

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 17 December 2021 for the *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021* [F2021L01825] to include further information about the eligibility criteria, delegation of administrative powers and functions and merits review conducted by the Independent Assessors for the Territories Stolen Generations Redress Scheme.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Prime Minister and Cabinet Measures No. 11) 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 (Prime Minister and Cabinet Measures No. 11) Regulations 2021* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on certain activities to be administered by the National Recovery and Resilience Agency (projects of local significance under the Preparing Australian Communities Program) and the National Indigenous Australians Agency (Territories Stolen Generations Redress Scheme). Both agencies are within the Prime Minister and Cabinet portfolio.

Funding will be provided for:

- grants to support eligible entities to deliver eligible projects of local significance to help reduce the risks and impacts of natural disasters under the Preparing Australian Communities Program (\$150 million over four years from 2021-22); and

- the establishment and maintenance of the Territories Stolen Generations Redress Scheme, which is a financial and wellbeing redress package for Stolen Generations survivors who were removed as children in the Northern Territory or the Australian Capital Territory prior to their respective self- government, or the Jervis Bay Territory (\$378.6 million over five years from 2021-22).

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 National Recovery and Resilience Agency and the National Indigenous Australians Agency.

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 (Prime Minister and Cabinet Measures No. 11) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) 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 – 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 certain activities to be administered by the National Recovery and Resilience Agency (projects of local significance under the Preparing Australian Communities Program) and the National Indigenous Australians Agency (Territories Stolen Generations Redress Scheme). Both agencies are within the Prime Minister and Cabinet portfolio.

New **table item 528** establishes legislative authority for government spending on projects of local significance under the Preparing Australian Communities Program (the PACP Local). The National Recovery and Resilience Agency (NRRRA) has responsibility for the PACP Local.

The PACP Local is part of the Preparing Australia Program, which was announced by the Prime Minister, the Hon Scott Morrison MP, on 5 May 2021. The Preparing Australia Program will enable the Commonwealth to directly fund projects that mitigate natural disaster risks and minimise the impact of large scale natural disasters like floods, bushfires and cyclones (available at www.pm.gov.au/media/address-townsville-chamber-commerce-townsville-qld).

The objectives of the Preparing Australia Program are to:

- improve the long-term resilience of Australian communities and households to natural hazards; and
- deliver disaster risk reduction projects that reduce hazard exposure or vulnerability and are aligned with the recommendations of the *Royal Commission into National Natural Disaster Arrangements* (<https://naturaldisaster.royalcommission.gov.au/>) and the *National Disaster Risk Reduction Framework* (<https://www.homeaffairs.gov.au/emergency/files/national-disaster-risk-reduction-framework.pdf>).

The Preparing Australia Program will comprise two streams:

- Preparing Australian Communities, including projects of local significance (PACP Local) and projects of national significance; and
- Preparing Australian Homes.

The PACP Local will provide grant funding for locally identified and locally led projects that improve the resilience of communities against natural hazards. Funding will be allocated using an open competitive selection process under one or more funding rounds. Round 1, which will open on 10 December 2021, will focus on projects that will improve the resilience of communities against bushfires, floods and tropical cyclones as these hazards cause major impacts (disruption, damage and loss) on homes and infrastructure with significant fatalities. Grant funding amounts will range from \$20,000 to \$10 million for eligible projects, with total funding of \$150 million over four years from 2021-22 available under Round 1.

The PACP Local is open to applications for projects all around Australia, and will prioritise selected local government areas (LGAs) based on their level of comparative hazard risk, informed by the Australian Climate Service and state and territory governments. Detailed information about the current grant opportunity is available on the Business Grants Hub (www.business.gov.au) and the GrantConnect (www.grants.gov.au) websites.

The intended outcome of grant opportunities under the PACP Local is to support communities to undertake disaster risk reduction and resilience initiatives that provide public benefit through reducing:

- the impact of future natural hazards on Australian communities; and
- the burden (cost and time) of recovery in communities following future disasters.

Activities to be funded under the PACP Local are expected to target or deliver resilience in one or more of the following domains:

- social environment – increasing the community’s social resilience to relevant natural hazards (for example, projects that strengthen social networks that enable the community to continue functioning in the event of a disaster);
- economic environment – improving the ability of the local economy to withstand and recover from relevant natural hazards (for example, projects that enable businesses to continue operating in the event of a disaster);
- natural environment – increasing the disaster resilience of and/or reducing the disaster risk to natural assets such as wetlands, rivers, land, forests, and other assets; and
- built environment – increasing the disaster resilience of and/or reducing the disaster risk to natural assets such as transport, energy and telecommunications, utilities, housing, and other assets.

Eligible applicants for the PACP Local include, but are not limited to, private sector organisations, community organisations, Regional Development Australia Committees, local governing agencies or bodies, and registered Aboriginal and Torres Strait Islander corporations and land councils.

The PACP Local will be administered in accordance with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs) through the Business Grants Hub, part of the Department of Industry, Science, Energy and Resources.

