



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

Parliament House, Canberra ACT 2600
02 6277 3066 | sdlc.sen@aph.gov.au
www.aph.gov.au/senate_sdlc

8 October 2020

Senator the Hon Mathias Cormann
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: Senator.Cormann@aph.gov.au

CC: dlo@homeaffairs.gov.au; DLO-Finance@finance.gov.au; plc@finance.gov.au

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters. The committee has also resolved to draw this instrument to the attention of the Senate under standing order 23(4) in its *Delegated Legislation Monitor 11 of 2020*.

Significant matters in delegated legislation

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be included in primary, rather than delegated, legislation).

The instrument amends the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) regulations) to provide legislative authority for the government to make pandemic leave disaster payment grants (pandemic payments) to eligible individuals who are unable to earn income while under a direction to self-isolate or quarantine resulting from COVID-19.

The instrument appears to contain significant elements of the government's policy response to COVID-19. In this regard, the committee generally considers that such significant policy matters should be set out in primary, rather than delegated, legislation.

The explanatory statement states that it is appropriate to include the program in the FF(SP) regulations as 'government spending on the program will be time limited and not recurrent' and the program 'has a limited purpose and expenditure criteria'. However, the

committee does not consider that this, of itself, is a sufficient justification for including such a significant COVID-19 policy response in delegated legislation.

In light of these matters, the committee requests your advice as to why it is considered necessary and appropriate to include a significant element of the government's policy response to COVID-19 in delegated legislation.

Parliamentary oversight

Senate standing order 23(3)(k) requires the committee to examine each instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether any instrument may exclude or limit parliamentary oversight.

In general, the committee will be concerned where significant details concerning the operation and application of measures prescribed by an instrument are set out in non-legislative policy guidance. The committee notes that this issue often arises in instruments which amend the FF(SP) regulations.

In this instance, the instrument provides for the broad purpose of the grant program; however, it does not appear to provide any detail as to how the program will operate. Further, while the explanatory statement contains some high-level guidance as to how the grant program may operate, it states that further information about the grants program, including the eligibility criteria for pandemic payments, will be set out in the grant opportunity guidelines.

The committee is concerned that the inclusion of such eligibility criteria for pandemic payments in non-legislative policy guidance rather than the instrument will enable the criteria to be changed without any form of parliamentary oversight. For example, the committee notes that while the explanatory statement states that grants will be provided to eligible individuals in Victoria, the grants program has already been extended to New South Wales, Tasmania and Western Australia, without an opportunity for parliamentary oversight of these extensions.

The committee acknowledges that the amount of expenditure under the program will be demand-driven. Nevertheless the committee's scrutiny concerns about inadequate parliamentary oversight are heightened by the failure to specify a cap on the amount of money that may be expended under the grants program (which could later be increased, if necessary), or to at least provide details in the explanatory statement as to how much is forecast to be expended under the program.

In light of these matters, the committee requests your advice as to:

- **why it is considered necessary and appropriate to set out significant elements of the grants program, including the eligibility criteria for pandemic payments, the amount of grants provided and the duration of the grants program, in grant opportunity guidelines, rather than in a legislative instrument;**
- **why a cap on the amount that may be expended under the grants program has not been specified; and**
- **whether the explanatory statement to the instrument could be amended to specify how much is forecast to be expended under the grants program.**

Availability of independent merits review

Senate standing order 23(3)(i) requires the committee to scrutinise each instrument as to whether it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests.

Where an instrument empowers a decision-maker to make discretionary decisions with the capacity to affect rights, liberties, obligations or interests, the committee ordinarily expects that those decisions should be subject to independent merits review.

It appears that a range of discretionary decisions relating to the pandemic payments may be made in the administration of the program. The explanatory statement to the instrument notes that independent merits review is not suitable for such decisions as they are 'automatic or mandatory in nature'. The explanatory statement further explains that the decision to make a payment will be very limited and procedural.

