

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 and Communications Measures No. 6)
Regulations 2020*

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 FF(SP) Act applies to 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 (Infrastructure, Transport, Regional Development and Communications Measures No. 6) Regulations 2020* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Local Roads and Community Infrastructure Program (the LRCI Program). The Department of Infrastructure, Transport, Regional Development and Communications has responsibility for the LRCI Program.

Under the LRCI Program, grant funding of \$500 million over two years from 2020-21 will be provided to local councils and other bodies who are responsible for the provision of local community services and infrastructure to support construction and maintenance of, and improvements to, priority local road and community infrastructure projects across Australia. The LRCI Program aims to support community-led recovery from the adverse effects of the coronavirus known as COVID-19. Construction activity will take place between 1 July 2020 and 30 June 2021.

The LRCI Program was announced by the Prime Minister, the Hon Scott Morrison MP, the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP, and the Minister for Regional Health, Regional Communications and Local Government, the Hon Mark Coulton MP, on 22 May 2020 as part of the Government's wider economic response to COVID-19.

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 Infrastructure, Transport, Regional Development and Communications.

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 and Communications Measures No. 6) Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 6) Regulations 2020*.

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

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 Infrastructure, Transport, Regional Development and Communications (the department).

New **table item 424** establishes legislative authority for government spending on the Local Roads and Community Infrastructure Program (the LRCI Program).

It is appropriate to include the LRCI Program in the *Financial Framework (Supplementary Powers) Regulations 1997* as government spending on the LRCI Program will be time limited and not recurrent, and has a limited purpose and expenditure criteria, such as eligibility, which are clearly described in the COVID-19 LRCI Program Guidelines. Further, spending on the LRCI Program will not affect personal rights and liberties.

Under the LRCI Program, the Government will provide grant funding of \$500 million over two years from 2020-21 to local councils and other bodies who are responsible for the provision of local community services and infrastructure (local governments) to support construction and maintenance of, and improvements to, priority local road and community infrastructure projects across Australia.

The objective of the LRCI Program is to stimulate additional infrastructure construction activity in local communities across Australia to assist communities to manage the adverse

impacts of the coronavirus known as COVID-19. It is expected that local governments will, where possible, use local businesses and workforces to deliver projects funded by the Program to ensure stimulus funding flows into local communities, thus supporting local jobs, firms and procurement.

Under the LRCI Program, the Government will calculate a 'nominal funding allocation' in respect of each local government area based on a formula modelled on funding allocations under the Roads to Recovery Program and the local road component of the Financial Assistance Grants program. The value of each eligible funding recipient's allocation has been derived based on recommendations from the relevant Local Government Grants Commission, which takes into consideration factors such as population estimates and road length in each local governing body area.

Each eligible funding recipient (generally, the local council responsible for the local government area) will receive a letter of offer to participate in the LRCI Program, which will specify their nominal funding allocation. The eligible funding recipient must accept the offer and enter into a grant agreement with the Commonwealth to receive funding under the LRCI Program up to the nominal funding allocation amount.

Various requirements apply to the funding, including that:

- grant money can only be used on:
 - eligible local road projects (involving the construction or maintenance of roads managed by local governments); and
 - eligible community infrastructure projects (involving the construction, maintenance and/or improvements to government-owned assets (including natural assets) that are generally accessible to the public);
- the projects need to be additional to an eligible funding recipient's existing work plan;
- construction activity on eligible projects must be undertaken between 1 July 2020 and 30 June 2021 (except where agreed in exceptional circumstances);
- for projects over \$10,000, signs must be erected that comply with signage guidelines; and
- reporting be provided, including on amounts spent, details of progress on projects and jobs supported by the funding, on a quarterly, annual and (where required) ad hoc basis.

Eligible funding recipients will be required to nominate projects they intend to spend grant money on in a work schedule, which will need to be approved before funding is paid. Approval will be based on whether the work schedule complies with the requirements set out in the grant agreement and the LRCI Program Guidelines.

Funding under the LRCI Program will be paid in up to three instalments, with the first instalment equal to 50 per cent of a recipient's nominal funding allocation to rapidly inject needed funds into local communities. The first instalment will be paid within four weeks of the work schedule being approved by the department. The second and third instalments will be paid based on quarterly reporting against the work schedule. The third instalment will be equal to a minimum 10 per cent of a recipient's nominal funding allocation, and is subject to the recipient submitting an Annual Report. The third instalment may include costs incurred from construction activity undertaken pre-30 June 2021, and post-30 June 2021 in exceptional circumstances with prior agreement by the department.

The LRCI Program was announced by the Prime Minister, the Hon Scott Morrison MP, the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP, and the Minister for Regional Health, Regional Communications and Local Government, the Hon Mark Coulton MP, on 22 May 2020 as part of the Government's wider economic response to COVID-19. Details of the announcement are available at <https://minister.infrastructure.gov.au/mccormack/media-release/18-billion-boost-local-government>.

The Program is a demand-driven (eligibility-based) grants program, and will be conducted in accordance with the requirements of the *Public Governance, Performance and Accountability Act 2013* and instruments made under that Act (including the *Commonwealth Grants Rules and Guidelines 2017*).

Eligibility to be a recipient of funds under the LRCI Program has been pre-determined, and nominal funding amounts pre-allocated based on a formula as set out in the LRCI Program Guidelines, which have been approved by the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development.