Grant applications will be assessed by a committee, chaired by the Coordinator-General of the NRRA and including representatives from relevant Commonwealth entities. The committee may also seek additional advice from independent technical experts, including the Australian Climate Service, as well as local knowledge through the engagement network of the NRRA. The committee will assess applications against the assessment criteria, as set out in the grant opportunity guidelines, compare them to other eligible applications in a funding round (eligibility checks will be undertaken by the Business Grants Hub), and have regard to state and territory priorities for disaster risk reduction, the geographical spread of proposed projects and the selected LGAs, before recommending which projects to fund.

The Minister for Emergency Management and National Recovery and Resilience (the Minister) will decide which grants to approve taking into account the recommendations of the committee and the availability of grant funds. The Minister's decisions will be final in all matters. Grants awarded under the PACP Local will be reported on GrantConnect.

Grant funding decisions made in connection with the PACP Local are not considered suitable for independent merits review, as they are decisions relating to the allocation of a finite resource, from which all potential claims for a share of the resource cannot be met. In addition, any funding that has already been allocated would be affected if the original decision was overturned. The Administrative Review Council (ARC) has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.19 of the guide, *What decisions should be subject to merit review?* (ARC guide)).

The review and audit process undertaken by the Australian National Audit Office provides a mechanism to review Australian Government spending decisions and report any concerns to the Parliament. Further, the right to review under section 75(v) of the Constitution and review under section 39B of the *Judiciary Act 1903* may be available. Persons affected by funding decisions would also have recourse to the Commonwealth Ombudsman where appropriate.

The NRRA has been working closely with the Australian Climate Service and the Business Grants Hub to design the PACP Local. The NRRA has also consulted with local, state and territory governments. Program details have been developed based on feedback from key stakeholders and lessons learned from similar programs. The NRRA will evaluate the outcomes of Round 1 of the PACP Local to inform future program design.

Funding of \$615.5 million for the Preparing Australia Program was included in the 2021-22 Budget under the measure 'Building Australia's Resilience' for a period of six years commencing in 2021-22. Details are set out in *Budget 2021-22, Budget Measures, Budget*

Paper No. 2 2021-22 at pages 65 to 67. Out of this total program funding, \$150 million over four years from 2021-22 will be available under Round 1 of the PACP Local.

Funding for this item will come from subprogram 1.3.1 ‘Preparing Australia Program’ under Program 1.3: Australian Government Resilience, Preparedness and Disaster Risk Reduction Support, which is part of Outcome 1. Details are set out in the *Portfolio Budget Statements 2021-22, Budget Related Paper No. 1.11, Prime Minister and Cabinet Portfolio* at page 261.

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));
- the power to grant financial assistance to the states (section 96); and
- the territories power (section 122).

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 implementing Australia’s obligations under international treaties to which it is a party.

Grants under the PACP Local may be provided for the purposes of giving effect to Australia’s obligations under the following international conventions:

- the *United Nations Framework Convention on Climate Change*, particularly Article 4 (which, among other things, requires Parties to formulate, implement, publish and regularly update national programs containing measures to facilitate adequate adaptation to climate change);
- the Kyoto Protocol to the *United Nations Framework Convention on Climate Change*, particularly Article 10 (which is in similar terms to the obligation outlined above); and
- the Paris Agreement, particularly Articles 7 and 8 (which, among other things, require Parties to:
 - implement climate change adaptation measures, including by building the resilience of socioeconomic and ecological systems in relation to the effects of climate change (Article 7), and
 - enhance action and support with respect to loss and damage associated with the adverse effects of climate change (Article 8)).

Projects funded under the PACP Local may be directed at addressing and adapting to the impacts of climate change; for instance, by improving the resilience of communities against damage caused by natural disasters, to the extent that the increased risk of such disasters is attributable to climate change.

Power to grant financial assistance to the states

Section 96 of the Constitution empowers the Parliament to ‘grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’.

The PACP Local may involve the provision of financial assistance to one or more States.

Territories power

Section 122 of the Constitution empowers the Parliament to ‘make laws for the government of any territory’.

The PACP Local may involve the provision of financial assistance to one or more territories. The PACP Local may also fund measures within one or more territories.

New **table item 529** establishes legislative authority for government spending on the Territories Stolen Generations Redress Scheme (the Scheme). The National Indigenous Australians Agency (NIAA) has policy and administrative responsibility for the Scheme.

The Scheme is a financial and wellbeing redress package for Stolen Generations survivors who were removed as children in the Northern Territory or the Australian Capital Territory prior to their respective self- government, or the Jervis Bay Territory (the Territories). The Scheme facilitates a process of truth-telling as part of the nation’s journey to reconciliation, and represents a major practical step forward towards healing.

On 5 August 2021, the Prime Minister, the Hon Scott Morrison MP, and the Minister for Indigenous Australians, the Hon Ken Wyatt AM MP, jointly announced the Scheme as part of the Commonwealth’s first *Closing the Gap Implementation Plan*. Media release is at <https://www.pm.gov.au/media/commonwealths-closing-gap-implementation-plan>.

The Government has committed \$378.6 million over five years to 2025-26 for the Scheme to:

- make one-off payments of up to \$75,000 in recognition of the harm suffered as a result of removal for Stolen Generations survivors;
- make one-off healing assistance payments of \$7,000 in recognition of the trauma for Stolen Generations survivors who were removed in the Territories; and
- help survivors gain access to counselling and support services, including providing each survivor the opportunity to confidentially tell their story about the impact of their removal to a senior official within government and have it acknowledged through a face-to-face or written direct personal response.

