source	Entity	Purpose	Amount ($m)	Allocation Date
1	*Supply Act (No. 2) 2020-2021*	Department of Infrastructure, Transport, Regional Development and Communication	Provide grant funding through the Local Roads and Community Infrastructure program	250.0	2/07/2020
2	*Supply Act (No. 1) 2020-2021*	Australian Trade and Investment Commission	Extension of the International Freight Assistance Mechanism	230.1	24/08/2020

Accountability and transparency to the Parliament

16. AFM Determinations are legislative instruments under the *Legislation Act 2003*, registered on the Federal Register of Legislation (FRL) and tabled in the Parliament. AFM Determinations are also listed on Finance's website with a link provided to each instrument on the FRL.

17. AFM allocations are supported by accountability and transparency arrangements. The Auditor-General advised on 23 April 2020 in correspondence to Senator Katy Gallagher, the Chair of the Senate Select Committee on COVID-19 (available on the Australian National Audit Office (ANAO) website), that he would conduct a series of monthly assurance reviews on AFM allocations in accordance with section 19A of the *Auditor-General Act 1997*.

18. The Auditor General noted these reviews "will provide more timely assurance to the Parliament than the annual review undertaken by the ANAO in the current circumstances in which the appropriation for Advances to the Finance Minister has been significantly increased to support Australian Government activities in light of the COVID-19 pandemic".

19. To date, four reviews have been completed by the ANAO, with the results reported to Parliament.

20. Additionally, under a longstanding arrangement, the Minister for Finance tables an Annual Report in Parliament on use of the AFM during the prior financial year. This Annual Report, prepared by Finance, is subject to an assurance review by the ANAO. The ANAO's assurance report forms part of the tabled Annual Report. The 2019-2020 Annual Report will be tabled later in 2020-2021.

21. For each AFM allocated under the extraordinary provisions in place over 2019-2020 and 2020-2021, the allocation is communicated through a weekly media release on the Minister for Finance's website. Further, a stocktake of AFMs made in response to the COVID-19 pandemic was also published in the July 2020 Economic and Fiscal Update at page 56.

Consequences of making AFM allocations disallowable

22. The Appropriation Acts require that, in order for an AFM to be allocated, there must be a need for urgent expenditure. Requiring AFM allocations to be subject to disallowance would delay otherwise urgent expenditure, particularly when Parliament is not sitting or is unable to sit. This would fundamentally frustrate the operation of the AFM mechanism and the delivery of Australian Government programs and services.

23. Had it been required that AFM Determinations were subject to disallowance in 2019-20, it would not have been possible for the Australian Government to purchase necessary health and medical equipment for the National Medical Stockpile in the quantities and timeframes required, to respond to the COVID-19 pandemic.

3. Investment Mandates for Commonwealth Investment Funds

Overview

24. There are six Commonwealth investment funds.[3] These funds have been established with the purpose of generating a funding stream to finance the provision of particular policy outcomes.

25. Each investment fund is established under its own legislation which, in broad terms, sets the purpose of the fund, the circumstances that must be met to withdraw and spend public monies from the fund (the policy outcomes), as well as the mechanics of how the monies are to be invested.

26. Each investment fund is managed at arms-length from Government by the Future Fund Board of Guardians (Future Fund Board), supported by the Future Fund Management Agency (Agency). The *Future Fund Act 2006* is the primary legislation governing the investment functions of the Future Fund Board and Agency. Each Commonwealth Investment Fund Act further contextualises the investment function to the particular fund and requires the responsible Ministers (the Minister for Finance and the Treasurer) to issue the Future Fund Board with an investment mandate.

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[3] The Future Fund, the Medical Research Future Fund, the DisabilityCare Australia Fund, the Aboriginal and Torres Strait Islander Land and Sea Future Fund, the Future Drought Fund and the Emergency Response Fund.

27. The investment mandates provide operational and technical direction to the Future Fund Board on its investment functions for each investment fund. The primary purpose of an investment mandate is to communicate the appropriate benchmark rate of return and acceptable level of risk for the fund.

Rationale for exemption from disallowance

28. As a direction from the responsible Ministers to a body (the Future Fund Board), investment mandates are exempt from disallowance under item 2 of the table at section 9 of *the Legislation (Exemption and other Matters) Regulation 2015*, which provides that a class of instruments not subject to disallowance is 'an instrument that is a direction by a Minister to any person or body'.

Practical operation of investment mandates

29. The legislative framework (under the *Future Fund Act 2006* and the other Acts establishing the Commonwealth investment funds) includes many features that ensure Commonwealth investment funds are invested independently by the Future Fund Board, in a prudent manner, consistent with the legislated intent, and with an appropriate level of accountability and transparency.

    a. The Future Fund Board must seek to maximise long-term returns, consistent with international best practice for institutional investment.[4]

    b. The Future Fund Board must formulate and publish written investment policies covering matters such as investment strategy, benchmarks for assessing performance and risk management.[5]

    c. There are strict limitations on borrowing and the use of derivatives.[6]

    d. Reviews of the operation of funds' legislation.[7]

