

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 1 November 2021 for the *Financial Framework (Supplementary Powers) Amendment (Industry, Science, Energy and Resources Measures No. 1) Regulations 2021* [F2021L01495] to clarify the nature of delegation of administrative powers and functions in relation to the international climate action program.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Industry, Science, Energy and Resources Measures No. 1) 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 (Industry, Science, Energy and Resources Measures No. 1) Regulations 2021* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish (and renew) legislative authority for government spending on international climate action (the program). The program is administered by the Department of Industry, Science, Energy and Resources.

Australia is a longstanding participant in international climate change action and agreements. The program has been implemented consistent with Australia's treaty obligations under the *United Nations Framework Convention on Climate Change*, Kyoto Protocol and Paris Agreement, such as obligations relating to climate finance and capacity building. Australia has a particular focus on assisting developing countries with mitigation of greenhouse gas emissions and adaptation to the impacts of climate change.

The program will establish a high-integrity carbon offset scheme in the Indo-Pacific under Article 6.2 of the Paris Agreement. The Indo-Pacific Carbon Offset Scheme (the scheme) will improve private sector finance flows to the region, deliver economic and development benefits, and transfer low emissions technologies.

The Government will provide \$59.9 million over five years from 2021-22 to support the scheme deliver the following activities:

- strengthening host countries' capacity to participate in global carbon markets and meet Paris Agreement obligations, including through the provision of guidance materials, legal and governance advice, and draft legislation to support carbon market participation;
- developing demonstration offset projects which focus on nature-based solutions, renewable energy and energy efficiency;
- establishing an independent, robust and transparent co-investment mechanism to finance further projects that deliver carbon offset credits beyond 2030;
- developing a digital data analysis and mapping tool to inform partner country governments or businesses in the decision making process;
- provisions to ensure project benefits are appropriately shared with communities and that environmental and social safeguards are in place; and
- regular assessment of progress and lessons learned, and program evaluation to support successful scheme transition to independent operation in year five.

Additional funding of \$44 million over ten years from 2021-22 will be provided to establish a larger number of partnerships under the scheme, with a focus on building capacity to meet Paris Agreement-era emissions reporting and transparency standards, a central requirement for participation in carbon markets.

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 Industry, Science, Energy and Resources.

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 (Industry, Science, Energy and Resources Measures No. 1) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Industry, Science, Energy and Resources Measures No. 1) 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 (and renew) legislative authority for government spending on an activity administered by the Department of Industry, Science, Energy and Resources (the department).

New **table item 512** establishes (and renews) legislative authority for government spending on international climate action (the program).

Australia is a longstanding participant in international climate change action and agreements. The program has been implemented consistent with Australia's treaty obligations under the *United Nations Framework Convention on Climate Change* (UNFCCC), Kyoto Protocol and Paris Agreement, such as obligations relating to climate finance and capacity building.

Australia's participation has had a particular focus on assisting developing countries in mitigation and adaptation. Information about Australia's international climate action can be found in Australia's National Communications and Biennial Reports under the UNFCCC. These are available at <https://www.dfat.gov.au/international-relations/themes/climate-change/australias-reporting>. Legislative authority for that activity has previously been provided by table item 406.018 in Part 4 of Schedule 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997*.

The program will establish a high-integrity carbon offset scheme in the Indo-Pacific under Article 6.2 of the Paris Agreement. The Indo-Pacific Carbon Offset Scheme (the scheme) will improve private sector finance flows to the region, deliver economic and development benefits, and transfer low emissions technologies.

On 23 April 2021, the Prime Minister, the Hon Scott Morrison MP, the Minister for Energy and Emissions Reduction, the Hon Angus Taylor MP, and the Minister for the Environment, the Hon Sussan Ley MP, jointly announced a \$100 million package of measures to protect ocean habitats and coastal environments. The package includes a commitment to develop a high-integrity carbon offset scheme in the Indo-Pacific region. Media release is available at www.pm.gov.au/media/australia-announces-100-million-initiative-protect-our-oceans.

The scheme will build the market architecture to deliver greater amounts of credible abatement for the Australian private sector to potentially purchase in the medium to longer term. For partner countries and Australian businesses, there will be improved reporting coverage of emissions sources in the region and mutual confidence in claimed outcomes.

