

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 1) Regulations 2022

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

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 (Education, Skills and Employment Measures No. 1) Regulations 2022* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Innovation Development Fund (the Fund) to support eligible English Language Intensive Course for Overseas Students (ELICOS) providers deliver services to overseas students. The Fund is administered by the Department of Education, Skills and Employment.

The Fund builds on the initial Innovation Fund for Online and Offshore Education Services, which expired at the end of 2021 and was supported by table item 490 in Schedule 1AB. The objectives of the Fund, in addition to the provision of online and offshore services to overseas students, are to invest in infrastructure, staff expertise and the marketing and promotion of education services to prepare for the return of onshore international students, and to design curriculums and innovative digital teaching solutions.

Grant funding of \$9 million in 2021-22 will be made available to ELICOS providers who are regulated under the *Education Services for Overseas Students Act 2000*. This funding will be provided in one-off grants of up to \$150,000, targeted toward those providers most affected by border closures. These providers are almost entirely reliant on the arrival of international students and are at risk of closure. The sustainability of the sector is important for the broader international education sector, with providers eligible for the grant funding providing a key pipeline into further study in Australia.

An industry peak body will administer the grants, including determining the eligibility of the applicants and approving the payments to successful applicants.

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 Education, Skills and Employment.

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 (Education, Skills and Employment Measures No. 1) Regulations 2022*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 1) Regulations 2022*.

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 administered by the Department of Education, Skills and Employment (the department).

New **table item 533** establishes legislative authority for government spending on the Innovation Development Fund (the Fund) to support eligible English Language Intensive Course for Overseas Students (ELICOS) providers deliver services to overseas students.

The Fund builds on the initial Innovation Fund for Online and Offshore Education Services, which expired at the end of 2021 and was supported by table item 490 in Schedule 1AB. The objectives of the Fund, in addition to the provision of online and offshore services to overseas students, are to invest in infrastructure, staff expertise and the marketing and promotion of education services to prepare for the return of onshore international students, and to design curriculums and innovative digital teaching solutions.

On 25 November 2021, the then Minister for Education and Youth, the Hon Alan Tudge MP, and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Hon Alex Hawke MP, jointly announced the Government's commitment for a \$37 million package to provide further support for international education sector and international students. The Fund was included as part of this package. The joint media release is available

at <https://ministers.dese.gov.au/tudge/further-support-international-education-sector-and-international-students>.

The Fund will also align with the *Australian Strategy for International Education 2021-2030* (the Strategy) released on 26 November 2021 (<https://www.dese.gov.au/australian-strategy-international-education-2021-2030>). The Strategy includes key initiatives supporting its implementation including the Fund.

The Fund will provide further short-term targeted support to private ELICOS providers to diversify their education offerings into online and offshore delivery. Administration of the Fund commences from January 2022, however contract agreements or payments will not be made until the legislative authority is in place. The Fund will provide targeted funding for six months.

The ELICOS providers have seen a sharp decline in profitability and have limited ability to further cut costs, particularly as revenues for the sector have dropped in the order of 70 per cent. The English language providers were not well placed to pivot to domestic students during the COVID-19 pandemic. International student numbers experienced a substantial decline in 2020 and 2021 and this has led to the sharp decline in business for ELICOS providers. These business providers are at risk of closure due to reduced student enrolments as a consequence of border closures. Even with the announcement of Australia's borders opening to fully vaccinated international students from December 2021, it will take time for the ELICOS sector to recover and for international students to return at scale.

These English language providers fill an important niche in the education system and contribute to Australia's overall attractiveness as an international education destination. In 2019-20, the ELICOS sector was directly worth over \$1.4 billion in export revenue annually. The Fund will ensure the continued operation and viability of these providers until international students can return at scale. The sustainability of the private international education sector, and in particular the private ELICOS sector, is important for the broader international education sector as 67 per cent of ELICOS students go on to pursue further study in higher education and vocational education and training programs.

Grant funding of \$9 million in 2021-22 will be made available to ELICOS providers who are regulated under the *Education Services for Overseas Students Act 2000*. This funding will be provided in one-off grants of up to \$150,000, targeted toward those providers most affected by reduced student enrolments given international border closures. The funding will be evenly distributed between the eligible providers that submit an application, and as such, providers may receive less than \$150,000 if the program is oversubscribed. Successful ELICOS provider grantees will have until 30 June 2022 to commit/spend the grant funding, and until 31 December 2022 to acquit.

Eligibility criteria for the Fund are similar to those of the existing Innovation Fund, which require that education providers are registered on the Commonwealth Register of Institutions and Courses for Overseas Students under the *Education Services for Overseas Students Act 2000* and were operating on 19 March 2020, when Australia's international borders closed, and have been operating since. These providers must also have received the majority of their revenue (greater than 50 per cent) in 2019 from international student enrolments and experienced a total revenue decline by more than 30 per cent between 2019 and 2021. It is estimated that approximately 76 providers will meet the above eligibility criteria.