30. Investment mandates are operational in nature. They allow the Government to provide directions to the Future Fund Board that relate to the technical and administrative aspects of the Board's investment function. Primarily this relates to advice on the appropriate benchmark rate of return and acceptable level of risk for the fund. Investment mandates are set following expert financial advice and with reference to prevailing as well as forecast market conditions. For example, in a pragmatic sense, there may be considerations about whether the rate of return target should be linked to cash or bond indices[8] or the Consumer Price Index.[9]

31. Some flexibility in setting or changing investment mandates can be useful. Changes to an existing investment mandate might be warranted following a significant or structural change in the investment landscape that was materially different to the circumstances forecast when the initial investment mandate was first set. This occurred in 2017, when

[4] For example, see section 35 and subsection 18(10) of the *Future Fund Act 2006* (FF Act).
[5] For example, see section 24 of the FF Act.
[6] For example, see sections 23 and 25 of the FF Act.
[7] For example, see section 65 of the *Future Drought Fund Act 2019*.
[8] Such as the Medical Research Future Fund which has a capital maintenance objective or the DisabilityCare Australia Fund which has short term liquidity requirements.
[9] Such as the Future Fund which has a growth investment objective as a provision for future superannuation expenses.

the Government issued a new investment mandate for the Future Fund in recognition of increasingly difficult global investment market conditions.[10]

32. Under the Commonwealth investment funds' legislation, the Parliament has put in place particular requirements governing the setting and amending of investment mandates. Investment mandates are legislative instruments under the *Legislation Act 2003*. Investment mandates are registered on the Federal Register of Legislation and tabled in the Parliament.[11]

33. In addition, prior to issuing an investment mandate, the legislation requires responsible Ministers to consult with the Future Fund Board. Any response from the Board is required to be tabled in both Houses of the Parliament.[12] This provides Parliament with information on new and changed investment mandates as well as advice from the Board.

34. Furthermore, the *Future Fund Act 2006* prohibits the responsible Ministers from issuing an investment mandate that seeks to influence or affect the investment of monies in particular financial assets.[13] These governance controls are intended to ensure that the Future Fund Board operates with independence in managing the investments of the Commonwealth investment funds.

35. There is an established and longstanding process for issuing investment mandates, with the first investment mandate for an investment fund being issued in 2006 (for the Future Fund). This established process was first laid out in the *Future Fund Act 2006* and has effectively been replicated in the legislation establishing each of the five other investment funds.

36. Other requirements provide for further parliamentary oversight. The Future Fund Management Agency publishes quarterly performance reports, which include comparisons against the benchmark rates specified in each investment mandate. The Future Fund Annual Report provides detailed investment, portfolio risk and performance information on each fund.

37. A table summarising the investment mandates for the Commonwealth investment funds is included below.

Consequences of making investment mandates disallowable

38. Investment mandates are considered operational in nature. Their subject matter relates primarily to technical investment market considerations. The investment mandate and any statement from the independent Future Fund Board is tabled in the Parliament.

39. If investment mandates were to be subject to disallowance, they would not come into effect until the disallowance period expired. It is possible that, in volatile market conditions, this could delay the Board's implementation of investment mandates and potentially impede the ability of Government to make timely operational changes to an investment mandate, if required.

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[10] Joint Media Release, Minister for Finance and Treasurer on 25 May 2017. Accessible at: https://www.financeminister.gov.au/media-release/2017/05/25/future-fund-investment-mandate.

[11] Investment mandates are also listed on Finance's website with a link provided to the documents as well as accompanying explanatory statements.

[12] For example, see section 19 of the FF Act.

[13] Section 18A of the FF Act.

40. It is pertinent to highlight that the investment operation of investment funds (and the investment mandate) are separate from the use and spending of public monies subsequently disbursed. The legislation includes important controls over the scope of investment mandates.

Other Legislative Instruments related to Commonwealth Investment Funds

41. Commonwealth investment funds' legislation also allows other Ministers to make credits into investment funds by way of legislative instruments that are exempt from disallowance.[14] These legislative instruments are authorised by the primary legislation and do not alter the legislated policy of investment funds. They are administrative in nature and allow for a simpler, more practical and more efficient administration of investment funds.

42. As with investment mandates, the legislative instruments used to credit amounts to investment funds are tabled in both Houses of the Parliament to provide appropriate parliamentary oversight.

Table 2: Summary of Investment Mandates

Fund	**Rate of Return Target**	**Risk**
Future Fund	Consumer Price Index (CPI) + 4 per cent to 5 per cent per annum over the long term	Acceptable but not excessive level of risk
Medical Research Future Fund	Reserve Bank of Australia cash rate target + 1.5 to 2.0 per cent per annum, net of investment fees, over a rolling 10-year term	Acceptable but not excessive level of risk, taking into account the principle that the nominal value of credits be preserved over the long term and the principle to moderate the volatility of the maximum annual distribution
DisabilityCare Australia Fund	Three-month bank bill swap rate + 0.3 per cent per annum calculated on a rolling 12-month basis	Invest in such a way as to minimise the probability of capital losses over a 12-month horizon
Future Drought Fund	CPI + 2.0 per cent to 3.0 per cent per annum	Acceptable but not excessive level of risk. Targeting the long-term benchmark return implies accepting the risk of capital losses, in adverse markets, that may be 15-20 per cent of the portfolio over a three year period
Emergency Response Fund		
Aboriginal and Torres Strait Islander Land and Sea Future Fund		

[14] For example, see section 14 of the *Future Drought Fund Act 2019*.