While noting this explanation, it appears that decisions relating to determining the amount to be awarded and whether a person meets the eligibility criteria for a grant may contain an element of discretion. The capacity of the decision-maker to exercise some discretion, albeit minor, suggests that the decisions made under the instrument cannot accurately be described as 'automatic or mandatory'.

Accordingly, the committee requests your more detailed advice as to the rationale for not providing for merits review of discretionary decisions made under the instrument, including what other characteristics of the decisions relating to pandemic payments justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.

Consultation with persons affected

Senate standing order 23(3)(d) requires the committee to scrutinise each instrument as to whether persons likely to be affected by the instrument were adequately consulted in relation to it.

The explanatory statement to the instrument notes that consultation was undertaken between the Prime Minister and the Premier of Victoria in relation to the program. However, the explanatory statement does not indicate whether consultation was also undertaken with persons likely to be affected by the instrument, such as employers, employees and relevant peak organisations, or if not, why not.

The committee therefore request your advice as to whether persons likely to be affected by the instrument, such as employers, employees and relevant peak organisations, were consulted in relation to the instrument, and if not, why not.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **22 October 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Weiss
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Leader of the Government in the Senate

REF: MS20-001035

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600


Dear Senator Fierravanti-Wells

I refer to your letter dated 8 October 2020 seeking further information about the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020*.

The Minister for Agriculture, Drought and Emergency Management, the Hon David Littleproud MP, who is responsible for the 'Coronavirus economic response – pandemic leave disaster payments' item in this instrument, has provided the attached response to the Committee's request for information. The explanatory statement to the instrument has also been amended to specify the amount of funding allocated to this program, and will be published on the Federal Register of Legislation shortly. I trust this advice will assist the Committee with its consideration of the instrument.

I have copied this letter to the Minister for Agriculture, Drought and Emergency Management.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance

 31 October 2020

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

Response provided by the Minister for Agriculture, Drought and Emergency Management

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) requests the minister's advice as to why it is considered necessary and appropriate to include a significant element of the government's policy response to COVID-19 in delegated legislation.

The Pandemic Leave Disaster Payment (the Payment) was required as a matter of urgency in response to the escalating public health emergency in Victoria. The Payment was introduced to encourage workers to comply with a direction to self-isolate or quarantine and prevent any financial hardship experienced by the individual in complying with that health directive. The Payment was to replace the Victorian Government's existing worker support payment.

The Australian Government needed to act quickly to transfer responsibility for the delivery of the Payment from the Victorian Government to Services Australia to prevent any further exacerbation of the crisis. On the day the instrument was made (6 August 2020), Victoria recorded 421 cases. In the days immediately preceding this (3-5 August), Victoria recorded a total of 1,535 cases. Once the transfer occurred, Services Australia used the agency's extensive service delivery capability to deliver the Payment immediately. This action helped to reduce the risk of the virus spreading in workplaces and the community more broadly.

Initially, the Payment was to be a measure restricted to the state of Victoria and for a limited period (operating for the period Victoria was in a state of disaster). As such, government spending was to be time-limited. The Payment bestowed a benefit and did not impact on an individual's personal rights and liberties.

To promote compliance by all affected workers with public health requirements, the Payment was made available to both Australian residents¹ and temporary visa holders with working rights (with state governments to reimburse the Australian Government for any payments made to temporary visa holders). Given the escalating health emergency in Victoria and the need to implement a rapid solution, as well as the absence of another readily available legislative mechanism for administering payments, providing legislative authority for making the Payment in delegated legislation was considered the most appropriate mechanism. In addition, Parliament was not sitting at the time the Payment was being considered, and therefore primary legislation was not at that time a viable option to deliver a rapid Australian Government response. In any event, it was considered that delegated legislation was more appropriate, given the inherent nature of the program and the need for flexible response capacity. The time limited and ad hoc (rather than recurrent) and non-regulatory nature of the government expenditure, which has a limited purpose and eligibility criteria which are capable of being clearly described, were additional factors which supported the establishment of legislative authority for the Payment in delegated legislation.

