

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Prime Minister and Cabinet's Portfolio Measures No. 5) 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 (Prime Minister and Cabinet's Portfolio Measures No. 5) Regulations 2022* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Referendum Engagement Group program (the program), which forms part of the Government's strategy to deliver its election commitment for a referendum to enshrine an Aboriginal and Torres Strait Islander Voice (Voice) in the Constitution. The program is administered by the National Indigenous Australians Agency (the Agency), part of the Prime Minister and Cabinet portfolio.

The program supports meetings of the First Nations Referendum Engagement Group (Engagement Group) to discuss building community awareness and understanding of, and support for, a referendum to alter the Constitution to provide for a Voice, and to discuss building support for a Voice enshrined in the Constitution.

Funding of \$6.5 million over two years from 2022-23 has been allocated to the Agency to support the referendum, including to establish a governance structure to support the special advisory groups that are engaging with First Nations stakeholders and providing advice to government. The special advisory groups include the Engagement Group.

The Engagement Group comprises more than 60 First Nations leaders and representatives of key organisations from across Australia. The Engagement Group meets to:

- discuss strategies to engage First Nations people and the broader community and provide insights on community understanding, awareness and support for the referendum;
- provide advice on, and discuss strategies to assist with, building community understanding, awareness and support for the referendum; and
- discuss strategies to advocate for a Voice enshrined in the Constitution.

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 registration on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Agency and the Department of the Prime Minister and Cabinet.

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's Portfolio Measures No. 5) Regulations 2022*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 5) Regulations 2022*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration 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 National Indigenous Australians Agency (the Agency), part of the Prime Minister and Cabinet portfolio.

New **table item 585** establishes legislative authority for government spending on the Referendum Engagement Group program (the program), which forms part of the government's strategy to deliver its election commitment for a referendum to enshrine an Aboriginal and Torres Strait Islander Voice (Voice) in the Constitution.

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- discuss strategies to advocate for a Voice enshrined in the Constitution.

Funding to support the meetings of the Engagement Group will cover expenditure relating to Engagement Group meetings, including sitting fees for members, costs associated with travel, catering, facilities (venue hire and equipment hire) and other related arrangements.

The Engagement Group is one of three key advisory groups established by the Government in the context of the referendum to enshrine a Voice in the Constitution. The other groups are: the First Nations Referendum Working Group (Working Group) and the Constitutional Expert Group.

The Working Group works together with government and guides the big questions that need to be considered in the coming months, including the timing to conduct a successful referendum, refining the proposed constitutional amendment and question, and determining the information on the Voice necessary for a successful referendum. The Constitutional Expert Group provides the Working Group with legal support on key issues relating to the content and drafting of the proposed constitutional amendment proposed by the Prime Minister in his address to the Garma Festival and the referendum more generally.

The Agency's delivery of the program will involve procurement, including on things such as catering and facilities for Engagement Group meetings. Procurement will be undertaken in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the *Commonwealth Procurement Rules* (CPRs) and the Agency's Accountable Authority Instructions.

Final spending decisions will be made by the Chief Executive Officer of the Agency or an appropriate SES Band 1 delegate with relevant subject-matter expertise as specified in the Agency's Instrument of Delegation, Financial Management No. 3 of 2022.

The Agency 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. Information about the tender and the resultant contracts will be made available on AusTender (www.tenders.gov.au) once relevant contracts are signed, if the reporting threshold is met. Procurement decisions will be based on value for money, including capability and capacity to deliver, and price and risk considerations.

Independent merits review would not be suitable for decisions made in connection with procurements. Payments such as expenditure on catering, venue hire and equipment hire will include the allocation of finite resources and the decisions to provide payments to certain service providers. Payments to members related to their attendance at meetings of the Engagement Group follow from their appointment to undertake a specified function and are unsuitable for independent merits review on that basis. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of the above nature (see paragraphs 4.11 to 4.19 of the guide ‘*What decisions should be subject to merit review?*’).

