

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Defence Measures No. 1) Regulations 2020*

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 powers in the FF(SP) 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*.

Section 65 of the FF(SP) 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.

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 *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2020* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Joint Strike Fighter Industry Support Program (JSF-ISP) – Sustainment Grants, which will provide grant funding to defence sector enterprises to develop and implement their maintenance and repair capability for components used in the F-35 Joint Strike Fighter. The Department of Defence has responsibility for the program.

The JSF-ISP is a key initiative in support of the Joint Strike Fighter Program, an international aerospace systems capability program led by the United States Government, in collaboration with eight international partner nations including Australia. Participation in the Joint Strike Fighter Program by the Australian defence industry has derived many long-term benefits for the Australian economy.

Funding of up to \$4 million over four years from 2020-21 will be provided to support the Australian defence industry to secure contracts for the provision of activities which are linked to the sustainment phase of the Joint Strike Fighter Program.

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 Defence.

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 (Defence Measures No. 1) Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Defence Measures No. 1) Regulations 2020*.

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

Financial Framework (Supplementary Powers) Regulations 1997

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

This item adds a new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity that will be administered by the Department of Defence (the department).

New **table item 448** establishes legislative authority for government spending on the Joint Strike Fighter Industry Support Program (JSF-ISP) – Sustainment Grants, which aims to increase Australia’s defence capability and preparedness through the acquisition and sustainment of the F-35 Joint Strike Fighter, by funding defence sector enterprises to develop and implement their maintenance and repair capability for components used in the F-35 Joint Strike Fighter.

The JSF-ISP is a key initiative in support of the global Joint Strike Fighter (JSF) Program, the largest defence program in the world which relates to the development of the F-35 Joint Strike Fighter for the United States of America (United States) and eight international partner nations, including Australia.

As a global partner, Australia has established its own JSF Program (JSFP). In addition to the fundamental objective of supporting Australian defence capability, the Australian JSFP is intended to stimulate the Australian economy by creating significant business opportunities for the Australian defence industry.

Since 2006, the Australian companies have secured over \$1 billion worth of the Joint Strike Fighter production contracts, which has in turn led to a sustained increase in employment with the creation of over 2,400 jobs in the Australian marketplace.

More information about the long-term benefit to the Australian economy resulting from the Australian defence industry participation in the JSFP is available on the departmental website (<https://www.defence.gov.au/casg/AboutCASG/OurStructure/Air/JSF%20Industry%20Participation.asp>).

The Australian defence enterprises participating in production, sustainment or modernisation activities under the JSFP are engaged on a contractual basis, either by the JSFP prime contractors Lockheed Martin Corporation and/or Pratt & Whitney (JSFP Prime Contractors); or directly by the United States Department of Defense (US DoD). The Australian defence industry is competing for the F-35 Joint Strike Fighter supply chain contracts in a global market, whereby suppliers and service providers are subject to a competitive request for quote process and selected on a 'best value' basis.

The requirements to be competitive in securing contracts under the JSFP are relatively onerous, particularly as they relate to security and capital infrastructure. Some of these requirements are mandated by the US DoD, while others are imposed by the JSFP Prime Contractors. To ensure that the Australian defence industry remains competitive in the global marketplace for the JSFP production and sustainment activities, the Australian Government has provided funding and support to the Australian defence industry through a number of grant programs.

One such example of the commitment by the Australian Government to support Australian industry participation in the JSFP is the New Air Combat Capability Industry Support Program (NACC-ISP), which was established in 2011 to enable Australian companies and research organisations to support the development of new or improved capability to win work in the production, sustainment and follow-on development phases of the F-35 Joint Strike Fighter. Funding for the NACC-ISP is expected to be fully awarded by the end of 2020-21.

The JSF-ISP has been developed to follow on from the NACC-ISP. Under the JSF-ISP, the Australian Government will provide grants to support the Australian defence industry to secure contracts for the provision of activities which are linked to the sustainment phase of the JSFP.

The JSF-ISP is an open, non-competitive grant program whereby grant recipients are selected on the basis of established eligibility criteria which relate to the legal and operational status of the applicant, the proposed projects and activities for which funding is sought, and the nature of the expenditure which the grant is intended to fund.

Applicants for the JSF-ISP must be 'Assigned Product Support Providers' (A-PSP) which are undertaking the process of qualification to become a 'Qualified F-35 Component Depot Source of Repair' (DSOR). The US Government 'assigns' a particular part (or group of parts) used in the F-35 Joint Strike Fighter to certain entities to maintain and repair. The relevant entity is the A-PSP for that part (or group of parts). An A-PSP needs to become a DSOR in order to carry out the maintenance and repair of their assigned part(s). In order to become a qualified DSOR, an A-PSP must develop and implement a 'Depot Maintenance Activation Plan' (DMAP), which provides a structured and comprehensive approach that ensures the

integrated product support or logistics support elements are addressed in the activation. The department oversees the development of all DMAPs by A-PSPs; the DMAP must then be approved by the US Government before being implemented.

To be an eligible applicant for a grant under the JSF-ISP, an applicant must:

- be an A-PSP in the process of developing and/or implementing a DMAP;
- have an Australian Business Number;
- be registered for Goods and Services Tax; and
- be either an Australian company or a corporate trustee.

To demonstrate eligibility, an entity must provide (among other things) a congressional letter from the US DoD confirming their status as an A-PSP for a particular part number or repair technology group.

Eligible project activities for which an applicant may apply for funding must be related to the development or implementation of a DMAP. Examples of eligible project activities which may be approved for funding under the JSF-ISP include:

- activities to develop a DMAP in accordance with the requirements of the US DoD such as gap analysis or certification processes; and
- activities to implement a DMAP once it has been approved by the US DoD, including capital equipment acquisition and capability upgrades.

The grant will be provided to fund up to 50 per cent of the agreed project cost, and any percentage of the project cost not met by the grant must be funded by the applicant. The grant must be used only to fund eligible types of project expenditure. Eligible expenditure is those costs which are incurred during the project period and directly arising out of the project. Eligible expenses must also comply with the grant opportunity guidelines which set out specific criteria for eligible expenses, and provide the detail on those expenses which are ineligible for funding under the JSF-ISP.

All JSF-ISP grant recipients will be required to enter into a grant agreement with the Commonwealth, which specifies the obligations of the grant recipient to keep detailed records of how the grant is allocated, and retain supporting evidence of all associated expenditure. In addition, grant recipients will be required to develop and maintain a project budget and project progress reports.

The JSF-ISP grant program will be administered by the Business Grants Hub, part of the Department of Industry, Science, Energy and Resources (DISER), on behalf of the department and in accordance with the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs). The JSF-ISP eligibility criteria and application process (including opening and closing dates) will be set out in the grant opportunity guidelines which will be published on the business.gov.au and GrantConnect websites (www.grants.gov.au).

Applications for a grant under the JSF-ISP will be assessed by DISER officials, who will make a recommendation to the Head of Aerospace Systems Division (HASD) within the department. The HASD is the current delegate of the Secretary of the department for decisions to award a grant under the NACC-ISP, and will likewise be a delegate of the Secretary of the department for decisions to award a grant under the JSF-ISP.

The HASD, the Program Delegate with responsibility for the program within the department, will decide which grants to approve taking into account the application assessment by DISER and the availability of grant funds. As the Program Delegate, the HASD will not approve funding if there is insufficient program funds available across relevant financial years for the program.

In the event of a complaint in relation to the outcome of an application under the JSF-ISP, decisions made under the JSF-ISP will be subject to internal review by an official of the department at least one rank higher than the original decision maker.

Decisions under the JSF-ISP will not be subject to independent merits review because they relate to the allocation of a finite resource between competing applicants, and an allocation that has already been made to another party would be affected by overturning the original decision. The Administrative Review Council has recognised that such decisions are not suitable for merits review (see paragraphs 4.11 to 4.14 of the guide, *What decisions should be subject to merit review?*).

In addition, merits reviews would likely result in delays to the allocation of funding to the JSFP activities which are critical to Australia's security and defence capability. To ensure administrative accountability in relation to decisions under the JSF-ISP, the department will ensure that the process for allocating funds under the program is fair, the criteria for funding are made clear, and decisions relating to grant funding are made objectively. This is consistent with the Administrative Review Council's recommendations (see paragraph 4.19 of the guide).

These requirements will be met as a result of the detailed governance arrangements for the administration and implementation of the JSF-ISP, in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* and the CGRGs.

Further, the outcome of grant applications and all non-sensitive details of the relevant projects will be publicly announced by either the Minister for Defence or the Minister for Defence Industry and published on the business.gov.au and GrantConnect websites.

Complainants who are unsatisfied with the outcome of an internal review of a grant decision will be encouraged to approach the Commonwealth Ombudsman.

The department has consulted with various stakeholders throughout the development of the JSF-ISP. Previous NACC-ISP recipients were provided a survey to determine the success and challenges of the NACC-ISP, and the department took these responses into consideration when developing the JSF-ISP to ensure it met the Australian defence industry's evolving needs.

During the JSF-ISP development, the department also consulted with business advisers in the Centre for Defence Industry Capability (CDIC), part of the department and previously part of DISER that was established to assist the Australian defence industry with navigating the frameworks for accessing defence industry grants. The department leveraged the advice of CDIC business advisers in relation to the conduct of previous defence industry grant programs, and modelled the JSF-ISP based on that advice.

The department has followed AusIndustry's lead when developing this grant program and held numerous meetings with the AusIndustry design team when designing the JSF-ISP (AusIndustry is part of DISER). The meetings were to ensure that the new program aligned with current and previous defence industry grant programs and the JSF-ISP grant opportunity guidelines were developed appropriately.

Initial funding of \$4 million was included in the 2020-21 Budget under the measure 'Joint Strike Fighter Industry Support Program' for a period of four years commencing in 2020-21. Details are set out in *Budget 2020-21, Budget Measures, Budget Paper No. 2 2020-21* at page 71.

Funding for this item will come from the New Air Combat Capability AIR6000 Phase 2A/B project under Program 2.7: Air Force Capabilities, which is part of Outcome 2. Details are set out in the *Portfolio Budget Statements 2020-21, Budget Related Paper No. 1.3A, Defence Portfolio* at page 113.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the defence power (section 51(vi)) of the Constitution.

Defence power

Section 51(vi) of the Constitution empowers the Parliament to make laws with respect to 'the naval and military defence' of the Commonwealth and States, and 'the control of the forces to execute and maintain the laws of the Commonwealth'.

The Joint Strike Fighter is defence materiel clearly for defence purposes, that is, to ensure Australia's defence preparedness. The JSF-ISP grants are directly related to the sustainment of the Joint Strike Fighter, and therefore support defence preparedness. The grant program will also provide assistance to defence industry entities in maintenance and repair roles, supporting their ability to produce and maintain material required for defence purposes.

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 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 powers in the FF(SP) 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 (Defence Measures No. 1) Regulations 2020* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on the Joint Strike Fighter Industry Support Program (JSF-ISP) – Sustainment Grants, which will provide grant funding of \$4 million over four years from 2020-21 to defence sector enterprises to develop and implement their maintenance and repair capability for components used in the F-35 Joint Strike Fighter. The Department of Defence has responsibility for the program.

The JSF-ISP is a key initiative in support of the Joint Strike Fighter Program, an international aerospace systems capability program led by the United States (US) Government, in collaboration with eight international partner nations including Australia. Participation in the Joint Strike Fighter Program by the Australian defence industry has derived many long-term benefits for the Australian economy.

As the Joint Strike Fighter Program progresses to the sustainment phase, and noting the substantial positive impact on the Australian economy to date during the production phase, the Australian Government will support the Australian defence industry to continue its partnership with the US Government and its prime contractors. The global market for securing contracts under the Joint Strike Fighter Program is particularly competitive, and Australian enterprises are required to comply with rigorous security and capital infrastructure requirements in order to be eligible for the award of a Joint Strike Fighter Program sustainment activity contract.

To assist Australian enterprises to compete effectively in the global marketplace, the Australian Government will award grants under the JSF-ISP to eligible defence industry applicants to promote the undertaking of eligible activities required to meet the prerequisite

conditions for participation in the US-led procurement processes for the Joint Strike Fighter Program sustainment contracts.

Human rights implications

This disallowable legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This disallowable legislative instrument is compatible with human rights as it does not raise any human rights issues.

**Senator the Hon Simon Birmingham
Minister for Finance**