

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 21 March 2022 for the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2022* [F2022L00353] to confirm that funding information on the Papua New Guinea Independent Management Arrangement will not be made publicly available to maintain the confidential nature of the arrangement.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Home Affairs Measures No. 1) Regulations 2022*

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*.

The Principal Regulations are exempt from sunseting under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunseting regime under the *Legislation Act 2003*, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties (particularly those extending beyond 10 years), as well as the Commonwealth's legislative authority to continue making, varying or administering arrangements, grants and programs.

Additionally, the Principal Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. To ensure that the Principal Regulations continue to reflect government priorities and remain up to date, the Principal Regulations are subject to periodic review to identify and repeal items that are redundant or no longer required.

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. Section 32D of the FF(SP) Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

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.

The *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2022* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for the Government to provide funding to the Papua New Guinea (PNG) Government to support its independent management of the residual regional processing caseload. The funding arrangement is administered by the Department of Home Affairs.

Regional processing as a key pillar of Operation Sovereign Borders is an important element of Australia's strong border protection policies against maritime people smuggling. Regional processing arrangements have been in place since 2012 in partnership with the governments of Nauru and PNG.

On 6 October 2021, the Minister for Home Affairs, the Hon Karen Andrews MP and Papua New Guinea's Minister for Immigration and Border Security, the Hon Westly Nukundj MP, jointly announced the finalisation of the Regional Resettlement Arrangement (RRA). The Ministers agreed that regional processing arrangements in PNG would transition to the PNG Government's full and independent management from 1 January 2022, realising a long shared objective of the PNG and Australian Governments.

Australia's association with regional processing arrangements in PNG ended on 31 December 2021 with the transition of arrangements and individuals remaining in PNG, to the PNG Government's independent management.

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 Home Affairs.

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 (Home Affairs Measures No. 1) Regulations 2022*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2022*.

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 administered by the Department of Home Affairs (the department).

New **table item 540** establishes legislative authority for the Government to provide funding to support Papua New Guinea's (PNG) independent management of the residual regional processing caseload.

The Funding Arrangement Supporting Papua New Guinea's Independent Management of the Residual Regional Processing Caseload (the Independent Management Arrangement) provides funding to, or for the benefit of, the PNG Government to support its full and independent management of the residual caseload in PNG. The residual caseload comprises persons transferred to PNG prior to 1 January 2022 as unauthorised maritime arrivals in connection with PNG's designation as a regional processing country and who remain in PNG after 31 December 2021 on a permanent or temporary basis, and their family members.

Regional processing, as a key pillar of Operation Sovereign Borders, is an important element of Australia's strong border protection policies against maritime people smuggling. Regional processing arrangements have been in place since 2012 in partnership with the governments of Nauru and PNG.

On 6 October 2021, the Minister for Home Affairs, the Hon Karen Andrews MP and the PNG's Minister for Immigration and Border Security, the Hon Westly Nukundj MP, jointly announced the finalisation of the Regional Resettlement Arrangement (RRA). The Ministers agreed that regional processing arrangements in PNG would transition to the PNG Government's full and independent management from 1 January 2022, realising a long shared objective of the PNG and Australian Governments. The media release is available at <https://minister.homeaffairs.gov.au/KarenAndrews/Pages/finalisation-of-the-regional-resettlement-arrangement.aspx>.

Consistent with this announcement, Australia ended regional processing arrangements with PNG on 31 December 2021. Australian-held service delivery contracts ended on 31 December 2021. Effective 1 January 2022, the PNG Government became fully and independently responsible for the management of the residual caseload in PNG.

The department negotiated a funding arrangement with the PNG Government to support its full and independent management of the residual caseload, including settlement support for those on a permanent or temporary settlement pathway in PNG. Australian and PNG officials entered into the Independent Management Arrangement on 16 December 2021.

The Independent Management Arrangement provides funding to, or for the benefit of, the PNG Government to support its delivery of the following services and supports to the residual caseload:

- accommodation and welfare assistance, including income support for individuals without employment;
- health services, including mental health supports;
- employment, education and training linking; and
- status resolution support to assist with third country migration outcomes, including assisted voluntary return, or PNG citizenship.

The PNG Government has established a community integration framework to support the residual cohort to live and reside in PNG, either permanently or temporarily pending other durable migration outcomes. The PNG Government has established a robust settlement framework and engaged a number of service delivery partners to support its service delivery.

Legislative authority through a new table item **540** to Part 4 of the Schedule 1AB, will put beyond doubt the legislative authority governing payments under the Independent Management Arrangement to the PNG Government.

Funding under the Independent Management Arrangement with PNG is provided as a procurement, consistent with earlier arrangements and in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013*, the Commonwealth Procurement Rules and the Accountable Authority Instructions of the department.

The Independent Management Arrangement was executed by a SES Band 2, Regional Processing and Resettlement Division, the official with lead responsibility for regional processing arrangements, in compliance with existing financial delegation. Details are exempt from publication on AusTender.