The Government will provide \$59.9 million over five years from 2021-22 to support the scheme deliver the following activities:

- strengthening host countries' capacity to participate in global carbon markets and meet Paris Agreement obligations. This includes:
 - the design, development, production and distribution of guidance material on carbon market readiness for partner country governments in the Indo-Pacific, including guidance materials to assist partner governments' project approval processes on abatement projects;
 - legal and governance advice on the readiness of a partner country to participate in global carbon markets;
 - preparation of model climate legislation or regulations for use in host countries;
- developing demonstration projects with capacity to generate high-integrity offsets, focussing on nature-based solutions, renewable energy and energy efficiency. Examples include projects to deliver renewable energy mini-grids and off-grid solar systems, and to demonstrate technical performance for different potential technology options and mixes;
- establishing an independent, robust and transparent co-investment mechanism to finance further projects that deliver credits beyond 2030;
- developing a digital data analysis and mapping tool that can be used by partner country governments or businesses to:
 - support decision makers with rapid calculation and forecasting of emissions in host countries; and
 - assess the acceptability of units for Australian purposes, based on the robustness of the abatement estimates and any associated risks;
- developing Paris Agreement-era greenhouse gas inventory systems with partner countries and facilitating a program to train inventory compilers across the region as Technical Expert reviewers of Paris Agreement biennial transparency reports;
- provisions to ensure project benefits are appropriately shared with communities and that environmental and social safeguards are in place;
- regular assessment of progress and lessons learned, and program evaluation to support successful scheme transition to independent operation in 2025-26;

- technical advice on new registry systems and modification of the Australian National Registry of Emissions Units to enable international credits to be brought into the registry; and
- any additional activities required to attract private sector investment in emissions reduction projects, which will address, where cost effective and feasible, investment barriers identified in the legal and governance readiness assessments.

Additional funding of \$44 million over ten years from 2021-22 will be provided to establish a larger number of partnerships under the scheme, with a focus on building capacity to meet Paris Agreement-era emissions reporting and transparency standards, a central requirement for participation in carbon markets.

Spending under the scheme will support:

- contracts to deliver services that will build capacity in partner countries in the Indo-Pacific. This could include building understanding of legal and regulatory requirements to support carbon market activity, good governance arrangements, and creditable abatement opportunities in partner countries;
- contracts to obtain technical advice on amendments to the Australian National Registry of Emissions Units, to enable carbon offset units from abatement projects in the region to come into Australia's registry; and
- contracts with non-government organisations or private sector entities to deliver abatement projects in partner countries, in line with the scheme guidelines.

Further information about scheme design and delivery will be made available on the departmental website in due course.

The department will deliver the scheme through a suite of procurement processes in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the *Commonwealth Procurement Rules* (CPRs) and the department's Accountable Authority Instructions. A range of procurement methods may be used such as open and limited tenders or procurements under existing arrangements. The selection of which procurement method to use will depend on the activity.

The department 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 the contracts are signed. Procurement decisions will be based on value for money, including capability and capacity to deliver, and price and risk considerations.

As the scheme develops over time, the department may also deliver some spending under the scheme as grants or other financial arrangements, if appropriate. Any grants will be administered in accordance with the Commonwealth resource management framework, including the PGPA Act and the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs). Any other financial arrangements will also be administered in accordance with the Commonwealth resource management framework, including the PGPA Act.

The department will manage all contracts, with the exception of contracts to advise on and implement any necessary amendments to the Australian National Registry of Emissions Units, which will be managed by the Clean Energy Regulator.

The Minister for Energy and Emissions Reduction will be the ultimate decision maker for the scheme, with advice from project sponsors (nominated Senior Executive Service officers from the department and the Department of Foreign Affairs and Trade). The Minister will make decisions on high-level issues such as the guidelines for the operation of the scheme and the types of abatement projects to receive investment through the scheme. The project sponsors will receive advice from a steering committee with representatives from a range of relevant Commonwealth agencies, and an advisory body that will include representatives from industry and civil society. Final spending decisions will be made by the Secretary of the department or an appropriate delegate under the department's financial frameworks, made pursuant to the PGPA Act and the *Financial Framework (Supplementary Powers) Act 1997*.