The Scheme is designed to give agency to Stolen Generations survivors to address the impact of trauma resulting from historical circumstances that continue to deny those affected by removals the advantages essential for the full development of human personality. The purpose of the Scheme is to address the ongoing impact of past policies as felt by the Stolen Generations. It aims to achieve a meaningful recognition of, and healing from, the harm caused by the removal of these people from their family, community, culture, language and surroundings.

The Scheme confers benefits on this group of Indigenous peoples through monetary payments and, importantly, by providing access to non-monetary redress such as an opportunity for survivors to tell their story and receive a direct personal response. This latter form of redress offers an acknowledgement of the harm caused and has proven, at least in other like contexts, to play a meaningful role in the healing process. In these ways, the Scheme seeks to recognise and address the harm suffered by members of the Stolen Generations.

Commonwealth expenditure associated with the Scheme will include all costs to establish, implement and maintain the Scheme by the NIAA. This includes expenditure for the payments under the Scheme, costs associated with delivering direct personal responses, engaging Independent Assessors, and costs associated with providing legal, financial, counselling and other advisory and support services in relation to the Scheme.

The Scheme will operate from 1 March 2022 to 30 June 2026. It opens for applications between 1 March 2022 and 28 February 2026. It will be voluntary to apply to participate in the Scheme and the Scheme's length will ensure a sufficient period of time for applications to be made. The final four months of the Scheme are to process any applications made up until the application period end date and to deliver any remaining direct personal responses.

Applications may also be brought forward for Stolen Generations survivors who pass away between 5 August 2021 and 28 February 2026. That is, where a survivor (or someone acting on their behalf) 'registers an interest', indicates an 'intention to apply', or submits an application (whether in full or in part) before the survivor passes away, the application may be considered under the Scheme. This also enables the healing process to start as soon as possible.

As the Scheme is largely administratively based, the detailed eligibility criteria and evidentiary requirements are set out in Scheme policies, procedures and guidelines. This enables the Scheme to be survivor-focused and trauma informed, and more accessible and understandable. The relevant policies addressing eligibility criteria and evidentiary requirements will be publicly available on the Scheme's website (www.territoriesredress.gov.au).

Broadly, to determine if an applicant is eligible for redress under the Scheme, the decision-maker must be satisfied that it is 'plausible' that both of the following criteria are met:

- the applicant is a person of Aboriginal and/or Torres Strait Islander descent, who is a Stolen Generations survivor. In assessing this, the decision-maker will consider:
 - whether the applicant was removed from their family or community by a government agency or non-government body, or an officer of such an agency or body;
 - whether the applicant was under the age of 18 at the time of removal;
 - whether the applicant's Aboriginal and/or Torres Strait Islander descent was a factor in their removal;
 - any other factors that are relevant to determining whether the applicant meets this criterion; and
- the applicant's removal took place in the:
 - Northern Territory before 1 July 1978;
 - Australian Capital Territory before 11 May 1989; or
 - Jervis Bay Territory.

It is anticipated around 3,600 Stolen Generations survivors who were removed whilst living in the Territories will be positively impacted by the Scheme.

The NIAA will have an administrative role in assessing applications and collating records. Decisions on the Scheme will be made in the manner appropriate for the type of expenditure available.

The Chief Executive Officer, who is the accountable authority of the NIAA, or a delegate at the Senior Executive Service (SES) Band 1 level or above with subject matter expertise, will be responsible for making decisions on who will receive payments under the Scheme. The SES Band 1 is the primary delegate for decisions in relation to eligibility to receive redress. The delegation is only exercised by alternative delegates where the SES Band 1 has a real or perceived conflict of interest, or when an applicant requests a review of a decision made by the SES Band 1. Limiting the delegations to specified SES roles within the NIAA ensures the Scheme decision-makers are qualified and informed to make an appropriate and considered decision. The accountable authority or delegate is able to exercise discretion in regards to a finding against the eligibility criteria where they consider it would be in the interests of justice or equity to find a person eligible.

Prior to making the decision, case managers within the NIAA will undertake a preliminary assessment of an application to ensure it is completed correctly and undertake any necessary research to support the application. Then an Independent Assessor (whose services will be procured by the NIAA on the basis of their skills, qualifications and expertise) will assess the application and make a recommendation to the accountable authority or delegate on whether an applicant is eligible.

Decisions on, and the administration of, redress payments and healing assistance payments under the Scheme will be made in accordance with the requirements of the *Financial Framework (Supplementary Powers) Act 1997*; the PGPA Act; rules, policies and procedures under the Scheme; the *Territories Stolen Generations Redress Scheme (Facilitation) Bill 202*; the amendments to relevant legislation made by the *Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 202*; and the Commonwealth resource management framework, in particular Resource Management Guide No. 411. It is anticipated that payments to eligible applicants will be made subject to an arrangement between the Commonwealth and the eligible applicant (most likely a deed).

