

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 1 April 2021 for the *Financial Framework (Supplementary Powers) Amendment (Infrastructure, Transport, Regional Development and Communications Measures No. 2) Regulations 2021* [F2021L00409] to include funding information for the Tourism Aviation Network Support Program.

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. 2)
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 (Infrastructure, Transport, Regional Development and Communications Measures No. 2) Regulations 2021* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Tourism Aviation Network Support Program (the TANS program), which will support airlines to provide increased capacity and discounted fares for consumers to travel to regions affected by the downturn in international and domestic tourism resulting from the COVID-19 pandemic. The Department of Infrastructure, Transport, Regional Development and Communications has responsibility for the program.

The tourism sector, particularly its parts that are heavily reliant on international tourism, continue to suffer a significant downturn caused by COVID-19, the closure of international borders and uncertainty around state border closures. The TANS program aims to assist the recovery of a range of regions in Australia that are economically reliant on tourism from the adverse effects on tourism and those regions of the COVID-19 crisis.

The TANS program will provide grant funding to Australian airline operators to enable them to offer discounted fares for flights to identified regions, and additional flights where required, in order to support jobs and generate an economic multiplier effect from tourists spending money on accommodation, food and activities during their stay in those regions.

On 11 March 2021, the Prime Minister, the Hon Scott Morrison MP; the then Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP; the Treasurer, the Hon Josh Frydenberg MP; and the Minister for Trade, Tourism and Investment, the Hon Dan Tehan MP, jointly announced the TANS program as part of the Government's \$1.2 billion *Tourism and Aviation's Flight Path to Recovery* package.

The program will run from 1 April 2021. Tickets will need to be booked by 31 July for travel by 30 September 2021.

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. 2) Regulations 2021*

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. 2) 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 a new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity that will be administered by the Department of Infrastructure, Transport, Regional Development and Communications (the department).

New **table item 475** establishes legislative authority for government spending on the Tourism Aviation Network Support Program (the TANS program).

It is appropriate to include the TANS program in the *Financial Framework (Supplementary Powers) Regulations 1997* as government spending on the program is time limited, and has a limited purpose and expenditure criteria, such as eligibility, which will be clearly described in the program guidelines. Further, spending on the program will not affect personal rights and liberties.

The tourism sector, particularly its parts that are heavily reliant on international tourism, continue to suffer a significant downturn caused by the COVID-19 pandemic, the closure of international borders and uncertainty around state border closures. As a result of consumer concerns about border closures, domestic tourism is also depressed, with a reduction in interstate tourism spending compared to pre-COVID-19.

The TANS program aims to assist the recovery of a range of regions in Australia that are economically reliant on tourism from the adverse effects on tourism and those regions of COVID-19. The initial regions include:

- Broome;
- Avalon;
- Kangaroo Island;
- Lasseter and Alice Springs;
- Merimbula;
- Launceston;
- Devonport and Burnie;
- Gold Coast;
- Sunshine Coast;
- Tropical North Queensland (Cairns);
- Whitsundays and Mackay (Proserpine and Hamilton Island);
- Adelaide;
- Darwin;
- Townsville; and
- Hobart.

On 11 March 2021, the Prime Minister, the Hon Scott Morrison MP; the then Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Michael McCormack MP; the Treasurer, the Hon Josh Frydenberg MP; and the Minister for Trade, Tourism and Investment, the Hon Dan Tehan MP, jointly announced the TANS program as part of the Government's \$1.2 billion *Tourism and Aviation's Flight Path to Recovery* package. Media release is available at minister.infrastructure.gov.au/mccormack/media-release/tourism-and-aviations-flight-path-recovery.

The TANS program will provide grant funding to Australian airline operators to enable them to offer discounted fares for flights to and from identified regions, and additional flights where required, in order to support jobs and generate an economic multiplier effect from tourists spending money on accommodation, food and activities during their stay in those regions.

