

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

Financial Framework (Supplementary Powers) Amendment (Defence 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 (Defence Measures No. 2) Regulations 2021* (the Regulations) amend table item 448 in Part 4 of Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Joint Strike Fighter Industry Support Program (JSF-ISP). The amendments to table item 448 seek to provide for the Production and Modernisation opportunity phase of the JSF-ISP. The Department of Defence has responsibility for the JSF-ISP.

The JSF-ISP is a key initiative in support of the global Joint Strike Fighter (JSF) Program, an international aerospace systems capability program led by the United States Government, in collaboration with seven international partner nations including Australia. Participation in the JSF Program by the Australian defence industry has derived many long-term benefits for the Australian economy.

The JSF-ISP consists of two grant opportunities available to Australian companies: the Sustainment opportunity which was launched on 10 December 2020, and the Production and Modernisation opportunity which will be launched in late 2021.

Total funding of up to \$64 million over seven years from 2020-21 will be provided to assist the Australian defence industry in the development of new or improved capabilities that may enhance their competitiveness in winning work as part of the global F-35 Program.

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 Defence.

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 (Defence Measures No. 2) Regulations 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Defence 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 – Part 4 of Schedule 1AB (table item 448, column headed “Program”)

Table item 448 establishes legislative authority for government spending on the Joint Strike Fighter Industry Support Program (JSF-ISP), which is administered by the Department of Defence (the department).

Item 1 amends the name of the program by omitting “—Sustainment Grants” to reflect the expansion of the JSF-ISP scope from only supporting sustainment related grants to include grant opportunities under the Production and Modernisation phase of the JSF-ISP.

Item 2 – Part 4 of Schedule 1AB (table item 448, column headed “Objective(s)”)

Item 2 amends the program objective to reflect an expanded scope of the JSF-ISP. The amended table item 448 establishes legislative authority for government spending on the JSF-ISP to further Australia’s defence capability and preparedness through the acquisition and sustainment of the F-35 Joint Strike Fighter, by funding defence sector enterprises to develop and maintain their capability in relation to the production and maintenance of the F-35 Joint Strike Fighter.

The JSF-ISP is a key initiative in support of the global Joint Strike Fighter (JSF) Program, the largest defence program in the world which relates to the development of the F-35 Joint Strike Fighter for the United States of America and seven international partner nations, including Australia.

As a global partner, Australia has established its own JSF Program (JSFP). In addition to the fundamental objective of supporting Australian defence capability, the Australian JSFP is intended to stimulate the Australian economy by creating significant business opportunities for Australia's defence industry.

Since 2006, Australian companies have secured over \$2.7 billion worth of Joint Strike Fighter production contracts, which has in turn led to a sustained increase in employment with the creation of over 2,400 jobs in the Australian marketplace.

The objective of the JSF-ISP is to support Australian defence industry to meet requirements set by the United States Department of Defense (US DoD), allowing Australian industry to be more competitive in F-35 Program tender processes. The JSF-ISP consists of two grant opportunities available to Australian defence industry: the Sustainment opportunity (Sustainment phase) and the Production and Modernisation opportunity (Production and Modernisation phase).

Australian defence enterprises participating in sustainment, production or modernisation activities are engaged on a contractual basis, either by the F-35 Joint Program Office (F-35 JPO) Prime Contractors Lockheed Martin Corporation and/or Pratt & Whitney (JSFP Prime Contractors); or directly by the US DoD. Australian defence industry is competing for F-35 Joint Strike Fighter supply chain contracts in a global market, whereby suppliers and service providers are subject to a competitive request for quote process and selected on a 'best value' basis.

The requirements to be competitive in securing contracts are relatively onerous, particularly as they relate to security and capital infrastructure. Some such requirements are mandated by the US DoD, while others are required by the Prime Contractors. To ensure that the Australian defence industry remains competitive in the global marketplace for F-35 global production and sustainment activities, the Australian Government has provided funding and support to Australian defence industry through a number of grant and funding programs. The purpose of the JSF-ISP is to continue to support Australian defence industry to compete meaningfully in the F-35 global market for sustainment, production or modernisation activities.