Funding decisions made in connection with the procurement are not considered appropriate for merits review as they relate to policy decisions of a high political content affecting Australia's relations with other countries. Given the high political consequence of this funding decision, as well as the impact this funding decision will have on Australia's relationship with other countries, including but not limited to the Government of PNG, it is appropriate that the decision is not subject to merits review. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.22 to 4.30 of the guide, *What decisions should be subject to merit review?*).

Extensive consultation occurred between PNG and Australian Government officials on the Independent Management Arrangement, with respective PNG and Australian Ministers endorsing the final Independent Management Arrangement.

Funding for the Independent Management Arrangement forms part of the overall administered funding for regional processing of \$877.3 million in 2021-22. Funding will come from Program 2.4: IMA Offshore Management, which is part of Outcome 2. Details are set out in the *Portfolio Additional Estimates Statements 2021-22, Home Affairs Portfolio* at page 37. Program 2.4 provides for all regional processing costs including ongoing regional processing operations in Nauru and third country resettlement, of which the Independent Management Arrangement is a component.

The funding supports the Government of PNG deliver its commitment to independently manage the caseload, in turn reducing legal risks associated with Australia's exit from regional processing arrangements in PNG. The arrangement is of bilateral significance and enabled Australia's withdrawal from regional processing arrangements in PNG.

The expenditure amount was confidentially negotiated and agreed with the Government of PNG. Disclosure of the amount would breach the confidential nature of the arrangement and could compromise PNG's ability to manage the residual caseload independently, including the potential to cause significant damage to the Australia/Papua New Guinea bilateral relationship. The Government will not publicly release financial information to ensure confidentiality is maintained.

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 aliens power (section 51(xix)); and
- the Pacific Islands power (section 51(xxx)).

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, as well as matters concerning Australia's relations with other nations. The program provides funding to, or for the benefit of, PNG to assist its independent management and delivery of services and other forms of support to the residual regional processing caseload in PNG.

Aliens power

Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to ‘naturalization and aliens’. The funding will assist PNG to deliver services and other forms of support to persons who were transferred to PNG in connection with its role as a regional processing country prior to 31 December 2021, as well as their family members.

Pacific Islands power

Section 51(xxx) of the Constitution empowers the Parliament the power to make laws with respect to ‘the relations of the Commonwealth with the islands of the Pacific’. The program involves funding to, or for the benefit of, the Government of PNG.

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 (Home Affairs Measures No. 1) Regulations 2022

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 (Home Affairs Measures No. 1) Regulations 2022* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for the Government to provide funding to the Papua New Guinea's (PNG) Government under the Funding Arrangement Supporting Papua New Guinea's Independent Management of the Residual Regional Processing Caseload (the Independent Management Arrangement). The Department of Home Affairs is responsible for the spending activity.

The Independent Management Arrangement provides funding to, or for the benefit of, the PNG Government to support its full and independent management of the residual caseload in PNG. The residual caseload comprises persons transferred to PNG prior to 31 December 2021 as unauthorised maritime arrivals in connection with PNG's designation as a regional processing country and who remain in PNG after 31 December 2021 on a permanent or temporary basis, and their family members.

On 6 October 2021, the Minister for Home Affairs, the Hon Karen Andrews MP and the PNG Minister for Immigration and Border Security, the Hon Westly Nukundj MP, jointly announced the finalisation of the Regional Resettlement Arrangement. The Ministers agreed that regional processing arrangements in PNG would transition to the PNG Government's full and independent management from 1 January 2022, realising a long shared objective of the PNG and Australian Governments. Australia's association with regional processing arrangements in PNG ended on 31 December 2021 with the transition of arrangements and individuals remaining in PNG to the PNG Government's independent management.

The Independent Management Arrangement supports PNG's independent management of the residual caseload from 1 January 2022; delivering a broad range of settlement supports and

services. The PNG Government has established a robust settlement framework and engaged a number of service delivery partners to support its service delivery arrangements. Services include:

- accommodation and welfare assistance, including income support for individuals without employment;
- health services, including mental health supports;
- employment, education and training linking; and
- Status Resolution Support to assist with third country migration outcomes, including assisted voluntary return, or PNG citizenship.

Human rights implications

The disallowable legislative instrument does not engage any of the applicable human rights or freedoms. The disallowable legislative instrument confirms the regulatory authorisation of financial assistance under the Independent Management Arrangement to PNG to support its full and independent management of the Residual Caseload.

The disallowable legislative instrument does not engage the applicable human rights and freedoms as Australia's human rights obligations are essentially territorial. Persons in a regional processing country are outside Australia's territory. Australia has accepted that there may be exceptional circumstances in which the rights and freedoms set out under the *International Covenant on Civil and Political Rights* and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* may apply to persons beyond the territory of a State party, and the extent of the obligations that may be engaged where it is operating extra-territorially will be informed by the degree of control exercised by the State. Australia does not exercise the degree of control necessary in a regional processing country to enliven Australia's international obligations

Conclusion

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

**Senator the Hon Katy Gallagher
Minister for Finance**