Details relating to recipients of payments under the Scheme, including amount of payments received, will not be made publicly available due to privacy considerations. Other forms of expenditure will comprise both grant and procurement arrangements. Specifically, the NIAA will either grant fund, or procure as appropriate, a range of independent services related to the Scheme, including those that support applicants throughout the Scheme, in accordance with applicable legislative requirements under the PGPA Act, relevant rules applicable to procurements and grants being the *Commonwealth Procurement Rules* (CPRs) and the CGRGs respectively, as well as the NIAA's Accountable Authority Instructions.

A range of delivery methods may be used such as direct, open and limited tender procurements or grant funding arrangements comprising either new grants or further funding under existing grant arrangements. The selection of which method of delivery to use will depend on the nature of the activity. The Indigenous Procurement Policy will be a key factor underpinning procurement processes to support the Scheme delivery. Final spending decisions will be made by the accountable authority or an appropriate delegate.

The NIAA will procure, or provide grant funding, as appropriate for the following services through third parties, using administered and departmental funds:

- practical and emotional support;
- legal advice;

- financial counselling;
- communications products;
- data searches;
- interpreters;
- facilitators; and
- Independent Assessors.

For procurement processes, the NIAA will provide an opportunity for suppliers and tenderers to make complaints if they wish, and to receive feedback. These complaints and inquiries can be made at any time during the procurement process, and will be handled in accordance with probity requirements. Procurement decisions will be based on value for money, including capability and capacity to deliver, and price and risk considerations. Information about the tender and the resultant contracts will be made available on AusTender (www.tenders.gov.au) once the contracts are signed.

Where appropriate, the NIAA will fund organisations to provide applicant support services such as free application support, legal advice and financial counselling through a range of grant opportunities in accordance with the Commonwealth resource management framework, including the PGPA Act and the CGRGs. Support services under the Scheme will be funded through a range of grants. Grants for practical application and emotional support services will be managed in-house by the NIAA through a non-competitive direct approach. This approach is recommended based on the existing footprint of the service providers, existing relationships with many potential applicants (through the family tracing and reunion process), and the specialised services they deliver.

Independent legal advice and financial counselling services will be delivered by an individual organisation through grant arrangements, similar to those available to applicants under the National Redress Scheme. The grants will be managed in-house by the NIAA.

Final spending decisions will be made by the accountable authority or an appropriate delegate within the NIAA. The decision-making authority in relation to selecting and funding services for the Scheme is governed by the same policy that applies to payment decisions under the Scheme. The same positions listed above (SES Band 1 or above) hold decision-making authority, and decisions will be escalated depending on the value of funding and identified level of risk considered in the decision. The financial delegation thresholds are specified in the NIAA Instrument of Delegation.

Decisions associated with the approval to enter into grant arrangements and legally commit funding will be made based on the NIAA's financial delegations and assessment of risk. The normal safeguards apply to the exercise of the decision-making power by the delegate, as contained in the PGPA Act, the Public Governance, Performance and Accountability Rule 2014, the *Financial Framework (Supplementary Powers) Act 1997*, the *Privacy Act 1988* and the CPRs. In addition, NIAA delegates must comply with the NIAA Conflict of Interest Policy, NIAA Privacy Policy and NIAA Values and Behaviours.

Information about grants, including relevant grant opportunity guidelines, will be made available on the GrantConnect website (www.grants.gov.au).

The final decision on whether an applicant is to receive a payment under the Scheme will be made by the accountable authority of the NIAA in accordance with fair, competent and

documented processes. This will involve an Independent Assessor assessing a person's application against eligibility criteria.

Independent Assessors are engaged by the NIAA under a fee for service arrangement after being selected via an extensive merit selection process. Independent Assessors are obliged under the terms of their engagement to identify and disclose to the NIAA any actual, potential or perceived conflicts of interests that may arise, or which the Independent Assessor may become aware of, in the course of providing assessments.

If an Independent Assessor recommends an application as ineligible for redress, the application is referred to a second Independent Assessor for review, before a recommendation to the delegate for final decision. Independent Assessors are not permitted under any circumstances to contact each other and discuss cases that have been assessed as ineligible. This directive also extends to when an applicant requests a review after being formally notified by a Scheme representative of a decision as it relates to Scheme eligibility.

The NIAA ensures the new Independent Assessor undertaking the review has all relevant information, including any information provided by the applicant with their request for review. The new Independent Assessors do not have access to assessment notes created by any previous Independent Assessors assigned to the applications and stored on the Scheme case management system.

The eligibility criteria for redress under the Scheme is relatively simple, and the standard of proof on an applicant is low. As at 2 October 2022, the Scheme has made determinations on 305 applications, with only three of those applicants found ineligible for redress. This means less than 1 per cent of decisions have been adverse to the applicant. The Scheme, including the review process, has a strong focus on trauma-informed practices, with the overarching aim of 'doing no further harm'.

Information about the internal review process is contained within the Offer Letter sent to Scheme applicants and through the advice from the Scheme's free independent legal advice and financial counselling support service. Applicants are encouraged to seek this free legal advice throughout the entire application process. At the same time the Scheme eligibility policies are published on the Scheme's website, the NIAA will also publish a factsheet on the review process to ensure Scheme applicants are fully informed about the application process, internal review process and support available throughout the entire application process.