The JSF-ISP Sustainment phase has been developed to support the Assigned-Product Support Providers (A-PSPs) in the development and implementation of their approved Depot Maintenance Activation Plan. This phase was launched on 10 December 2020 with initial funding of \$4 million, supporting A-PSPs to become Qualified F-35 Component Depot Source of Repair for maintenance and repair activities for components used in the JSF.

The Government will provide additional funding of \$56 million to further support the sustainment activities, as well as new funding of \$4 million for the production and modernisation activities over the period of seven years commencing in 2021-22. This funding will assist in developing and maintaining the capability of companies in Australia's defence industry and support their competitiveness in the global F-35 JSF supply chain.

The JSF-ISP Production and Modernisation phase will support Australian companies with the development of new or improved capabilities that may enhance the ability for these

companies to win work in the Production and Modernisation phase of the JSFP. This grant opportunity will be made available to Australian companies in late 2021.

The intended outcomes of the JSF-ISP Production and Modernisation grant opportunity are:

- a strong, successful and skilled defence industry that is committed to increasing the opportunities for the Australian defence industry to identify and make the most of business opportunities within Australia and overseas; and
- improved competitiveness of the Australian defence industry through developing skills of the workforce, fostering innovation and boosting productivity.

The department will deliver the JSF-ISP through an open, non-competitive grant process in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act) and the *Commonwealth Grants Rules and Guidelines 2017* (CGRGs). Grant recipients are selected on the basis of established eligibility criteria for the Sustainment opportunity and merit criteria for the Production and Modernisation opportunity. Both opportunities relate to the legal and operational status of the applicant, the proposed projects and activities for which funding is sought, and the nature of expenditure which the grant is intended to fund.

The applicant must address the assessment criteria and the application is assessed based on the weighting given to each criterion. There are four criteria that total 100 points. Applications will only be considered where applicants achieve a score of at least 50 per cent against each criterion, as these represent best value for money. The assessment criteria are as follows:

- impact of the project (30 points);
- market opportunity (30 points);
- capacity, capability and resources to deliver the project (30 points); and
- impact of grant funding on the project (10 points).

Eligible project activities for which an applicant may apply for funding must be related to the development of a new or improved JSF technology, product, process or service that is required by entities within the JSF supply chain, and which can demonstrate more than one JSF application. Funding can also be used to develop new or improved technologies, products, processes or services to enhance a company's competitiveness in winning work from entities within the JSF supply chain; or to engage in a study effort that relates to a capability required by entities within the JSF supply chain or the JSF Program Office.

Under the JSF-ISP Sustainment opportunity, grants will be limited to up to 50 per cent for planning and analysis of the value agreed in the activation plan, F-35 related project or undertaking, with the remaining 50 per cent expected to be met by JSF-ISP participants. Grant amounts for the Production and Modernisation opportunity will be a minimum of \$150,000 to a maximum of \$1.5 million.

All JSF-ISP grant recipients will be required to enter into a grant agreement with the Commonwealth, which specifies the obligations of the grant recipient to keep detailed records of how the grant is allocated and retain supporting evidence of all associated expenditure. In addition, grant recipients will be required to develop and maintain a project budget and project progress reports.

The JSF-ISP grant program will be administered by the Business Grants Hub, part of the Department of Industry, Science, Energy and Resources (DISER), on behalf of the department and in accordance with the CGRGs. The JSF-ISP eligibility criteria and application process (including opening and closing dates) will be set out in the grant opportunity guidelines which will be published on business.gov.au and www.grants.gov.au.

Applications for a grant under the JSF-ISP Production and Modernisation opportunity will be assessed via a panel review comprised of members that have extensive knowledge of and/or experience in the defence procurement industries relevant to the JSF project. The panel will review the application against the assessment criteria and formulate a recommendation to the Head of Aerospace Systems Division (HASD) within the department. HASD is the current delegate of the Secretary of the department for decisions to award a grant under the New Air Combat Capability Industry Support Program (NACC-ISP) and JSF-ISP.

HASD will therefore be the Program Delegate with responsibility for the program within the department, and will decide which grants to approve taking into account the application assessment by DISER and the availability of grant funds. As the Program Delegate, HASD will not approve funding if there is insufficient program funding available across relevant financial years.