As set out in the explanatory statement for the instrument, the model developed for Victoria provided the framework for Commonwealth assistance to other jurisdictions as

¹ As defined in the *Social Security Act 1991*

the need arose. Once the grant mechanism was in place for Victoria, it was considered appropriate to extend the Payment to other states to incentivise compliance with health directions to self-isolate and help prevent further outbreaks.

The committee requests the minister's advice as to:

- *why it is considered necessary and appropriate to set out significant elements of the grants program, including the eligibility criteria for pandemic payments, the amount of grants provided and the duration of the grants program, in grant opportunity guidelines, rather than in a legislative instrument;*
- *why a cap on the amount that may be expended under the grants program has not been specified; and*
- *whether the explanatory statement to the instrument could be amended to specify how much is forecast to be expended under the grants program.*

The *Commonwealth Grants Rules and Guidelines* (CGRGs) is a legislative instrument made under section 105C(1) of the *Public Governance, Performance and Accountability Act 2013*, which provides the policy framework for administering grants programs. A mandatory requirement under the CGRGs is that officials must develop grant opportunity guidelines for all new grant opportunities and revised guidelines where significant changes have been made to a grant opportunity.

The CGRGs provide that officials should consider that a single reference source for policy guidance and other documentation (for example, administrative procedures, eligibility and assessment criteria, appraisal processes, monitoring requirements, evaluation strategies and standard forms) helps to ensure consistent and efficient grants administration. Consistent with this, it is appropriate that grant opportunity guidelines include the amounts of grants available and the duration of the grants program, as well as inform potential grant recipients of the terms and conditions they will need to meet during the life of the grant, such as financial and performance reporting.

The CGRGs also mandate that grant opportunity guidelines must be made publicly available on GrantConnect, to aid accountability and public transparency.

Apart from this, providing elements of the grants program – such as the eligibility criteria – in grant opportunity guidelines rather than in a legislative instrument also addressed the need for a sufficiently flexible response to ensure that payments could be extended to other states and territories quickly to promote compliance with public health directives.

Funding of \$34.3 million in 2020-21 for one-off payments of \$1,500 to eligible workers in states 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.

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

The explanatory statement to the instrument will be amended to reflect funding information for this grants program.

The committee requests the minister's more detailed advice as to the rationale for not providing for merits review of discretionary decisions made under the instrument, including what other characteristics of the decisions relating to pandemic payments justify the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's (ARC) guidance document, What decisions should be subject to merit review?.

Chapter 3 of the ARC guidance document outlines decisions that are considered to be unsuitable for merits review, which include decisions that may be described as automatic or mandatory. That is, decisions made where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances (paragraph 3.8 of the ARC guidance document).

The qualification criteria for the Payment are set out in the grant opportunity guidelines which under the mandatory requirements of the CGRGs must be made publicly available on GrantConnect (section 5, Public Reporting, paragraph 5.2). The qualification criteria can be classified as mandatory in nature as the criteria are based on objective circumstances such as the state where a person lives and works, whether they have or have not received certain disqualifying payments or are subject to a direction to self-isolate or quarantine. These circumstances are largely factual in nature and do not invite subjective deliberation.

Decisions to reject a person's claim for the Payment are subject to review processes within Services Australia at a customer's request. This review provides an effective means of addressing any mistakes made in the decision making process. I consider that the review process undertaken by Services Australia, and outlined in the grant opportunity guidelines, provides a robust and accountable mechanism for review of a customer's claim.

The Payment is a one-off set amount of \$1,500. It is not subject to pro-rata conditions and there is no discretion exercisable concerning the amount of payment.

The committee requests the minister's advice as to whether persons likely to be affected by the instrument, such as employers, employees and relevant peak organisations, were consulted in relation to the instrument, and if not, why not.