The Scheme's internal review approach is consistent with the review mechanism for the National Redress Scheme for people who experienced institutional child sexual abuse (the National Redress Scheme), which is a significantly larger and more complex scheme. Having different review mechanisms could create an unintended negative inference for the National Redress Scheme, as well as disparity between two Commonwealth redress schemes.

Noting the review process available as detailed above, decisions on whether an applicant is to receive a payment under the Scheme are not considered suitable for independent merits review, as this could result in delays to delivery of the Scheme. As many of Stolen Generations survivors are now elderly and suffering life-threatening illnesses, a delay in the provision of payments involves a significant public interest element. The ARC has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.34, 4.35 and 4.38 of the ARC guide).

Decisions made in connection with the procurement of services that support the delivery of the Scheme will follow standard processes for the engagement of commercial services that represent value for money to the Commonwealth. In procuring services, the Commonwealth is likely to only require a limited number of providers for each service and only has limited resources to do this. As there are potentially multiple suppliers that may be successfully selected to provide services, an allocation that has been made to another supplier would be affected by a review overturning the original decision.

Consequently, resources available for the procurements is finite. By negatively impacting the security of future funding for the successfully selected supplier, this may delay the provision of time critical services required to implement the Scheme. The ARC has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.19 of the ARC guide). Even though such decisions are not considered appropriate for merits review, procurements will be conducted in accordance with the CPRs, and will be subject to the *Government Procurement (Judicial Review) Act 2018* which provides an existing review mechanism for procurements conducted by Commonwealth agencies.

With respect to decisions associated with grant funding providers to deliver ancillary services in respect of the Scheme, these have been identified as grant arrangements because of important policy considerations that mean they are only appropriate to deliver as a grant. These include that the services will be funded from finite resources by providers selected according to certain criteria as well as that there is an identified need to have the services delivered with a level of independence from government, and that it would otherwise be inappropriate for the Commonwealth to obtain them in the way it obtains such services for itself (that is, through a procurement from the commercial market, subject to arrangements that are only applicable to the Commonwealth).

As with procurements, the Commonwealth is likely to only require a limited number of grant recipients to deliver each program and only has limited funding to do this. As there are potentially multiple recipients that may be eligible for funding, an allocation that has been made to another recipient would be affected by a review overturning the original decision.

Consequently, these decisions to provide grant funding to recipients will be based on the allocation of finite resources between applicants with the capacity to successfully deliver program objectives. A reviewed decision made in relation to one grant would affect decisions in relation to others, particularly around timing and funding amounts, which could jeopardise the delivery of activities which are time critical, create inefficiencies and directly affect participants' experience of the Scheme.

Moreover, there is no reason in policy to apply any additional review requirements beyond that which is ordinarily applied to the processes above (grants and procurements) conducted by the Commonwealth. These services and activities mirror grants and procurements implemented to support similar schemes including the National Redress Scheme. Considerations such as the requirement to responsibly manage public funds under the CGRGs and to achieve value for money under the CPRs, as applicable to grants and procurements respectively, sufficiently promote effective decision making such that further review would be an unnecessary burden on these processes.

The NIAA engages with, and funds, key Stolen Generations organisations (such as The Healing Foundation, Link Up Services, and Social Emotional Wellbeing providers) regularly on issues relevant to Stolen Generations policy and programs. It is through these relationships and listening to these organisations that this Scheme has been developed.

An External Advisory Board will provide critical advice to the NIAA throughout the establishment, policy development, and implementation phases of the Scheme to ensure it is delivered in a survivor-focused, trauma-informed and culturally sensitive manner. The Board membership includes representatives of key Indigenous organisations that have direct engagement and/or service delivery to Stolen Generations survivors.

The Healing Foundation, in its role in partnering with Stolen Generations survivors and organisations to address the ongoing trauma caused by removal of children, is well placed to advise the NIAA as to how to ensure the Scheme operates to best meet the needs of Stolen Generations survivors. The Healing Foundation has agreed to participate as a member of the External Advisory Board.

The NIAA continues to engage with the Department of Social Services and the Department of Defence and Aboriginal Affairs, NSW about their respective redress schemes (the National Redress Scheme, the Defence Reparations Scheme and its predecessor the Defence Abuse Response Taskforce, and the NSW Stolen Generations Reparations Scheme), seeking to apply their learnings to the Scheme.

The NIAA intends to undertake significant communications and stakeholder engagement to seek the views of Stolen Generations survivors and organisations about the design and delivery of the Scheme and to ensure potential applicants are aware of the Scheme. The NIAA has developed a communications strategy and a stakeholder engagement plan to facilitate this. The NIAA's ability to engage in-person with Stolen Generations survivors to hear their views and to raise awareness of the Scheme has been impacted by COVID-19 lockdowns and border restrictions. The NIAA is looking at alternative engagement approaches to facilitate awareness of the Scheme.

Funding of \$378.6 million over five years from 2021-22 for the Scheme is expected to be included in the 2021-22 Mid-Year Economic and Fiscal Outlook and Portfolio Additional Estimates Statements for the Prime Minister and Cabinet portfolio. Funding will come from the NIAA's Indigenous Advancement Strategy Program 1.3: Safety and Wellbeing and Program 1.7: Program Support, which are part of Outcome 1.