Providers that are affiliated with a Table A, Table B or Table C provider listed under the *Higher Education Support Act 2003*, as well as those affiliated with Technical and Further Education institutes (TAFEs) or registered as a school, will not be eligible to receive grants through the Fund.

The Fund will be administered by an appropriate industry peak body engaged by the department through a limited tender. The program administrator will determine the eligibility of the applicants and approve the payments to successful applicants. Final decision on the procurement process will be made by the Assistant Secretary (SES Band 1), International Policy Branch of the department, who has the relevant skills, experience and understanding of the policy context in which the Fund operates.

The department also intends to procure media and evaluation services to support the campaign and program evaluation through an existing panel arrangement. The department will provide an opportunity for tenderers to make complaints 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.

Procurement decisions will be made in accordance with the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Commonwealth Procurement Rules* (CPRs).

Grants to private providers will be administered in accordance with the *Commonwealth Grants Rules and Guidelines 2017*. Grant recipients will be selected through a targeted funding process. Eligible providers will be invited to apply and address the selection criteria listed on the program administrator's website. Grant opportunity guidelines will be developed by the department and made publicly available through the program administrator's website and the departmental website. (www.dese.gov.au).

Applicants will need to demonstrate they will use the grant funds to support new delivery models for their products or support the development of new markets over the 12-month period the grant is awarded. The appropriate industry peak body will determine the eligibility of the applicants and approve the payments to successful applicants.

Final decisions relating to the allocation of grant funding will be made by the program administrator. Their decisions are intended to be binding and final, including the approval of the grant, grant funding amount, and the terms and conditions of the grant. The program administrator will not approve funding unless it is reasonably considered that the grant will work towards the objectives of the program in accordance with the grant opportunity guidelines.

Funding decisions in relation to procuring an industry peak body and providing grants to providers will not be subject to independent merits review because these decisions relate to the allocation of a finite resource, and overturning a decision to allocate funding to one provider would affect an allocation that has already been made to another provider. 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 department will incorporate feedback from key industry peak bodies, including English Australia as the program administrator for the initial Innovation Fund, stakeholders and providers that received funding under the initial Innovation Fund to develop guidelines for the new Fund.

Total funding of \$9.4 million in 2021-22 for the Fund was included in the 2021-22 Mid-Year Economic and Fiscal Outlook under the measure ‘Supporting Australia’s Research and Higher Education Sectors’. Details are set out in the *Mid-Year Economic and Fiscal Outlook 2021-22*, Appendix A: Policy decisions taken since the 2021-22 Budget at pages 224 to 225.

Funding for this item will come from Program 2.7: International Education Support, which is part of Outcome 2. Details are expected to be included in the 2021-22 Portfolio Additional Estimates Statements for the Education, Skills and Employment portfolio.

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

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 Fund will provide funding for grants to support ELICOS providers to attract and retain international students including by investing in infrastructure, staff expertise, marketing and promotion of education services.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 4 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Financial Framework (Supplementary Powers) Amendment (Education, Skills and Employment Measures No. 1) Regulations 2022

This disallowable legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The powers in the FF(SP) Act to make, vary or administer arrangements or grants may be exercised on behalf of the Commonwealth by Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

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Grant funding of \$9 million in 2021-22 will be made available to ELICOS providers who are regulated under the *Education Services for Overseas Students Act 2000*. This funding will be provided in one-off grants of up to \$150,000, targeted toward those providers most affected by border closures. These providers are almost entirely reliant on the arrival of international students and are at risk of closure. The sustainability of the sector is important for the broader

international education sector, with providers eligible for the grant funding providing a key pipeline into further study in Australia.

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Human rights implications

This disallowable legislative instrument engages the following rights:

- the right to education – Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2; and
- the right to recognition of benefits of scientific and cultural co-operation – Article 15 of the ICESCR.

Right to education

Article 2(1) of the ICESCR provides that each State Party to the ICESCR undertakes to take steps to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in that Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 13(1) of the ICESCR states that the parties to the treaty ‘recognise the right of everyone to education’ and ‘agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms ... education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.’

Article 13(2)(c) of the ICESCR provides that ‘higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means...’

The Fund will support the right of overseas students to access further education by ensuring that students are able to undertake courses and obtain valuable skills and qualifications through education providers. These skills will enable many of them to undertake study at Australian institutions when borders reopen and will assist them to participate in society, an increasingly international labour market and promote understanding and friendship across nations.

Right to recognition of benefits of scientific and cultural co-operation

Article 15(4) of the ICESCR states that parties to the treaty ‘recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.’

By supporting private international education providers to continue to provide courses to overseas students to obtain English language skills and qualifications and go on to undertake further study at Australian institutions, the grants will support development of international contacts and co-operation in scientific and cultural fields.

Conclusion

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

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