

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 3) 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 (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 3) Regulations 2022* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for the Government to provide a grant to Newcastle Airport Pty Limited (NAPL) to upgrade the international terminal facilities at Newcastle Airport. The grant is administered by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts.

The grant will fund construction of upgraded international terminal facilities to increase the capacity, efficiency and effectiveness of international passenger and border services facilities (customs, immigration and biosecurity) at Newcastle Airport. These facilities will provide opportunities for international air passenger and freight services to and from the Hunter Region, with positive economic and connectivity impacts including increased employment opportunities in tourism, trade and education, which will support regional economic recovery from COVID-19 impacts.

Funding of \$55 million over two years from 2022-23 will be provided to NAPL as a closed non-competitive grant, subject to NAPL's business case meeting the national interest test under the framework covering the provision of border services at new and redeveloping international airports.

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 Department of Infrastructure, Transport, Regional Development, Communications and the Arts.

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 (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 3) Regulations 2022*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 3) 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 3 of Schedule 1AB (table)

This item adds one new table item to Part 3 of Schedule 1AB to establish legislative authority for government spending on a certain activity to be administered by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department).

New **table item 64** establishes legislative authority for the Government to provide a grant to Newcastle Airport Pty Limited (NAPL) to upgrade the international terminal facilities at Newcastle Airport.

The grant to NAPL will deliver on the Government's election commitment for significant upgrade of Newcastle Airport's international passenger terminal. The upgrade will provide economic and connectivity benefits to Newcastle and the Hunter region, boosting international tourism, trade and education through facilitating more direct international flights and helping accelerate regional recovery from COVID-19 impacts.

Civil aircraft operations at Newcastle Airport provide air links for residents of the Hunter, Central Coast and Northern NSW regions. It is Australia's sixth largest regional airport and serviced nearly 1.3 million passengers in 2019, contributing more than \$1.16 billion to the

state's economy annually, including \$300 million to the visitor economy and supporting over 5,700 full-time employees across tourism and aviation industries.

The Government previously provided funding of \$66.1 million over two years from 2021-22 in the 2021-22 Budget to upgrade the Newcastle Airport runway to accommodate wider and heavier aircraft. The upgrade elevates the airfield to Code E status and provides the ability to host wide-bodied aircraft capable of international long-haul routes.

Funding of \$55 million over two years from 2022-23 was provided as part of the 2022-23 October Budget to upgrade the Newcastle Airport international terminal. This includes works to increase the capacity, efficiency and effectiveness of international passenger and border services facilities (customs, immigration and biosecurity) at Newcastle Airport.

The upgraded terminal will drive significant, sustainable economic benefits across the region through inbound tourism and new freight-related export and import industries. It is expected that Newcastle Airport will be international-ready in 2024 with both airfield and terminal works scheduled for completion early that year.

Grant funding to NAPL will be subject to its business case meeting the criteria in the national interest test under the framework covering the provision of border services at new and redeveloping international airports (the framework).

The framework is administered by the department in close consultation with the Australian border agencies (the Department of Home Affairs, the Australian Border Force and the Department of Agriculture, Fisheries and Forestry). The framework requires airport operators to submit the business case to the department for consideration to seek the Government's approval to either new or significant redevelopment of an existing international airport facility.

The framework's objective is to ensure border services and resources are only provided at airports where it is in the national interest to do so. The criteria that government considers when deciding whether to provide border services to airports seeking to expand or introduce new international flights includes the expected benefits to economy, tourism, trade and investment, rural and regional Australia, social benefits and funding and resourcing.

Under the framework, airports are responsible for the costs associated with establishment (or re-establishment) or re-location of border services within their international terminals. The Australian border agencies are responsible for ongoing costs of providing services. The Framework is available at www.infrastructure.gov.au/infrastructure-transport-vehicles/aviation/international-aviation/international-airports.

Subject to a positive assessment and NAPL's business case being agreed by Government under the framework, the department will provide funding to NAPL as a closed non-competitive grant process. The department considers this selection process appropriate as the grant is specifically dependent on NAPL being able to upgrade international terminal facilities at Newcastle Airport.

The grant will be administered by the department on the basis that expertise on the framework will be critically important to assist with the establishment and oversight of the grant contract.

The grant agreement will provide staged reimbursement for eligible works undertaken. Final payments under the grant will be subject to independent verification of claims. Eligible grant activities will be activities directly related to upgrading international terminal facilities including those incurred in upgrading facilities for use by border agencies.

The grant will be administered in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines 2017*. Information about the grant, including final decisions, will be made available on the GrantConnect website (www.grants.gov.au).

The Minister for Infrastructure, Transport, Regional Development and Local Government will approve the grant opportunity guidelines and grant agreement. A delegate of the Secretary of the department under the *Financial Framework (Supplementary Powers) Act 1997* will be responsible for approving Commonwealth payments provided to NAPL for the upgrade. The delegate (at the SES level) will have the relevant expertise in, and understanding of, aviation policy, and be able to perform relevant functions in accordance with the Commonwealth resource management framework.

The department will only make payments after the grant recipient has demonstrated it has met agreed milestones and satisfactory Progress Reports have been approved by the relevant department delegate.

Independent merits review of decisions made in connection with the grant would not be considered appropriate because the decisions relate to the provision of a one-off grant to a specific service provider, over other service providers. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.16 to 4.19 of the guide, *What decisions should be subject to merit review?*).

The review and audit process undertaken by the Australian National Audit Office also provides a mechanism to review Government spending decisions and report any concerns to the Parliament. These requirements and mechanisms help to ensure the proper use of Commonwealth resources and appropriate transparency around decisions relating to making, varying or administering arrangements to spend relevant money.

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 spending decisions would also have recourse to the Commonwealth Ombudsman where appropriate.

The department and the Australian border agencies have been engaging with NAPL since 2018 on the potential upgrade of its international terminal to facilitate increased international air services at Newcastle Airport.

The department will continue to work closely with NAPL to finalise the grant agreement and the Australian border agencies will continue to consult with NAPL on the final detailed terminal design to ensure that border facilities within the upgraded international terminal are built to the required standards to enable efficient and effective passenger processing.

The department has also consulted with the Department of Defence, the owner of the airport, to ensure NAPL continues to have responsibility for fulfilling its contractual obligations.

Consultation with key stakeholders will continue until the upgrades are completed.

Funding of \$55 million for the grant was included in the 2022-23 October Budget under the measure ‘Support for the Aviation Sector’ for 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 165.

Funding for this item comes from Program 2.3: Air Transport, part of Outcome 2. Details are set out in Portfolio Budget Statements 2022-23, Budget Related Paper No. 1.12, Infrastructure, Transport, Regional Development, Communications and the Arts Portfolio at page 45.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the purpose of the item references the following powers of the Constitution:

- the Commonwealth place power (section 52(i)); and
- the trade and commerce power (section 51(i)).

Commonwealth place power

Section 52(i) of the Constitution empowers the Parliament to make laws with respect to ‘placed acquired by the Commonwealth for public purposes’. The places referred to in section 52(i) are often called ‘Commonwealth places’.

Newcastle Airport is located on Commonwealth-owned land.

Trade and commerce power

Section 51(i) of the Constitution empowers the Parliament to make laws with respect to ‘trade and commerce with other countries, and among the states’.

The initiative involves providing a grant to NAPL to increase the capacity, efficiency and effectiveness of international passenger and border processing facilities at Newcastle Airport which may foster interstate and/or international trade and commerce activities.

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 (Infrastructure, Transport, Regional Development, Communications and the Arts Measures No. 3) 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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Human rights implications

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

Conclusion

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

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