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 race power (section 51(xxvi)); and
- the territories power (section 122).

Race power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

The Scheme will fund the provision of redress by the Commonwealth in relation to Indigenous Australians who were removed as children in the Northern Territory or Australian

Capital Territory, prior to their respective self-government, or in Jervis Bay Territory. In particular, the Scheme will provide the following:

- redress payments to recognise the hurt caused by removal;
- healing payments to assist with the trauma arising from removal; and
- the opportunity to receive a direct personal response from the Commonwealth.

These benefits will be available in respect of Indigenous Australians only (although the survivor may not, in every case, be the recipient of the relevant payment. For example, where a member of the Stolen Generations has passed away, a payment might be made to their estate).

Territories power

Section 122 of the Constitution empowers the Parliament to ‘make laws for the government of any territory’.

The Scheme will support the provision of redress in respect of removals that took place in the Northern Territory, Australian Capital Territory and Jervis Bay Territory during the period in which the Commonwealth was responsible for administering those territories.

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 (Prime Minister and Cabinet Measures No. 11) Regulations 2021

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 (Prime Minister and Cabinet Measures No. 11) Regulations 2021* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on certain activities to be administered by the National Recovery and Resilience Agency (NRRA) and the National Indigenous Australians Agency. Both agencies are within the Prime Minister and Cabinet portfolio.

This disallowable legislative instrument adds the following table items to Part 4 of Schedule 1AB:

- table item 528 ‘Preparing Australian Communities Program—Projects of Local Significance’; and
- table item 529 ‘Territories Stolen Generations Redress Scheme’.

Table item 528 – Preparing Australian Communities Program—Projects of Local Significance

New table item 528 establishes legislative authority for government spending on projects of local significance under the Preparing Australian Communities Program (the PACP Local).

The PACP Local is part of the Preparing Australia Program, which was announced by the Prime Minister, the Hon Scott Morrison MP, on 5 May 2021. The objectives of the Preparing Australia Program are to:

- improve the long-term resilience of Australian communities and households to natural hazards due to climate change; and
- deliver disaster risk reduction projects that reduce hazard exposure or vulnerability and are aligned with the recommendations of the *Royal Commission into National*

Natural Disaster Arrangements and the National Disaster Risk Reduction Framework.

The Preparing Australia Program will comprise two streams:

- Preparing Australian Communities, including projects of local significance (PACP Local) and projects of national significance; and
- Preparing Australian Homes.

The PACP Local will provide grant funding for locally identified and locally led projects that improve the resilience of communities against natural hazards. Round 1, which will open on 10 December 2021, will focus on projects that will improve the resilience of communities against bushfires, floods and tropical cyclones as these hazards cause major impacts (disruption, damage and loss) on homes and infrastructure with significant fatalities.

The PACP Local is open to applications for projects all around Australia. The intended outcome of grant opportunities under the PACP Local is to support eligible entities to undertake disaster risk reduction and resilience initiatives that provide public benefit through reducing:

- the impact of future natural hazards due to climate change on Australian communities; and
- the burden (cost and time) of recovery in communities following future disasters.

Activities to be funded under the PACP Local are expected to target or deliver resilience in one or more of the following domains:

- social environment – increasing the community’s social resilience to relevant natural hazards (for example, projects that strengthen social networks that enable the community to continue functioning in the event of a disaster);
- economic environment – improving the ability of the local economy to withstand and recover from relevant natural hazards (for example, projects that enable businesses to continue operating in the event of a disaster);
- natural environment – increasing the disaster resilience of and/or reducing the disaster risk to natural assets such as wetlands, rivers, land, forests, and other assets; and
- built environment – increasing the disaster resilience of and/or reducing the disaster risk to natural assets such as transport, energy and telecommunications, utilities, housing, and other assets.

The NRRA has responsibility for the Preparing Australia Program, including the PACP Local.

Human rights implications

Table item 528 may engage the following rights:

- the right to an adequate standard of living – Article 11 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2;
- the right to enjoyment of the highest attainable standard of health – Article 12 of the ICESCR;
- the inherent right to life – Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR), read with Article 2; and

- the right of persons with disabilities to protection and safety in situations of risk (including natural disasters) – Article 11 of the *Convention on the Rights of Persons with Disabilities* (CRPD), read with Article 4.

Article 2 of the ICESCR and the ICCPR and Article 4 of the CRPD, broadly speaking, require each State Party to give effect to the rights recognised in those Conventions.

Article 11(1) of the ICESCR provides that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions...

The PACP Local will protect communities from the impacts of natural disasters that would otherwise diminish their standard of living.

Article 12(1) of the ICESCR provides that the States Parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The PACP Local will engage the right to the enjoyment of the highest attainable standard of health by reducing the impact of natural disasters on communities.

Article 6(1) of the ICCPR provides that every human being has the inherent right to life. The PACP Local will reduce the likelihood of death from natural disaster

Article 11 of the CRPD provides that:

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

The PACP Local will engage the right of persons with disabilities to protection and safety in situations of risk (including natural disasters) insofar as projects would reduce the likelihood of people with disabilities suffering harm as a result of natural disasters.

