



Senator the Hon Simon Birmingham

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

REF: MS21-000003

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

Connie,

I am writing in relation to the interim report of the Committee's inquiry into the exemption of delegated legislation from parliamentary oversight, hoping that the information contained herein may assist the Committee in its deliberations.

The Committee has proposed at Recommendation 10 of its report that parliamentarians and the Government ensure that Advance to the Finance Minister (AFM) determinations made in times of emergency should be subject to disallowance. It is my view that Recommendation 10 of the interim report, if pursued, would give rise to significant practical difficulties and risks to Commonwealth financial arrangements, and as a result frustrate the purpose and use of the AFM mechanism.

The AFM is a funding source of last resort that has been a longstanding provision that has featured in annual Appropriation Acts since 1901 and has equivalents in the appropriation laws of other Westminster Parliaments both preceding and following Federation. This contingency is intended to accommodate urgent and unforeseen expenditure that is not provided for, or is insufficiently provided for, in the current year, and where the passage of additional Appropriation Acts is either not possible or not practical. As the Finance Minister, I approve AFM proposals for expenditure up to a limit for the year, subject to these proposals meeting legislative requirements. I note that in doing so I use the powers already authorised by the Parliament when passing Appropriation Acts.

While I agree with the Committee that disallowance of an AFM determination would not invalidate expenditure that has already been made, it would leave entities short of the funds that they need to carry out other expenditure that has previously been approved by Parliament in what remains of a financial year.

Disallowance of an AFM determination would mean that an entity's appropriation is reduced to its original level. Yet the urgent expenditure it has already undertaken in reliance upon the determination would consequently be deducted from the newly reduced appropriation. This would leave the entity with a shortfall to fund other expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.

This 'collateral damage' effect could negatively impact longstanding programs that are relied upon by the public and have may have been repeatedly endorsed by the Parliament.

The reason why this problem occurs is because an AFM determination does not authorise expenditure on a particular purpose. It increases an existing multi-purpose line appropriation item (departmental or administered) in an Appropriation Act. If a House disallows the determination, it reverses the increase. This causes no problem if the urgent expenditure has not occurred. But if the urgent expenditure has occurred prior to the disallowance – which is a high risk as AFMs are innately matters of urgency – then the House's disallowance withdraws parliamentary authority to draw money to carry out other, ordinarily budgeted expenditure which the Parliament approved when it passed the Appropriation Act.

In its argument in support of a disallowance mechanism, the committee observes that if an AFM can be expended fast enough, ahead of passage of a disallowance motion, then *“disallowance would have little effect.”* It then observes *“consideration of a disallowance motion would at least provide opportunities for parliamentary debate and, if successful, would signify the relevant House's dissatisfaction in relation to the expenditure.”*

However, as outlined above, a disallowance would have a real impact regardless of whether or not the intended urgent expenditure had been undertaken. Mindful of the time limited impact of an AFM, should a parliamentarian wish to signal disagreement with an AFM, there other parliamentary processes such as Members or Senators' statements, general business motions, urgency motions, matters of public importance, or adjournment speeches.

The AFM is an important mechanism that provides the Government with the capacity to respond to urgent and unforeseen pressures such as those that emerged throughout the COVID-19 pandemic without impinging on the important role of the Parliament in its consideration of other legislation. While the Committee has considered the use of the AFM in the context of an emergency response to the extraordinary circumstances of COVID-19, most AFM allocations are significantly smaller in value.

In the years commencing from 2008-09, the *Appropriation Act (No. 1)* has provided an AFM of \$295 million for the ordinary annual services of government while the *Appropriation Act (No. 2)* has provided an AFM of \$380 million for the non-ordinary annual services of government (which includes major capital expenditure and payments to states, territories and local governments). For perspective, I note that these sums are together less than one per cent of the Budget. Until the exceptional one-off contingencies enacted during the COVID-19 pandemic, these standard AFM provisions have remained constant despite the size of appropriations nearly doubling since that time.

I note that the same difficulties and risks, as set out above, would also apply if disallowance were applicable to the AFM in its ordinary context (outside an emergency scenario like the COVID-19 pandemic). Without certainty of funding availability, it is highly likely that entities would delay urgent AFM related expenditure until the relevant disallowance period had expired. This would fundamentally frustrate the purpose and use of the AFM to address urgent pressures and delay the implementation of Government policy.

Finally I note that, in its discussion of the disallowance idea, the committee incidentally observed that some of the transparency mechanisms associated with the AFM are not enshrined in legislation. If these are matters of concern, then I would welcome the committee's elaboration on that aspect of AFM administration and the opportunity to engage further in any potential actions on those matters.

I thank the Committee for its consideration of my views as it works to prepare its final report.

Yours sincerely

Simon Birmingham

 March 2021