

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Environment and Energy Measures No. 1) Regulations 2018*

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 FF(SP) Act applies to 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 that Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to that 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 purpose of the *Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2018* (the Regulations) is to amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on two initiatives administered by the Department of the Environment and Energy.

Funding will be provided to:

- undertake assessments of the security and resilience of Australia's electricity, gas and liquid fuel sectors to human and environmental threats; and
- develop improved climate information for the energy sector to support the security and resilience of Australia's energy infrastructure.

These initiatives are part of the Government's response to the Independent Review into the Future Security of the National Electricity Market (the Finkel Review). Funding for these initiatives was included in the *Powering Forward – Delivering More Affordable, Reliable and Sustainable Energy* package announced as part of the 2018-19 Budget.

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 the Environment and Energy.

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 (Environment and Energy Measures No. 1) Regulations 2018*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Environment and Energy Measures No. 1) Regulations 2018*

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

Item 1 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds two new table items to Part 4 of Schedule 1AB to establish legislative authority for government spending on activities administered by the Department of the Environment and Energy (the department).

New **table item 275** establishes legislative authority for government spending on energy security and resilience assessments of Australia’s electricity, gas and liquid fuel sectors. Australia’s energy supply and use has changed significantly over recent decades and further transformation is inevitable. These assessments will enable the Government to understand the threats to adequate, reliable and affordable energy, and help build the capability needed to plan for the future.

This initiative will deliver on the Government’s commitment to implement recommendation 2.7 of the Independent Review into the Future Security of the National Electricity Market (the Finkel Review). The Finkel Review recommended that the Australian Government should lead a process to regularly assess the National Electricity Market’s (NEM) resilience to human and environmental threats. This should occur by mid-2019 and every three years thereafter.

The Finkel Review report and the Council of Australian Governments (COAG) Energy Council’s response can be found at www.coagenergycouncil.gov.au.

Funding will be provided to:

- design a robust methodology to assess energy security and resilience in consultation with energy producers and consumers that will measure performance of energy adequacy, reliability and affordability against an agreed set of measurable standards and expectations;
- engage independent experts to support the development of the performance framework, undertake analysis, prepare commissioned studies and draft technical reports to contribute to the assessment of energy security and resilience of energy markets; and
- collect and analyse information to support an assessment of the security and resilience of Australia's energy markets at a national scale. This will include collecting primary data as well as using secondary data from energy market bodies such as the Australian Energy Market Operator and other Australian Government departments and agencies.

Funding of \$12.8 million was included in the 2018-19 Budget as part of the measure 'Powering Forward – delivering more affordable, reliable and sustainable energy' for six years commencing in 2018-19. Details are set out in *Budget 2018-19, Budget Measures, Budget Paper No. 2 2018-19* at page 99.

The department will be responsible for developing the performance framework, delivering the assessments and managing all required consultancies.

Some activities will require the procurement of services, such as for undertaking analysis, preparing commissioned studies and drafting technical reports, to contribute to the assessment of energy security and resilience of energy markets. Procurement methods may include a mix of open tender (including using panels) and limited tender consultancies, based on specific needs and specialised skills and experience of tenderers. Final procurement decisions will be made by the relevant delegate of the Secretary of the department. Details of the tenders, including successful tenderers, will be published on AusTender at www.tenders.gov.au as appropriate.

Given the nature and purpose of the expenditure on the development of the performance framework and energy security assessments, merits review is not appropriate. Spending will be limited to the procurement of goods and services. Procurement processes will be subject to the Commonwealth's resource management framework, including the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Procurement Rules*.

In addition, the review and 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. These requirements and mechanisms help to ensure the proper use of Commonwealth resources, and appropriate transparency around decisions relating to making, varying or administering arrangements to spend relevant money.

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

Funding for this item will come from Program 4.1: Energy, which is part of Outcome 4. Details are set out in the *Portfolio Budget Statements 2018-19, Budget Related Paper No. 1.6, Environment and Energy Portfolio* at pages 28 and 71.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the Commonwealth executive power and the express incidental power (sections 51(xxxix) and 61) of the Constitution.

The express incidental power (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 it by the Constitution. Together with the executive power (section 61 of the Constitution), section 51(xxxix) 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 Finkel Review identified the NEM as ‘critical infrastructure’ on the basis that problems with the NEM would ‘significantly impact the social or economic wellbeing of the nation or affect Australia’s ability to conduct national defence and ensure national security’.

The program would involve undertaking, on a national scale, regular assessments of the resilience of the NEM and other energy markets across Australia to human and environmental threats. Further, with respect to these powers, the program would authorise research to enable the Commonwealth to inform itself about matters relating to national energy security and resilience.

New **table item 276** establishes legislative authority for government spending to support the security and resilience of Australia’s energy infrastructure by improving existing climate change and extreme weather information, and tailoring this information in a way that assists decision-makers in the energy sector. These decisions-makers include relevant energy sector organisations such as the Australian Energy Market Operator.

This initiative will contribute to the implementation of recommendation 2.11 of the Independent Review into the Future Security of the National Electricity Market (the Finkel Review). The Finkel Review recognised the increasing risks that extreme weather events pose to the security and reliability of Australia’s energy system, and the need for better analysis to support energy planning and investment decisions.

The Finkel Review report and the Council of Australian Governments (COAG) Energy Council’s response can be found at www.coagenergycouncil.gov.au.

Funding will be provided to develop improved climate and extreme weather information for the energy sector. This will involve updating the climate variables essential to inform management of climate change risk in the energy sector. For example, information on heatwaves or maximum temperature thresholds is critical to operation of energy infrastructure.