The applicable expenditure frameworks including the PGPA Act, CPRs and the Agency’s Accountable Authority Instructions provide assurances that expenditures under the program, which are inappropriate for independent merits review, will be sufficiently covered by accountability and transparency mechanisms.

The Agency consulted with key stakeholders within government, including the Department of the Prime Minister and Cabinet, the Department of Finance, and the Attorney-General’s Department, in relation to the governance structure for the referendum, including the Engagement Group.

The Government has consulted with members of the Engagement Group about the scope of its activities, and it will continue to do so. The members of the Engagement Group have expertise about the proposal for a Voice and other issues affecting Aboriginal and Torres Strait Islander people.

The Government will consult with Aboriginal and Torres Strait Islander peoples and relevant experts in relation to other referendum engagement activities that will be funded under the program.

Funding of \$6.5 million, which contains funding for the program is included in the 2022-23 October Budget under the measure ‘Delivery of a First Nations Voice to Parliament Referendum – preparatory work’ over a period of two years commencing in 2022-23. Details are set out in *Budget October 2022-23, Budget Measures, Budget Paper No. 2* at page 107.

Funding for this item will come from Program 1.7: Program Support, which is part of Outcome 1. Details are set out in *Portfolio Budget Statements 2022-23, Budget Related Paper No. 1.11, Prime Minister and Cabinet Portfolio* (National Indigenous Australians Agency) at page 210.

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 power to legislate with respect to the manner in which the vote is to be taken on a proposed law for the alteration of the Constitution (section 128); and
- the express incidental power (section 51(xxxix)).

Power to legislate with respect to the manner in which the vote is to be taken on a proposed law for the alteration of the Constitution and the express incidental power

Section 128 of the Constitution empowers the Parliament to make laws with respect to the manner in which the vote is to be taken on a proposed law for the alteration of the Constitution.

The express incidental power in section 51(xxxix) of the Constitution empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested in the Parliament, the executive or the courts by the Constitution, including the powers of the Parliament with respect to the alteration of the Constitution.

The program will provide funding to enable the Engagement Group to meet to discuss matters relating to holding a referendum to enshrine a Voice in the Constitution including building community awareness, understanding and support.

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's Portfolio Measures No. 5) 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*.

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- discuss strategies to advocate for a Voice enshrined in the Constitution.

Human rights implications

This disallowable legislative instrument engages the following rights:

- the right to take part in public affairs and elections – Article 25 of the *International Covenant on Civil and Political Rights* (ICCPR), read with Article 2;
- the right to self-determination – Article 1 of the ICCPR and the *International Covenant on Economic Social and Cultural Rights* (ICESCR), read with Article 2; and
- the right to enjoy and benefit from culture – Article 27 of the ICCPR.

Right to take part in public affairs and elections

Article 2 of the ICCPR states that each State Party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 25 of the ICCPR relevantly provides that every citizen shall have the right and the opportunity, without any distinction including race, to take part in the conduct of public affairs. This disallowable legislative instrument engages the right to take part in public affairs and elections in article 25 of the ICCPR as it will enable the funding of the program. The right is positively engaged as the program encourages participation in the referendum and related public debate on amendments to the Constitution.

Right to self-determination

Article 2 of the ICESCR requires States Parties to take steps to progressively achieve the full realisation of the rights recognised in the Covenant by all appropriate means.

Articles 1 of the ICCPR and of the ICESCR provide 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. This disallowable legislative instrument positively engages the right to self-determination through enabling participation, including by First Nations people, in the referendum and related public debate on amendments to the Constitution for a Voice.

Right to enjoy and benefit from culture

Article 27 of the ICCPR provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. This disallowable legislative instrument engages the right to enjoy and benefit from culture as it will enable participation,

including by First Nations people, in the referendum and related public debate on amendments to the Constitution for a Voice.

The program is compatible with human rights because it promotes the right to take part in public affairs and elections, the right to self-determination and the right to enjoy and benefit from culture. The program does not engage with other human rights.

Conclusion

This disallowable legislative instrument is compatible with human rights because it promotes the protection of human rights.

Senator the Hon Katy Gallagher
Minister for Finance