Spending decisions made in connection with the program are not considered suitable for independent merits review, as they are decisions relating to the allocation of a finite resource to service providers under procurement contracts and international partners under international partnership agreements. There would be delays with channelling funds to service providers and international partners and subsequently delays with meeting commitments under procurement contracts and international partnership agreements if funding decisions were subject to merits review. In addition, any funding that has already been paid or allocated to the service provider or international partner would be affected if the original decision was overturned. 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 4.19 of the guide, *What decisions should be subject to merit review?*).

Furthermore, spending decisions made in connection with the program are not considered suitable for merits review as these are policy decisions of a high political content and affect Australia's relations with other countries. If funding decisions are subject to a merits review, it may create a negative impact on the country that was expecting the allocated funding or commitment by Australia under a partnership agreement or pilot program. This may in turn affect the diplomatic relationship between that country and Australia and also Australia's reputation in the international arena. 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?*).

The private sector and relevant non-government organisations are being, and will continue to be, consulted on the design of the scheme, particularly as the scheme transitions from a government-sponsored mechanism to build carbon market capacity and pilot projects in partner countries to a standalone co-investment fund for commercial carbon offset projects. Stakeholders include domestic and international carbon market entities, potential investors and offset buyers, domestic and international project developers and delivery partners. The department has had discussions with many of these stakeholders on international carbon markets over a number of years, and all seem to be supportive of the scheme.

Partner countries are being selected for involvement in the scheme on the basis of abatement potential, willingness to participate in international carbon markets and a shared history with Australia of capacity building, particularly in relation to carbon measurement and reporting issues. Partner country governments will be involved in the co-design of the scheme and any

projects within their respective territories. Countries approached so far have indicated their interest in participating in the scheme.

Funding of \$59.9 million for the program was included in the 2021-22 Budget under the measure ‘Emissions Reduction and New Investments under the Technology Investment Roadmap’ for a period of five years commencing in 2021-22. Details are set out in *Budget 2021-22, Budget Measures, Budget Paper No. 2 2021-22* at pages 138 to 139.

Funding for this item will come from Program 2.1: Reducing Australia’s greenhouse gas emissions, which is part of Outcome 2. Details are set out in the *Portfolio Budget Statements 2021-22, Budget Related Paper No.1.9, Industry, Science, Energy and Resources Portfolio* at page 50.

Additional funding for the program of \$44 million over ten years from 2021-22 is expected to be included in the 2021-22 Mid-Year Economic and Fiscal Outlook and the 2021-22 Portfolio Additional Estimates Statements.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the external affairs power (section 51 (xxix)) of the Constitution.

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.

The UNFCCC [1994] ATS 2 includes a range of obligations on Australia to take actions that reduce emissions of greenhouse gases and address climate change, including through international cooperation.

The UNFCCC relevantly provides that Australia shall:

- formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change (Article 4.1(b));
- promote and cooperate in the development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors including energy, transport, industry, agriculture, forestry and waste management sectors (Article 4.1(c)); and
- adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs (Article 4.2(a)).

Article 6 of the UNFCCC includes obligations in relation to the development and implementation of educational and public awareness programs on climate change and its effects. It also includes obligations relating to ‘the development and implementation of education and training programmes, including the strengthening of national institutions and

the exchange or secondment of personnel to train experts in this field, in particular for developing countries’.

The Kyoto Protocol to the UNFCCC [2008] ATS 2 includes obligations on Australia to take action to reduce emissions, such as Article 10(b). Article 10(b) imposes obligations to formulate, implement and report upon climate change mitigation and adaptation programs.

The Paris Agreement [2016] ATS 24 was entered into by the parties to the UNFCCC to enhance its implementation. Under the Paris Agreement, Australia has a ‘nationally determined contribution’ of a 2030 emissions reduction target of 26 to 28 per cent below 2005 levels. Relevantly, Article 4.2 of the Paris Agreement provides that ‘[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions’.