The Payment mirrors the Victorian Government's worker support payment (which preceded and was replaced by the Pandemic Leave Disaster Payment), with eligibility criteria developed based on existing cases and feedback from stakeholders. Services Australia also receives feedback from potential claimants.

In light of the escalating health crisis in Victoria, there was a need to implement a sufficiently flexible response to ensure that the Payment could be delivered 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) imposed no regulatory burden on businesses, therefore broader consultation was not required in this instance.



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12 November 2020

Senator the Hon Simon Birmingham
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: Senator.Birmingham@aph.gov.au

CC: DLO-Finance@finance.gov.au; plc@finance.gov.au; FFSPRegs@finance.gov.au



Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]

The Senate Standing Committee for the Scrutiny of Delegated Legislation has been corresponding with your predecessor in relation to technical scrutiny concerns relating to the above instrument.

The committee considered the former minister's response dated 26 October 2020 at its private meeting on 11 November 2020. The former minister's response included a response to the committee's scrutiny concerns from the Minister for Agriculture, Drought and Emergency Management (the Emergency Management Minister). On the basis of that advice, the committee has resolved to seek further advice about the issues outlined below.

Significant matters in delegated legislation

Parliamentary oversight

The Emergency Management Minister advised that it was necessary to establish the pandemic leave disaster payment program (the program) in delegated, rather than primary, legislation due to the urgent need to respond quickly to the escalating COVID-19 public health emergency in Victoria. The minister noted that this approach was appropriate as:

- there were no other readily available legislative mechanisms for administering the payments;
- Parliament was not sitting at the time the program was being considered; and
- the program is time-limited and ad hoc (rather than recurrent) and non-regulatory, with a limited purpose and eligibility criteria.

The response further advised that the minister considered it appropriate to set out core elements of the program in the grant opportunity guidelines, rather than in a legislative instrument, as this approach provides sufficient flexibility to ensure that payments could be extended to other states and territories quickly to promote compliance with public health directives.

The response clarified that funding of \$34.3 million in 2020-21 for one-off payments of \$1,500 to eligible workers in relevant states was included in the 2020-21 Budget. However, the response also noted that there is no effective cap on the expenditure as payments are demand driven but any further funding is subject to government decision and parliamentary scrutiny through the budget process. The minister undertook to amend the explanatory statement to the instrument to reflect this information regarding funding for the program.

The committee welcomes the undertaking to amend the explanatory statement to the instrument to provide greater clarity as to the funding provided under the program and notes that this undertaking was implemented on 27 October 2020. However, the committee reiterates its longstanding scrutiny view that significant matters, such as significant elements of the government's policy response to the COVID-19 pandemic, are more appropriately enacted via primary, rather than delegated, legislation. This is to ensure a greater degree of parliamentary oversight of significant policy matters.

The committee acknowledges that the extraordinary circumstances created by the COVID-19 pandemic may have necessitated the establishment of the program, on a time-limited basis, via delegated legislation when the Parliament was not sitting. However, noting that parliamentary sittings have recommenced, it is unclear why it continues to be necessary to do so. In this regard, the committee considers that, from a scrutiny perspective, it would be more appropriate to introduce primary legislation to support the continued operation of the program, particularly noting that the program appears to be akin to existing payments, such as the Australian Government Disaster Recovery Payment which is appropriately established in primary legislation (Part 2.24 of the *Social Security Act 1991*).

Further, noting that the program has been significantly expanded beyond the scope originally outlined in the explanatory statement, the committee's concerns with regard to the inclusion of significant details of the program in non-legislative policy guidance are further heightened. It remains the committee's preference that such matters are set out in primary legislation. However, the committee considers that such detail should, at minimum, be included in a disallowable legislative instrument, rather than in the grants opportunity guidelines, which are not subject to parliamentary oversight.