Funding will be provided to airlines to directly offset half, on average, of the cost to consumers of commercial fares offered on scheduled air services on domestic routes to and from the identified regions. The airlines will also be able to use the provided funding to underwrite the cost of additional flights on domestic routes to and from the identified regions where those flights are not considered commercially viable, with the aim of providing additional capacity for tourists.

Support for airlines will be considered for direct domestic routes operated to and from the identified regions, where the airline has operated that route in the last two years or announced prior to 11 March 2021 that it would commence operating on the route, with scope to consider other routes on a case-by-case basis.

The discounted fares are scheduled to go on sale on 1 April 2021 on airline websites and through third parties such as travel agents. Tickets will need to be booked by 31 July for travel by 30 September 2021. Consumers will be able to access discounted fares at the time

of booking, rather than through a separate voucher or reimbursement system. Airlines will be paid in arrears and in accordance with a grant agreement.

Funding will be allocated through a closed, non-competitive grant process against eligibility and assessment criteria set out in the program guidelines, which will be published on GrantConnect at www.grants.gov.au. Successful grant outcomes will also be published on GrantConnect in accordance with the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs) and the departmental website at www.infrastructure.gov.au.

Grant funding will be administered by the department consistent with the CGRGs. Grant recipients must enter into a legally binding grant agreement whereby they directly deliver the agreed activity within defined terms and conditions.

Departmental officials will be the final decision makers as delegates of the Secretary of the department for grant expenditure under the program. All relevant approvals are subject to the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Decision makers will be supported by experienced assessors from the department. Assessors, who may seek additional information about the applicant or application, will assess applications on their merits against the eligibility and assessment criteria as set out in the program guidelines, and make recommendations to the decision maker on applications to be approved.

Applications will be assessed on the past performance of the applicant airline, on a value for money basis, within the available budget and against eligibility criteria that will include:

- the degree to which the support will contribute to achieving the objectives and outcomes of the TANS program;
- the demonstrated expertise and capacity of the applicant airline to undertake the activity in a timely fashion including logistics, capacity, sales and marketing support; and
- whether the airline has operated direct routes to and from the identified regions in the last two years or announced prior to 11 March 2021 that it would commence operating any such route.

Funding decisions will be made objectively, and in accordance with the assessment process set out in the program guidelines and applicable legislative requirements under the PGPA Act. Applications that meet all eligibility criteria will be ranked against the assessment criteria. Only applications that perform strongly against the assessment criteria will be awarded funding.

Supported grant activities will vary in scope according to the number of eligible routes operated by each airline and the quantum of eligible activities.

The department's decision is final in all matters, including the approval of grants, the grant funding amounts to be awarded, and the terms and conditions of grants. Funding will not be approved if the program funding available will not accommodate the funding offer, and/or the application does not represent value for money.

Funding decisions made in connection with the program are not considered 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. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.11 to 4.14 of the guide, *What decisions should be subject to merit review?*).

As funding requests are expected to exceed the limit of the available funding, only a proportion of suitable applications can be funded. A reviewed decision made in relation to one grant would also affect decisions in relation to all others, particularly around timing and funding amounts, which could jeopardise achievement of the program objectives.

In order to address accountability issues related to the exclusion of a merits review, the program design and assessment process places great emphasis on the administrative accountability for decisions to allocate funding. This includes ensuring that:

- the criteria for funding are made clear in the program guidelines; and
- decisions are made objectively and in accordance with applicable legislative requirements under the PGPA Act.

An applicant who is dissatisfied about the handling of their grant application under the program by the department will be able to lodge a complaint to the program manager for consideration.

Applicants who are otherwise affected by decisions or who have complaints about the TANS program also have recourse to the department, in accordance with the department's Client Service Charter (<https://www.infrastructure.gov.au/department/about/charter.aspx>), and such complaints will be investigated under the department's complaints policy and procedures. If the applicant is not satisfied with the outcome of the department's assessment or investigation of their complaint, they will be able to contact the Commonwealth Ombudsman as a final recourse.