Conclusion

Table item 528 is compatible with human rights because it promotes the protection of human rights.

Table item 529 – Territories Stolen Generations Redress Scheme

New table item 529 establishes legislative authority for government spending on the Territories Stolen Generations Redress Scheme (the Scheme). The National Indigenous Australians Agency (NIAA) has policy and administrative responsibility for the Scheme.

The Scheme is a financial and wellbeing redress package for Stolen Generations survivors who were removed as children in the Northern Territory or the Australian Capital Territory prior to their respective self- government, or the Jervis Bay Territory (the Territories). The

Scheme facilitates a process of truth-telling as part of the nation's journey to reconciliation, and represents a major practical step forward towards healing.

The Government has committed \$378.6 million over five years to 2025-26 for the Scheme to:

- make one-off payments of up to \$75,000 in recognition of the harm suffered as a result of removal for Stolen Generations survivors;
- make one-off healing assistance payments of \$7,000 in recognition of the trauma for the Stolen Generations survivors who were removed in the Territories; and
- help survivors gain access to counselling and support services, including providing each survivor the opportunity to confidentially tell their story about the impact of their removal to a senior official within government and have it acknowledged through a face-to-face or written direct personal response.

The Scheme will operate from 1 March 2022 to 30 June 2026. It opens for applications between 1 March 2022 and 28 February 2026. It will be voluntary to apply to participate in the Scheme and the Scheme's length will ensure a sufficient period of time for applications to be made. The final four months of the Scheme are to process any applications made up until the application period end date and to deliver any remaining direct personal responses.

Human rights implications

Table item 529 engages the following rights:

- the right to health – Article 12(1) of the ICESCR, read with Article 2;
- the right to protection and assistance for the family – Article 10(1) of the ICESCR;
- the rights of equality and non-discrimination – Articles 3, 16 and 26 of the ICCPR, read with Article 2; and Articles 1 and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), read with Article 2;
- the right to self-determination – Article 1 of the ICCPR and Article 1 of the ICESCR; and
- the right to an effective remedy – Article 2(3) of the ICCPR.

Right to health

Article 2 of the ICESCR provides that each State Party undertakes to take steps to the maximum of its available resources with a view to achieving progressively the full realisation of the rights recognised in the Covenant, by all appropriate means.

Article 12(1) of the ICESCR recognises the right of everyone to enjoy the highest attainable standard of physical and mental health. The Committee on Economic, Social and Cultural Rights has interpreted this to encompass the right to enjoy a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health.

Table item 529 will authorise expenditure in relation to payments to recognise the harm caused by removals and facilitate healing and the provision of related support under the Scheme (such as access to free wellbeing and counselling services). It is intended that payments can be made by instalment if chosen by the recipient, and applicants and recipients will be able to access independent support services funded through the Scheme. By facilitating the making of payments and access to support, table item 529 and the Scheme advance the right to health by providing opportunities for applicants and recipients to access

payments and services that can promote their overall physical and mental health in a manner of their choosing. This could include utilising the payments for services such as counselling or traditional healing approaches.

Right to protection and assistance for the family

Article 10(1) of the ICESCR guarantees the widest possible protection and assistance to the family. The Scheme provides for payments in recognition of the harm caused by removals which damaged family connections, and to facilitate healing of that harm. Recipients may choose to utilise payments under the Scheme to assist in repairing or re-establishing those family connections.

Table item 529 facilitates the provision of relevant payments under the Scheme, which will be available to recipients to utilise for these purposes if they so choose.

Rights of equality and non-discrimination

Article 2 of the ICCPR requires the States Parties ‘to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant’ and ‘where not already provided for by existing legislative or other measures...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant’.

The rights of equality and non-discrimination are contained in Articles 2, 3, 16 and 26 of the ICCPR and Articles 1 and 5 of the ICERD. These rights recognise that all human beings have the right to be treated equally and not to be discriminated against.

Of particular relevance, Article 2 of the ICERD requires States Parties to condemn racial discrimination and undertake ‘to pursue by all appropriate means...a policy of eliminating racial discrimination in all its forms and promoting understanding among all races’. The ICERD further establishes a general prohibition on racial discrimination. The *Racial Discrimination Act 1975* implements this prohibition in Australian domestic law.

The Scheme is designed for the benefit of Indigenous Australians who meet eligibility criteria. As such, the Scheme, in conjunction with table item 529, raise the issue of racial discrimination.

Article 1(4) of the ICERD provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Where a special measure is taken, it is deemed not to be racial discrimination. Table item 529, operates as part of a special measure in the context of Article 1(4) in that it authorises expenditure for the purposes of the Scheme. Table item 529, the *Territories Stolen*

Generations Redress Scheme (Facilitation) Bill 2021 and the Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021 should be considered as a package.

The Scheme, and table item 529, is designed to give agency to Stolen Generations survivors to address the impact of trauma resulting from historical circumstances that continue to deny those affected by removals the advantages essential for the full development of human personality. The purpose of the Scheme is to address the impact of past policies as presently felt by the Stolen Generations. It aims to achieve a meaningful recognition of, and healing from, the harm caused by the removal of these people from their family, community, culture, language and surroundings.