The department will work with a range of energy sector and research organisations to identify gaps in climate information and enhance decision-makers’ access to improved climate information. This work will commence in July 2018 and be completed by 30 June 2021.

Relevant research organisations or other providers will be engaged to develop the information and supporting services.

The improved information will provide input to the Energy Security Board's development of a strategy that improves the integrity of energy infrastructure and the accuracy of supply and demand forecasting. The strategy is expected to be completed by the end of 2018.

The Energy Security Board was established by the COAG Energy Council in 2017 to provide a whole-of-system oversight for energy security and reliability to drive better outcomes for consumers. The Board also coordinates the implementation of the Finkel Review.

Funding of \$6.1 million was included in the 2018-19 Budget under the measure 'Powering Forward – delivering more affordable, reliable and sustainable energy' for a period of three years commencing in 2018-19. Details are set out in *Budget 2018-19, Budget Measures, Budget Paper No. 2 2018-19* at page 99.

The department will be responsible for managing required contracts and ensuring the outputs are available for users and decision-makers in the energy sector.

Some activities will require the procurement of services such as for the development of improved climate and extreme weather information and services to inform management of climate change risk in the energy sector. Procurement methods may include a mix of open tender (including using panels) and limited tender consultancies, based on specific needs and specialised skills and experience of tenderers. Final procurement decisions will be made by the relevant delegate of the Secretary of the department. Details of the tenders, including successful tenderers, will be published on AusTender at www.tenders.gov.au as appropriate.

Decisions in relation to procurement expenditure will not be subject to independent merits review as they will be subject to the Commonwealth's resource management framework, including the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Procurement Rules*.

In addition, the review and 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. These requirements and mechanisms help to ensure the proper use of Commonwealth resources, and appropriate transparency around decisions relating to making, varying or administering arrangements to spend relevant money.

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

Funding for this item will come from Program 2.2: Adapting to Climate Change, which is part of Outcome 2. Details are set out in the *Portfolio Budget Statements 2018-19, Budget Related Paper No. 1.6, Environment and Energy Portfolio* at pages 28 and 57.

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 external affairs power (section 51(xxix)); and
- the Commonwealth executive power (section 61).

External affairs power

The external affairs power in section 51(xxix) of the Constitution supports legislation implementing treaties to which Australia is a party.

The *United Nations Framework Convention on Climate Change* [1994] ATS 2 (the UNFCCC) includes a range of obligations on Australia to take domestic actions that reduce Australia's emissions of greenhouse gases.

The UNFCCC relevantly provides that Australia shall:

- formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change (Article 4.1(b));
- promote and cooperate in the development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors including energy, transport, industry, agriculture, forestry and waste management sectors (Article 4.1(c));
- promote and cooperate in:
 - 'research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies' (Article 4.1(g));
 - 'the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies' (Article 4.1(h));
 - 'public awareness related to climate change' (Article 4.1(i));
- adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs (Article 4.2(a)); and
- promote and facilitate public access to information on climate change (Article 6(a)(ii)).

The *Kyoto Protocol* to the UNFCCC [2008] ATS 2 also includes obligations on Australia to take action to reduce emissions, such as Article 10.

Article 10(d) imposes obligations to '[c]ooperate in scientific and technical research and promote the maintenance and the development of systematic observation systems and development of data archives to reduce uncertainties related to the climate system, the adverse impacts of climate change and the economic and social consequences of various response strategies, and promote the development and strengthening of endogenous capacities and capabilities to participate in international and intergovernmental efforts, programmes and networks on research and systematic observation'.

The *Paris Agreement* [2016] ATS 24 was entered into by the parties to the UNFCCC to enhance its implementation. Under the Paris Agreement, Australia has a ‘nationally determined contribution’ of a 2030 emissions reduction target of 26 to 28 per cent below 2005 levels.

Relevantly, Article 4.2 of the Paris Agreement provides that ‘[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions’. Article 12 provides that Parties shall ‘cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information’.

The program would result in improved climate change information for decision-making, by:

- identifying gaps in climate knowledge;
- updating and maintaining Australian national climate change data; and
- developing and providing resources to support climate risk management.

Commonwealth executive power

With respect to the executive power of the Commonwealth (section 61 of the Constitution), the program would involve research to enable the Commonwealth to inform itself about gaps in climate knowledge. The program would also enable the Commonwealth, as a result of this research, to update and maintain Australian national climate change data, and to develop and provide resources to support climate risk management.

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 (Environment and Energy Measures No. 1) Regulations 2018

These Regulations are 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 Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The FF(SP) Act applies to 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 Regulations amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on two initiatives administered by the Department of the Environment and Energy.

Funding will be provided to:

- undertake assessments of the security and resilience of Australia's electricity, gas and liquid fuel sectors to human and environmental threats; and
- develop improved climate information for the energy sector to support the security and resilience of Australia's energy infrastructure.

These initiatives are part of the Government's response to the Independent Review into the Future Security of the National Electricity Market (the Finkel Review). Funding for these initiatives was included in the *Powering Forward – Delivering More Affordable, Reliable and Sustainable Energy* package announced as part of the 2018-19 Budget.

The Minister for the Environment and Energy has responsibility for these matters.

Human rights implications

The Regulations do not engage any of the applicable rights or freedoms.

Conclusion

These Regulations are compatible with human rights as they do not raise any human rights issues.

**Senator the Hon Mathias Cormann
Minister for Finance**