The program responds to extensive consultation across the aviation and tourism sectors and government to understand the magnitude and the nature of the COVID-19 impact on regions, particularly resulting from the closure of international borders, as well as reduced domestic tourism. This includes discussions on the state of the market as part of administering the Domestic Aviation Network Support and the Regional Aviation Network Support programs, and representations from the tourism sector on the impact of COVID-19. Further consultation prior to the introduction of the TANS program was not considered necessary due to the Government being well informed on the relevant issues. However, further consultation has occurred with the airlines as part of developing the program guidelines.

Funding for the TANS program is part of the Government's \$1.2 billion *Tourism and Aviation's Flight Path to Recovery* package, and will be included in the 2021-22 Budget and Portfolio Budget Statements for the Infrastructure, Transport, Regional Development and Communications Portfolio. Funding for the item will come from Program 2.3: Air Transport, which is part of Outcome 2.

The TANS program was announced on 11 March 2021. The Government did not disclose the funding commitment to the TANS program at the time, or subsequently in the Budget papers, pending the outcome of the grant process and subsequent commercial negotiation of program costs with airlines.

The grant agreements executed under the TANS program provide for an Australian Government financial commitment of \$210,740,137.70 (GST inclusive) over 2020-21 and 2021-22. Information about these agreements, including the maximum value of each grant, is published on GrantConnect, as required by Government policy.

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 trade and commerce power (section 51(i));
- the external affairs power (section 51(xxix)); 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. The executive power in 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.

The proposed expenditure responds to the nationwide adverse effects of the COVID-19 pandemic on the tourism sector, and aims to assist regions that are heavily reliant on tourism to recover from the effects of the COVID-19 pandemic.

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 proposed expenditure will support interstate trade and commerce activities of funding recipients by supporting or encouraging interstate air navigation.

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), including:

- Article 2(1) of the ICESCR which provides that each State Party undertakes to take steps to progressively realise the rights recognised in the Covenant ‘by all appropriate means, including particularly the adoption of legislative measures’; and
- Article 6 of the ICESCR which provides that States Parties recognise the right to work and will take appropriate steps to achieve the realisation of this right including through ‘policies and techniques to achieve steady economic, social and cultural development and full and productive employment’.

Australia also has obligations under International Labour Organization's *Convention concerning Employment Policy*. In particular, Articles 1 and 2 of that Convention 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.

The proposed spending will support Australia's implementation of these obligations. It will support and promote employment in the tourism sector, by supporting the continuing viability of tourism businesses in regions particularly reliant on tourism-related businesses for employment.

Territories power

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

The proposed spending may be used to support air navigation to or from 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 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 (Infrastructure, Transport, Regional Development and Communications Measures No. 2) Regulations 2021* amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on the Tourism Aviation Network Support Program (the TANS program), which will support airlines to provide increased capacity and discounted fares for consumers to travel to regions affected by the downturn in international and domestic tourism resulting from the COVID-19 pandemic. The Department of Infrastructure, Transport, Regional Development and Communications has responsibility for the TANS program.

The tourism sector, particularly its parts that are heavily reliant on international tourism, continue to suffer a significant downturn caused by COVID-19, the closure of international borders and uncertainty around state border closures. The TANS program aims to assist the recovery of a range of regions in Australia that are economically reliant on tourism from the adverse effects on tourism and those regions of the COVID-19 crisis.

The TANS program will provide financial support to Australian airline operators to enable them to offer discounted fares for flights to and from identified regions, and additional flights where required, in order to support jobs and generate an economic multiplier effect from tourists spending money on accommodation, food and activities during their stay in those regions.

The program will run from 1 April 2021. Tickets will need to be booked by 31 July for travel by 30 September 2021.

Human rights implications

This disallowable legislative instrument engages the following right:

- the right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2.

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

Article 6 of the ICESCR recognises the right to work.

The instrument promotes the realisation of the right to work by supporting employment in the tourism sector, and by supporting the continuing viability of tourism businesses in those regions particularly reliant on tourism-related businesses for employment.

Conclusion

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

**Senator the Hon Simon Birmingham
Minister for Finance**