Other relevant Paris Agreement obligations include:

- Article 5 obligations to conserve and enhance sinks and reservoirs of greenhouse gases;
- Article 6 concerning voluntary cooperation in the implementation of nationally determined contributions, including by internationally transferred mitigation outcomes;
- Article 7 concerning adaptation;
- Article 8 concerning the adverse effects of climate change;
- Article 9 concerning the provision of financial resources to developing countries;
- Article 10 relating to technology development and transfer;
- Article 11 concerning capacity building;
- Article 12 obligations ‘to cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information’; and
- Article 13 concerning reporting and transparency.

A range of international climate change engagement and funding under this item will contribute to meeting these obligations, including spending allocated to the scheme announced in the 2021-22 Budget.

The scheme will improve private sector finance flows to the region, deliver economic and development benefits, and transfer low emissions technologies. For partner countries and Australian businesses, there will be improved reporting coverage of emissions sources in the region and mutual confidence in claimed outcomes. Support for emissions accounting systems overseas will contribute to the transparency of international emissions reporting required by Article 13 of the Paris Agreement and cooperation under Article 6 of the UNFCCC. It will also provide building blocks for voluntary cooperation under Article 6 of the Paris Agreement, and will help build the market architecture required to enable purchase of credible abatement by the Australian private sector in the medium to longer term. Accordingly, the activities supported will further a wide range of international obligations in or under the relevant treaties.

The external affairs power also supports legislation with respect to matters or things outside the geographical limits of Australia. Activities under this program will generally be undertaken outside of the geographical limits of Australia.

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 (Industry, Science, Energy and Resources Measures No. 1) Regulations 2021

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 (Industry, Science, Energy and Resources Measures No. 1) Regulations 2021* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish (and renew) legislative authority for government spending on international climate action (the program). The program is administered by the Department of Industry, Science, Energy and Resources.

Australia is a longstanding participant in international climate change action and agreements, consistent with Australia's treaty obligations under the *United Nations Framework Convention on Climate Change*, Kyoto Protocol and Paris Agreement, and with a particular focus on mitigation and adaptation capacity building in developing countries.

The program will establish a high-integrity carbon offset scheme in the Indo-Pacific under Article 6.2 of the Paris Agreement. The Indo-Pacific Carbon Offset Scheme (the scheme) will improve private sector finance flows to the region, deliver economic and development benefits, and transfer low emissions technologies.

Government funding will support the scheme deliver the following activities:

- strengthening host countries' capacity to participate in global carbon markets and meet Paris Agreement obligations, including through the provision of guidance materials, legal and governance advice, and draft legislation to support carbon market participation;
- developing demonstration offset projects which focus on nature-based solutions, renewable energy and energy efficiency;
- establishing an independent, robust and transparent co-investment mechanism to finance further projects that deliver carbon offset credits beyond 2030;

- developing a digital data analysis and mapping tool to inform partner country governments or businesses in the decision making process;
- provisions to ensure project benefits are appropriately shared with communities and that environmental and social safeguards are in place; and
- regular assessment of progress and lessons learned, and program evaluation to support successful scheme transition to independent operation in year five.

Human rights implications

This disallowable legislative instrument engages the following rights:

- the right to work – Article 6 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), read with Article 2; and
- the right to scientific progress – Article 15 of the ICESCR.

Article 2 of the ICESCR requires that each State Party to the Covenant undertake to take steps to the maximum of its available resources, especially economic and technical, to realise the rights recognised in the Covenant, particularly through legislative measures.

Right to work and right to scientific progress

Article 6 of the ICESCR recognises the right to work and provides that the States Parties will take appropriate steps to achieve the realisation of the right to work, including through technical and vocational training.

Article 15 of the ICESCR requires that each State Party to the Covenant recognise the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests of individuals resulting from any scientific, literary or artistic production. Particularly, Article 15 requires each State Party to the Covenant to recognise the benefits from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

The program promotes government and private sector co-operation with partner countries in the Indo-Pacific region, bringing economic benefits such as additional local jobs in the region and the transfer of low emissions technologies to the region. The activities under the program support Articles 2, 6 and 15 of the ICESCR and more broadly are compatible with core international human rights treaties that Australia is party to.

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**