The Scheme confers benefits on this group of Indigenous peoples through monetary payments and, importantly, by providing access to non-monetary redress such as an opportunity for survivors to tell their story and receive a direct personal response. This latter form of redress offers an acknowledgement of the harm caused and has proven, at least in other like contexts, to play a meaningful role in the healing process. In these ways, the Scheme seeks to recognise and address the harm suffered by members of the Stolen Generations.

The Scheme will assist in extending equal enjoyment and exercise of human rights and fundamental freedoms to relevant Stolen Generations survivors because:

- a. the Scheme is designed to help address the harm caused to this group by past practices;
- b. that harm may have been felt across a whole range of areas, affecting survivors' enjoyment of a variety of human rights and freedoms (political, economic, social, and, importantly, cultural) in the past and on an ongoing basis; and
- c. redress is intended to help heal that past and ongoing harm (with recipients free to apply payments however most benefits them), thereby helping eligible persons to enjoy their relevant rights and freedoms on an equal basis with others.

Table item 529 facilitates the Scheme by authorising the provision of payments, as well as associated expenditure under the Scheme, such as expenditure in providing direct personal responses and support services. Table item 529 will be operational for the life of the Scheme. As the Scheme is intended to operate from 1 March 2022 to 30 June 2026, table item 529 and the Scheme will only maintain separate rights for Stolen Generations survivors for a finite period. By facilitating the Scheme, table item 529 advances the rights to equality and non-discrimination by being part of a special measure.

Right to self-determination

Article 1 of the ICCPR and Article 1 of the ICESCR recognise that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The Scheme responds to calls by Indigenous community stakeholders for the establishment of a redress scheme. The Scheme will have an External Advisory Board to monitor and advise on the establishment and implementation phases and, critically, to ensure the Scheme is delivered in a trauma-informed and culturally sensitive manner. Key Indigenous organisations, such as The Healing Foundation and Link Up Services, and trauma specialists will be invited to participate. The Healing Foundation, in its role of partnering with

individuals and organisations to address the ongoing trauma caused by removal of children, is well placed to ensure the Scheme operates to best meet the needs of those who suffered harm caused by removals.

In authorising expenditure in relation to payments and funding relevant activities under the Scheme, table item 529 will assist participants in the Scheme in pursuing their economic, social and cultural development.

Right to an effective remedy

Article 2(3) of the ICCPR provides that:

Each State Party to the present Covenant undertakes:

- a. to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- b. to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- c. to ensure that the competent authorities shall enforce such remedies when granted.*

The United Nations Human Rights Council advises that such remedies under Article 2(3) should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons. Further, such remedies should not be restricted to punishment of the perpetrator of the discrimination, and should extend to the awarding of financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.

Table item 529 will authorise expenditure for the Commonwealth to make payments and provide direct personal responses to eligible participants in the Scheme.

On 13 February 2008, the then Prime Minister, the Hon Kevin Rudd MP, made the apology to Australia's Indigenous peoples. In this statement, he reflected on the mistreatment of the Indigenous peoples who were the Stolen Generations. Whilst the payments under the Scheme are not in the nature of compensation or damages, they are intended to achieve recognition of, and healing from, the harm suffered as a result of removal. Direct personal responses also offer an acknowledgement of the harm suffered and have proven, at least in other like contexts, to play a meaningful role in the healing process. In these ways, the Scheme seeks to recognise and facilitate healing from the harm suffered as a result of removal.

To the extent that the mistreatment impacted the human rights of members of the Stolen Generations as recognised under the ICCPR, by authorising the expenditure of funding to make payments and provide direct personal responses, table item 529 and the Scheme seek to assist eligible participants to heal and, consequently, pursue an effective remedy.

The Scheme is designed to advance the right to an effective remedy by providing a pathway for participants to seek and receive a remedy. It is voluntary to access the Scheme and potential applicants may choose to seek a remedy through other means outside of the Scheme, such as through the courts. The Scheme provides an alternative, simpler pathway participants may voluntarily choose to pursue.

Eligibility for participation in the Scheme will be determined by the Commonwealth in accordance with fair, competent and published processes. This will involve an Independent Assessor assessing a person's application against eligibility criteria that will be found in guidelines and making a recommendation to the accountable authority of the NIAA on eligibility. Independent Assessors will be engaged on the basis of their skills, qualities and expertise. The accountable authority will then make a decision on whether a payment should be made to the applicant. Opportunities will exist under the Scheme for an application to be reviewed where an applicant may be found to not be eligible. These processes will be set out in the guidelines on administering the Scheme.

The Scheme is intended to operate from 1 March 2022 to 30 June 2026, and to be open for applications between 1 March 2022 and 28 February 2026. It will be voluntary to apply to participate in the Scheme and the Scheme's length will ensure a sufficient period of time for applications to be made. The final four months of the Scheme are to process any applications made up until the application period end date and to deliver any remaining direct personal responses.

Conclusion

Table item 529 is compatible with human rights because it promotes the protection of human rights.

Senator the Hon Katy Gallagher
Minister for Finance