The committee therefore requests your advice as to:

- **how long it is envisaged that the pandemic leave disaster payment program is likely to remain open for new claims;**
- **the appropriateness of establishing at least the broad scope of the program in primary legislation, noting that parliamentary sittings have recommenced and that similar payments have appropriately been established in primary legislation; and**

- **whether, at a minimum, the scope and details of the program could be set out in a disallowable legislative instrument, rather than in the grants opportunity guidelines, to provide at least some level of parliamentary oversight of important aspects of the program, such as the eligibility criteria for the payments.**

Availability of independent merits review

The minister's response noted that decisions made in the administration of the program are not subject to independent merits review as such decisions can be classified as mandatory in nature. The response suggested that such decisions are mandatory in nature as they are based on objective circumstances of fact and, as such, involve no discretion. The minister further advised that the decisions to reject a person's claim are subject to internal review processes within Services Australia.

The committee shares the view that automatic or mandatory decisions may be unsuitable for independent merits review. However, the committee remains concerned that, unlike strictly automatic or mandatory decisions, the relevant decisions in this instance may require the decision-maker to exercise some discretion, albeit minor. For example, it appears that there may be scope for disagreement on the facts of whether a person has exhausted all sick leave entitlements or has had close contact with a person diagnosed with COVID-19.

Generally, where there is any scope for disagreement about whether particular facts have occurred, the automatic or mandatory nature of a decision flowing from those facts will not mean that the decision is inappropriate for review, although such review will be confined to ascertaining whether relevant facts have occurred. In this instance, the provision of internal review appears to indicate that there is some scope for disagreement on the particular facts, or else that there is scope for discretion to be exercised.

As such, it appears that the decisions cannot accurately be described as automatic or mandatory. Accordingly, in the absence of any other reason to exclude independent merits review, the committee remains of the view that independent merits review should be available for decisions made in relation to the administration of the program.

The committee therefore requests your advice as to whether independent merits review can be made available for decisions made in relation to the administration of the pandemic leave disaster payment program.

Consultation with persons affected

The minister's response advised that no public consultation was undertaken in relation to the instrument as the escalating health crisis in Victoria necessitated the quick commencement of the program in order to promote compliance with public health directives.

The response further advised that as the payment imposed no regulatory burden on business, consultation was not considered necessary. However, the payment mirrored the existing payment in Victoria at the time, and the eligibility criteria was developed based on stakeholder feedback and existing cases, and that Services Australia provides feedback from potential claimants.

The committee generally considers that such information should be included in the explanatory statement to the instrument, noting the importance of explanatory statements as a point of access to understanding the law.

The committee therefore requests your advice as to whether the explanatory statement to the instrument could be amended to provide greater detail as to why only limited consultation was undertaken in relation to the development of this specific instrument.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **26 November 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



Senator the Hon Simon Birmingham

Minister for Finance
Leader of the Government in the Senate
Senator for South Australia

REF: MS20-001192

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600


Dear Senator Fierravanti-Wells

I refer to your letter dated 12 November 2020 seeking further information about the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020*.

The Minister for Agriculture, Drought and Emergency Management, the Hon David Littleproud MP, who is responsible for the ‘Coronavirus economic response – pandemic leave disaster payments’ item in this instrument, has provided the attached response to the Committee’s request for further information.

As requested by the responsible Minister, I have also agreed to amend item 434 in Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* to address the Committee’s concerns in relation to setting out eligibility criteria for the payments in the item.

The proposed amendments will be brought forward for the Governor-General’s consideration at one of the Federal Executive Council meetings early in 2021. The explanatory statement to the amendment instrument will also provide greater detail in relation to consultation, as requested by the Committee.

I trust this advice will assist the Committee with its consideration of the instrument.

I have copied this letter to the Minister for Agriculture, Drought and Emergency Management.

Thank you for bringing the Committee's comments to the Government's attention.

Yours sincerely

Simon Birmingham

(December 2020

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]

Response provided by the Minister for Agriculture, Drought and Emergency Management

How long it is envisaged that the pandemic leave disaster payment program is likely to remain open for new claims?