Eligible funding recipients can only receive funding under the LRCI Program for projects that meet the LRCI Program Guidelines and the terms and conditions of the grant. The Secretary of the department (or delegate) will assess whether projects proposed by an eligible funding recipient in their work schedule meet the LRCI Program Guidelines and the terms and conditions of the grant before the first instalment of funding can be paid, and approve the release of the first instalment. Decisions on payment of further instalments will be made by the Secretary of the department (or delegate) in accordance with the LRCI Program Guidelines and the terms and conditions of the grant, based on reporting by the eligible funding recipients.

The LRCI Program Guidelines can be found on the departmental website at <http://www.investment.infrastructure.gov.au/lrci> and on GrantConnect at www.grants.gov.au. The department will publish details of the grants awarded on GrantConnect.

Funding decisions made in connection with the LRCI Program are not suitable for independent 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 (see paragraph 4.11 of the Administrative Review Council's guide, *What decisions should be subject to merit review?*). Further, if one allocation of funding were altered, this has the potential of affecting all other grants (see paragraph 4.15 of the Administrative Review Council's guide). Therefore, independent merits review of decisions under the LRCI Program is not available.

Consultation on the LRCI Program was widely conducted. The Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP, sought assistance from all local councils to identify potential projects that could be fast-tracked given the economic impacts being experienced from the COVID-19 pandemic. Projects nominated by councils have informed the scope of the LRCI Program. The Australian Local Government Association was also consulted in developing the LRCI Program and associated Program Guidelines.

Funding of \$500 million over two years from 2020-21 will be included in the July Economic and Fiscal Update and the 2020-21 Portfolio Budget Statements for the Infrastructure, Transport, Regional Development and Communications Portfolio. Funding will come from Program 3.2: Local Government, which is part of Outcome 3.

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 express incidental power and the executive power (sections 51(xxxix) and 61), including the nationhood aspect;
- the interstate and overseas trade and commerce power (section 51(i));
- the communications power (section 51(v));
- the race power (section 51(xxvi));
- the external affairs power (section 51 (xxix));
- the power to grant financial assistance to any State (section 96); and
- the Territories power (section 122).

Executive power and express incidental power, including the nationhood aspect

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. Section 61 of the Constitution supports activities that are peculiarly adapted to the government of a nation and cannot be carried out for the benefit of the nation otherwise than by the Commonwealth.

Spending under the LRCI Program is directed at addressing the severe effects of the national crisis resulting from COVID-19.

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’.

Spending under the LRCI Program may be on interstate roads, or intrastate roads that feed into interstate roads or carry interstate traffic to a significant degree, or for projects to promote interstate or overseas tourism.

Communications power

Section 51(v) of the Constitution empowers the Parliament to make laws with respect to ‘postal, telegraphic, telephonic and other like services’.

Spending under the LRCI Program may involve spending on internet hubs.

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’.

Spending under the LRCI Program may include projects that benefit particular communities of Indigenous Australians.

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.

Australia has obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). In particular:

- Article 2 which provides that States Parties will undertake steps, particularly including adopting legislative measures, to achieve progressive realisation of the rights recognised by the ICESCR;
- Article 6 which recognises ‘the right to work’ and requires States Parties to ‘take appropriate steps to safeguard this right’ including the implementation of ‘programmes ... to achieve ... full and productive employment’.

Australia also has obligations under the International Labour Organization’s *Convention concerning Employment Policy* (ILO Convention 122). In particular:

- Articles 1 and 2 of the ILO Convention 122 require Members to pursue ‘an active policy designed to promote full, productive and freely chosen employment’, including deciding on and keeping under review measures to attain this objective.

Spending under the LRCI Program is likely to support and enhance employment in local government areas. It is expected that local governments will, where possible, use local businesses and workforces to deliver projects funded by the LRCI Program to ensure stimulus funding flows into local communities, thus supporting local jobs, firms and procurement.

Power to grant financial assistance to 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’.

Spending under the LRCI Program may involve grants of financial assistance to States.

Territories power

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

Spending under the LRCI Program may take place in a territory.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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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 FF(SP) Act applies to 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 (Infrastructure, Transport, Regional Development and Communications Measures No. 6) Regulations 2020* (the Regulations) amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on the Local Roads and Community Infrastructure Program (the LRCI Program). The Department of Infrastructure, Transport, Regional Development and Communications has responsibility for the LRCI Program.

Under the LRCI Program, the Government will provide grant funding of \$500 million over two years from 2020-21 to local councils and other bodies who are responsible for the provision of local community services and infrastructure (local governments) to support construction and maintenance of, and improvements to, priority local road and community infrastructure projects across Australia.

The objective of the LRCI Program is to stimulate additional infrastructure construction activity in local communities, supporting a community-led recovery from the impacts of the coronavirus known as COVID-19. It is expected, where possible, that local governments will use local businesses and workforces to deliver projects funded by the LRCI Program to ensure stimulus funding flows into local communities, thus supporting local jobs, firms and procurement.

Human rights implications

This disallowable legislative instrument engages with the right to work.

Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises ‘the right to work’ and requires States Parties to ‘take appropriate steps to safeguard this right’ including the implementation of ‘programmes ... to achieve ... full and productive employment’.

The LRCI Program supports the right to work by supporting and enhancing employment in local government areas. It is expected that local governments will, where possible, use local businesses and workforces to deliver projects funded by the LRCI Program, which will support local jobs, firms and procurement.

Conclusion

This disallowable legislative instrument is compatible with human rights because it promotes the right to work under the ICESCR.

**Senator the Hon Mathias Cormann
Minister for Finance**