In the event of a complaint in relation to the outcome of an application under the JSF-ISP, decisions made under the JSF-ISP will be subject to an internal review by an officer of the department at least one rank higher than the original decision maker. Complainants who are unsatisfied with the outcome of an internal review of a grant decision may approach the Commonwealth Ombudsman.

Decisions under the JSF-ISP will not be subject to merits review. This is because these decisions relate to the allocation of a finite resource, and overturning a decision to allocate funding to an Australian defence enterprise would affect an allocation that has already been made to another enterprise. 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 4.15 of the guide, *What decisions should be subject to merit review?*).

The outcomes of grant applications and non-sensitive details of the relevant projects will be publicly announced by the Minister for Defence Industry and published on www.business.gov.au and www.grants.gov.au.

The department has consulted with various stakeholders throughout the development of the JSF-ISP. Previous NACC-ISP recipients were provided a survey to determine the success and challenges of the NACC-ISP, and the department took these responses into consideration when developing the JSF-ISP to ensure it met the Australian defence industry's evolving needs.

During the JSF-ISP development, the department also consulted with business advisers in the Centre for Defence Industry Capability (CDIC), part of the department and previously part of DISER, which was established to assist the Australian defence industry with navigating the frameworks for accessing defence industry grants. The department leveraged the advice of CDIC business advisers in relation to the conduct of previous defence industry grant programs, and modelled the JSF-ISP based on that advice.

The department has extensively consulted with the Business Grants Hub design team when designing the JSF-ISP to ensure that the new program aligned with current and previous defence industry grant programs, and that the JSF-ISP guidelines were developed appropriately.

The department has also liaised with its own internal teams in designing the JSF-ISP, including the department's legal and finance teams. These teams have provided guidance and clearance when developing the JSF-ISP guidelines.

Initial funding of \$4 million for the JSF-ISP Sustainment phase was included in the 2020-21 Budget under the measure 'Joint Strike Fighter Industry Support Program' for a period of four years commencing in 2020-21. Details are set out in *Budget 2020-21, Budget Measures, Budget Paper No. 2 2020-21* at page 71.

Additional funding of \$60 million over seven years from 2021-22 will be available for the JSF-ISP. Details are expected to be published in the 2021-22 Mid-Year Economic and Fiscal Outlook and the 2021-22 Portfolio Additional Estimates Statements.

Funding for this item will come from the New Air Combat Capability AIR6000 Phase 2A/B project under Program 2.7: Air Force Capabilities, which is part of Outcome 2. Details are set out in the *Portfolio Budget Statements 2021-22, Budget Related Paper No. 1.3A, Defence Portfolio* at pages 59 and 105.

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

Defence power

Section 51(vi) of the Constitution empowers the Parliament to make laws with respect to 'the naval and military defence' of the Commonwealth and States, and 'the control of the forces to execute and maintain the laws of the Commonwealth'.

The grant program will provide assistance to defence sector enterprises in production and maintenance roles, supporting their ability to produce and maintain material required for defence purposes.

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 (Defence Measures No. 2) 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 (Defence Measures No. 2) Regulations 2021* (the Regulations) amend table item 448 in Part 4 of Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Joint Strike Fighter Industry Support Program (JSF-ISP). The amendments to table item 448 seek to provide for the Production and Modernisation opportunity phase of the JSF-ISP. The Department of Defence has responsibility for the JSF-ISP.

The JSF-ISP is a key initiative in support of the global Joint Strike Fighter (JSF) Program, an international aerospace systems capability program led by the United States Government, in collaboration with seven international partner nations including Australia. Participation in the JSF Program by the Australian defence industry has derived many long-term benefits for the Australian economy.

The JSF-ISP consists of two grant opportunities available to Australian companies: the Sustainment opportunity which was launched on 10 December 2020, and the Production and Modernisation opportunity which will be launched in late 2021.

Grant funding provided under the JSF-ISP will assist Australian defence industry in the development of new or improved capabilities that may enhance their competitiveness in winning work as part of the global F-35 Program.

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 Simon Birmingham
Minister for Finance**