The Australian Government does not propose to nominate an end date for the Pandemic Leave Disaster Payment (the Payment) at this stage, given the ongoing uncertainty with COVID-19, in particular given outbreaks can occur at any stage (as we saw recently in South Australia).

The Payment plays 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 Payment encourages people to quarantine, because they know they will be financially supported while they are not working.

Having the Payment readily available when it is required is vital to preventing the spread of the virus in workplaces, and the community more broadly, and makes it a key element of the national health response. As such, the Payment is intended to operate while the risk of workplace and community transmission continues in Australia.

Furthermore, a review of the ongoing need for the Payment 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 Payment into primary legislation while considering the broader context of the overall suite of disaster support payments. It would be preferable that the Payment remain available as a grant program authorised through Item 434 in Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* (Item 434) 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, Item 434 will be repealed.

The appropriateness of establishing at least the broad scope of the program in primary legislation, noting that parliamentary sittings have recommenced and that similar payments have appropriately been established in primary legislation?

As part of the review, the Australian Government will consider the appropriateness of introducing primary legislation that provides for the Payment, taking into account the broader context of the overall suite of disaster support payments.

Whether, at a minimum, the scope and details of the program could be set out in a disallowable legislative instrument, rather than in the grants opportunity guidelines, to provide at least some level of parliamentary oversight of important aspects of the program such as eligibility criteria for the payment.

I have requested that the Minister for Finance amend Item 434 at a Federal Executive Council meeting in early 2021. Item 434 will be amended to include additional details on the eligibility criteria for the Payment, including that a person is 17 years or over, is an Australian citizen or resident or the holder of a visa class that allows for work in Australia, that the person is unable to attend work or earn an income as a result of directed isolation or quarantine requirements, that the person does not have appropriate leave entitlements, and that the person must not be receiving an income support payment or JobKeeper Payment.

Similarly, I have asked the Minister for Finance to amend the Explanatory Statement to directly refer to the comprehensive information on the Payment available in the Grant Guidelines.

Request advice as to whether independent merits review can be made available for decisions made in relation to the administration of the pandemic leave disaster payment program.

If primary legislation is pursued, the Australian Government will also consider the appropriateness of the Payment being subject to independent merits review by the Administrative Appeals Tribunal (AAT).

The Government notes the Committee's view that the decision making process is not strictly automatic and may require the decision maker to exercise minor discretion. However, the Payment is 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.

Furthermore, where there are elements of doubt about qualification for the Payment or special circumstances unique to an individual, there is a long standing process whereby Services Australia can seek policy clarification from the Department of Home Affairs (Home Affairs).

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. In the case of a rejected claim, details on the review process within Services Australia are described 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 Home Affairs 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 or discretion that might occur in the decision making process.

As set out in the grant guidelines, the Payment is subject to Home Affairs' complaints process and oversight by the Commonwealth Ombudsman.

Request advice as to whether the explanatory statement to the instrument could be amended to provide greater detail as to why only limited consultation was undertaken in relation to the development of this specific instrument.

I have asked the Minister for Finance to amend the Explanatory Statement to Item 434 to provide greater detail on the reasons why limited consultation was undertaken.



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22 January 2021

Senator the Hon Simon Birmingham
Minister for Finance
Parliament House
CANBERRA ACT 2600

Via email: financeminister@finance.gov.au

CC: DLO-Finance@finance.gov.au; plc@finance.gov.au; FFSPRegs@finance.gov.au

Dear Minister,

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2020 [F2020L00994]

Thank you for your response of 1 December 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 22 January 2021. On the basis of your advice, the committee has concluded its examination of the instrument.

The committee welcomes the undertaking to amend the instrument to provide more detail in relation to the eligibility requirements for the pandemic leave disaster payments and to update the instrument's explanatory statement accordingly. The committee also welcomes the undertaking to update the instrument's explanatory statement to provide further detail on consultation undertaken in relation to the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation