**EXPLANATORY STATEMENT**

**Issued by the Authority of the Minister for Finance**

*Financial Framework (Supplementary Powers) Act 1997*

*Financial Framework (Supplementary Powers) Amendment*

*(Foreign Affairs and Trade Measures No. 1) Regulations 2021*

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 (Foreign Affairs and Trade Measures No. 1) Regulations 2021* (the Regulations) amend table item 336 in Part 4 of Schedule 1AB to the Principal Regulations to provide legislative authority for government spending on the Australian Infrastructure Financing Facility for the Pacific (AIFFP). The AIFFP is administered by the Department of Foreign Affairs and Trade (the department).

The AIFFP is a centrepiece of the Government’s Pacific Step-up. It is a $2 billion initiative which was set up to provide loans (up to $1.5 billion) and grants (up to $500 million) to support quality infrastructure in the Pacific and Timor-Leste. The AIFFP has been operational since 2019 with a strong investment pipeline of potential projects planned in the next 12 months.

Legislative authority for the AIFFP’s expenditure is provided by the *Export Finance and Insurance Corporation Act 1991* for loans, and table item 336 in Part 4 of Schedule 1AB for grants. The amended table item 336 will allow the provision of support for infrastructure irrespective of the nature of the financial transaction and clarify the geographic inclusions of the initiative.

The AIFFP grants component could be used to fund or directly procure overall project construction, discrete project elements, or associated requirements. Examples include, but are not limited to, the funding or direct procurement of feasibility studies, project administration costs, environmental and social safeguard assessments, project management operations, or construction of an infrastructure asset. Importantly, grants could also be used for the direct procurement of an entire infrastructure asset, such as an undersea telecommunications cable, road, port, or electricity transmission system.

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 Foreign Affairs and Trade.

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***

***(Foreign Affairs and Trade Measures No. 1) Regulations 2021***

**Section 1 – Name**

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 1) Regulations 2021*.

**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 – Part 4 of Schedule 1AB (cell at table item 336, column headed “Objective(s)”)**

This item repeals and substitutes the cell at table item 336 in the column headed “Objective(s)”. Table item 336 establishes legislative authority for government spending on the Australian Infrastructure Financing Facility for the Pacific (AIFFP), which supports the development or enhancement of infrastructure in the Pacific and Timor-Leste. The AIFFP is administered by the Department of Foreign Affairs and Trade (the department).

The AIFFP is a centrepiece of the Government’s Pacific Step-up, which expands and deepens Australia’s longstanding partnerships with Pacific island countries to better respond to the region’s priorities. The AIFFP was announced by the Prime Minister, the Hon Scott Morrison MP, on 8 November 2018 and became operational on 1 July 2019. It is a $2 billion initiative which was set up to provide loans (up to $1.5 billion) and grants (up to $500 million) to support quality infrastructure in the Pacific and Timor-Leste.

Legislative authority for the AIFFP’s expenditure is provided by the *Export Finance and Insurance Corporation Act 1991* for loans, and table item 336 in Part 4 of Schedule 1AB for grants. The amended table item 336 will allow the provision of support for infrastructure irrespective of the nature of financial transaction and clarify the geographic inclusions of the initiative.

The AIFFP partners with governments and the private sector to provide finance for priority infrastructure projects, including in the areas of transportation, water, energy and telecommunications. It supports the origination, financing and delivery of infrastructure projects, with a strong emphasis on high-quality, sustainable construction.

Since the initiative’s establishment in 2019, the Government has finalised AIFFP financing for three major capital projects totalling over $110 million. These are:

* the Undersea Cable Spur in Palau to support the construction of a second undersea telecommunications cable to Palau. The project is the first delivered under the Trilateral Partnership for Infrastructure Development in the Indo-Pacific (involving Australia, Japan and the United States of America);
* the Tina River Transmission System in Solomon Islands to support the construction of a 22-kilometre power line connecting the Tina River hydropower site to the electricity grid in Honiara; and
* financing for Airports Fiji where AIFFP’s investment, alongside ANZ Fiji, will help fund capital works at Nadi International Airport and other outer island airports, as well as refinance existing debt. It will help ensure Airports Fiji will be ready to welcome travellers once international travel resumes.

The AIFFP will play an important part in the region’s recovery from the COVID-19 pandemic. Its projects generate local and regional economic benefits by upskilling local labour and engaging local firms. The AIFFP has a strong investment pipeline with several hundred million dollars of potential projects planned in the next 12 months, a number of which will be fully grant funded and involve direct procurement by the Government.

The AIFFP financing is by loans where funds are repaid, grants where funds are not repaid, or both. Grants could be used to fund or directly procure overall project construction, discrete project elements, or associated requirements. Examples include, but are not limited to, the funding or direct procurement of feasibility studies, project administration costs, environmental and social safeguard assessments, project management operations, or construction of an infrastructure asset. Importantly, grants could also be used for the direct procurement of an entire infrastructure asset, such as an undersea telecommunications cable, road, port, or electricity transmission system.

The AIFFP is delivered by the Office of the Pacific, part of the department, and is supported by Export Finance Australia. The department follows internal processes for the administration of AIFFP grants, noting AIFFP grants are funded from the existing $4 billion Official Development Assistance (ODA) program.

The department conducts tenders, allocates and approves grant expenditure in accordance with applicable policies, including the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs) and the *Commonwealth Procurement Rules* (CPRs), to ensure value for money. The department has guidelines for handling complaints, including the conduct of a procurement process or its outcome, on the departmental website (www.dfat.gov.au).

The AIFFP website (www.aiffp.gov.au) also has information about the AIFFP’s investments, including grants and procurements. The AIFFP’s procurement contracts are available on AusTender (www.tenders.gov.au).

The AIFFP projects are subject to a robust governance process. They build on existing experience within government on infrastructure financing, including the department’s aid program management and project delivery expertise and Export Finance Australia’s lending expertise.

Project proposals are generated through a number of avenues, including direct discussions with Pacific countries on their infrastructure priorities, approaches from the private sector, ministerial liaison, or engagement with multilateral development banks or other donors. Proposals are assessed against a number of principles, including if it is in Australia’s national interest for the AIFFP to support the project and if the project has partner Government’s support.

Once a project has originated, it is subject to detailed scoping, including the application of best practice safeguards (environmental and social), development of financial parameters, and assessment of economic impacts and broader risks. In doing this, the department applies robust standards and draws on a wealth of in-house policies and processes in managing Australia’s ODA program, which in turn draw from and comply with the CGRGs and the CPRs.

Once fully scoped, the department submits the project to the AIFFP Board for consideration. The AIFFP Board is a risk advisory board consisting of government officials and independent members. It makes recommendations to the Minister for Foreign Affairs about the AIFFP projects. The Government retains decision making authority for all AIFFP projects. The Minister for Foreign Affairs approves grant expenditure for projects, and the Government approves the loan expenditure. The Minister for Trade, Tourism and Investment provides authorisation and direction to Export Finance Australia to issue an AIFFP loan on the National Interest Account.

A strong monitoring, evaluation and reporting framework is embedded in the AIFFP. This includes an internal operational review of the AIFFP, which in 2020 was delivered by Deloitte Touche Tohmatsu. The review found the department had successfully established:

* a credible, high quality pipeline of projects;
* a highly skilled and capable team from across the department, the Australian public sector and external contractors;
* extensive and well-received stakeholder outreach across the Pacific; and
* a reasonably firm operational footing over a short period of time, with a range of key policies, procedures and processes in place (noting ability to leverage the department’s systems and policies).

The framework also includes a commitment to a broader review of the AIFFP. The AIFFP Design Document (available at https://www.aiffp.gov.au/documentation) states that ‘a system-wide review of the AIFFP will take place after two years of operation’, with the objective of ‘… assessing the performance of the AIFFP model and informing continuous learning and improvement.’ This two-year review will focus on the establishment phase of the AIFFP. It has been commissioned and will be delivered by Alinea Whitelum.

The review will identify successes, learnings, and opportunities for improvement to efficiently and effectively deliver on the AIFFP’s strategic objectives, and will be supported by consultation with key stakeholders, including Pacific governments and the Australian Government agencies. The final review report will be made available on the AIFFP website to support transparency and accountability.

The decisions made by the Government will not be subject to independent review. This is because these decisions relate to policy decisions of a high political content as considerations made by the Minister for Foreign Affairs and endorsed by the Government may affect Australia’s relations with other countries. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraph 4.23 of the guide, *What decisions should be subject to merit review?*).

The AIFFP is supported by close consultation with partner governments and the private sector on individual projects. The establishment of the AIFFP also benefitted from extensive consultation, including meetings with Pacific governments, industry and NGOs, and a public consultation process through which a number of submissions were received.

Funding of $500 million allocated to the AIFFP will come from Program 1.2: Official Development Assistance, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2021-22, Budget Related Paper No. 1.6, Foreign Affairs and Trade Portfolio* at page 22.

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

*External affairs power*

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to ‘external affairs’. The external affairs power supports legislation with respect to matters or things outside the geographical limits of Australia.

The AIFFP supports the development or enhancement of infrastructure located outside the geographical limits of Australia, specifically in the Pacific region and Timor-Leste. It also supports the development or enhancement of infrastructure that is located anywhere where that infrastructure will be used wholly or substantially in the Pacific region or Timor-Leste. It has a particular emphasis on infrastructure that underpins economic growth and the movement of people, goods and services within and between countries around the region.

**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 (Foreign Affairs and Trade Measures No. 1) Regulations 2020***

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 (Foreign Affairs and Trade Measures No. 1) Regulations 2021* amend table item 336 in Part 4 of Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on the Australian Infrastructure Financing Facility for the Pacific (AIFFP). The AIFFP is administered by the Department of Foreign Affairs and Trade.

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Legislative authority for the AIFFP’s expenditure is provided by the *Export Finance and Insurance Corporation Act 1991* for loans, and table item 336 in Part 4 of Schedule 1AB for grants. The amended table item 336 will allow the provision of support for infrastructure irrespective of the nature of financial transaction and clarify the geographic inclusions of the initiative.

The AIFFP partners with governments and the private sector to provide finance for priority infrastructure projects, including in the areas of transportation, water, energy and telecommunications. It supports the origination, financing and delivery of infrastructure projects, with a strong emphasis on high-quality, sustainable construction.

The AIFFP has been operational since 2019 with a strong investment pipeline of potential projects planned in the next 12 months.

Each AIFFP-funded project will comply with:

* the Australian aid program’s rigorous safeguards and principles, which address environmental protection, gender equality and the rights of the children, vulnerable and disadvantaged groups; and
* Export Finance Australia’s policy for environmental and social review of transactions, which adopts the International Finance Corporation’s Environmental and Social Performance Standards (global best practice).

**Human rights implications**

The amended table item 336 engages the following rights:

* rights of equality and non-discrimination – Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), read with Article 2; Article 3 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW); Article 3 of the *Convention on the Rights of the Child* (CRC), read with Article 4; and Article 9 of the *Convention on the Rights of Persons with Disabilities* (CRPD), read with Article 4.

Article 2 of the ICCPR provides that the States Parties undertake to respect and ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR, without distinction of any kind, and to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the ICCPR.

Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Article 3 of the CEDAW provides that States Parties shall pursue measures to ensure the economic development and advancement of women.

Article 3 of the CRC provides that public policies and institutions must ensure the rights of the child are a primary consideration. Article 4 of the CRC provides that States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the CRC.

Article 4 of the CRPD provides that States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.

Article 9 of the CRPD provides that people with a disability will have the right to access all aspects of society on an equal basis with others including physical environment, transportation, information and communications.

Civil, political, economic, social and cultural rights will be positively affected through development of economic infrastructure, and associated economic opportunity, in targeted countries. Infrastructure projects financed under the AIFFP are required to comply with global best practice standards on environmental, social and corporate governance and the Australian aid program’s rigorous safeguards and principles on furthering gender equality; ensuring child protection; and promoting equal rights, opportunity and access for people with disabilities. Projects financed through the AIFFP will undertake to adhere with the Australian aid program’s child protection policy, and broader infrastructure improvements will enhance vulnerable children’s access to services.

**Conclusion**

The amended table item 336 is compatible with human rights because it promotes the protection of human rights.

**Senator the Hon Simon Birmingham**

**Minister for Finance**