**EXPLANATORY STATEMENT**

**Issued by the Authority of the Minister for Finance**

*Financial Framework (Supplementary Powers) Act 1997*

*Financial Framework (Supplementary Powers) Amendment*

*(Home Affairs Measures No. 1) Regulations 2023*

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*.

The Principal Regulations are exempt from sunsetting under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunsetting regime under the *Legislation Act 2003*, this would generate uncertainty about the continuing operation of existing contracts and funding agreements between the Commonwealth and third parties (particularly those extending beyond 10 years), as well as the Commonwealth’s legislative authority to continue making, varying or administering arrangements, grants and programs.

Additionally, the Principal Regulations authorise a number of activities that form part of intergovernmental schemes. It would not be appropriate for the Commonwealth to unilaterally sunset an instrument that provides authority for Commonwealth funding for activities that are underpinned by an intergovernmental arrangement. To ensure that the Principal Regulations continue to reflect government priorities and remain up to date, the Principal Regulations are subject to periodic review to identify and repeal items that are redundant or no longer required.

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. Section 32D of the FF(SP) Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

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.

The *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2023* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Status Resolution and Support Services (SRSS) —special purpose visa holders to be administered by the Department of Home Affairs.

The SRSS is an existing program established in 2015 to provide targeted support to eligible individuals while they resolve their immigration status. Legislative authority for the SRSS is provided under table item 187 to Part 4 of Schedule 1AB.

Following the High Court decision in *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152, with regards to persons who are not Australian citizens and who claim to be an Aboriginal or Torres Strait Islander person (the *Love* and *Thoms* cohort), a special purpose visa (SPV) was granted to certain individuals in the *Love* *and* *Thoms* cohort.

SPV holders are not able to access government entitlements or services, with the exception of Medicare. Legislative authority under new table item 588 to Schedule 1AB would enable the *Love* and *Thoms* cohort to have access to some services under the SRSS. The extended services provided under the SRSS would reduce the risk of harm to those certain individuals, including the risk of destitution and homelessness. The SRSS will be tailored to individual circumstances, and will be provided for the shortest reasonable time where a genuine need has been identified and evidenced.

Legislative authority under new table item 588 is required to provide needs-based support and assistance to holders of a SPV who are seeking to resolve their immigration status, or for whom there is currently no available pathway by which they can more permanently resolve their immigration status.

Funding of $871.1 million over three years from 2022-23 was included in the Budget October 2022-23 for the SRSS. Funding for SPV holders would be provided from the SRSS.

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 registration on the Federal Register of Legislation.

**Consultation**

In accordance with section 17 of the *Legislation Act 2003*, consultation has been undertaken with the Department of Home Affairs.

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 (Home Affairs Measures No. 1) Regulations 2023***

**Section 1 – Name**

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 1) Regulations 2023*.

**Section 2 – Commencement**

This section provides that the Regulations commence on the day after registration 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 Home Affairs (the department).

New **table item 588** establishes legislative authority for government spending to extend the Status Resolution and Support Services (SRSS) program for special purpose visa holders.

The SRSS program is an existing program (legislated under table item 187 to Part 4 of Schedule 1AB) that commenced on 1 January 2015 and provides targeted support to eligible individuals while they resolve their immigration status.

On 11 February 2020, the High Court handed down a decision in *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 (*Love* and *Thoms*) with regards to persons who are not Australian citizens and who claim to be an Aboriginal or Torres Strait Islander person (the *Love* and *Thoms* cohort). A majority of the High Court held that an Aboriginal person who meets the ‘tripartite test’ adopted in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 70(*Mabo (No 2)*) is not an ‘alien’ for the purposes of section 51(xix) of the Constitution, even if they are a non-citizen. The primary consequence of the Court’s decision is that a non-citizen non-alien cannot be detained or removed from Australia under the *Migration Act 1958* (‘the Act’).

As this category of persons is not reflected in any Commonwealth legislation, those affected by the decision who are not Australian citizens and are living in the Australian community with no immigration status have been granted a special purpose visa (SPV).

The SPV is a temporary visa, granted by operation of law where, for example, the Minister for Immigration, Citizenship and Multicultural Affairs (the Minister) declares, in writing, that a non-citizen is taken to have been granted an SPV. The SPV is not subject to any visa conditions.

SPVs have been granted to certain non-citizens who cannot be detained under section 189 of the *Migration Act 1958* as they have been found to meet or probably meet the tripartite test in *Mabo (No. 2)*. The number of individuals granted a SPV was 13 and while others may be granted a SPV based on being affected by the *Love* and *Thoms* decision, this number is not expected to grow significantly in the foreseeable future.

As SPV holders are not able to access government entitlements or services, with the exception of Medicare, legislative authority under new table item 588 in Schedule 1AB is required for the *Love* and *Thoms* cohort to have access to some services under the SRSS. SRSS provides targeted, needs-based support, with services not exceeding support levels provided to low-income Australian citizens or permanent residents. The *Love* and *Thoms* cohort will be provided access to SRSS if eligible, consistent with the current services provided under the SRSS, including financial and emergency accommodation support if needed.

The provision of SRSS is intended to reduce the risk of harm to the *Love* and *Thoms* cohort, including the risk of destitution and homelessness. The services will be tailored to individual circumstances, and will be provided for the shortest reasonable time where a genuine need has been identified and evidenced.

Each individual will be assessed by the department for eligibility to access the services. Eligibility differs depending on a person’s needs and vulnerabilities and depends on various circumstances and characteristics.

Each person who is granted an SPV will have a Status Resolution Officer allocated to their case from the department, who will regularly engage with the individual to identify whether they have needs which could be met through the SRSS. Any individuals who are provided with SRSS will be reviewed regularly to assess their continued eligibility.

SRSS providers contracted to the department through an open tender procurement process, are published on AusTender in accordance with the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Procurement Rules*.

Final spending decisions are expected to be made by the Associate Secretary, Immigration Group, or a delegate responsible for the management of the SRSS who has the appropriate skills and experience.

Decisions made in relation to contracting providers to deliver services under the SRSS program are not considered suitable for independent merits 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. In addition, any funding that has already been allocated would be affected if the original decision were 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?*).

The remaking of a procurement decision after entry into a contractual arrangement with a successful provider is legally complex, impractical, and could result in delays to providing services. The *Government Procurement (Judicial Review) Act 2018* enables suppliers to challenge some procurement processes for alleged breaches of certain procurement rules. This legislation might provide an additional avenue of redress (compensation or injunction) for dissatisfied providers or potential providers, depending on the circumstances.

Other decisions made in relation to an individual accessing services under SRSS are not subject to independent merits review. There are avenues for individuals to seek further consideration of a negative decision made by the department, including:

* submit a new SRSS application addressing all refusal points and submitting required evidence; and
* request a reconsideration of the decision through either the contracted service provider or the department.

As an existing program, engagement on the overall impacts of the SRSS was undertaken previously both across the Government and with the impacted sector, primarily those involved in refugee and humanitarian sector.

The consultation on expanding the SRSS to support SPV holders was undertaken within government and included the National Indigenous Australians Agency, the Department of Social Services and Services Australia. As the extension of the SRSS involved a small cohort of 13 people and the overall program’s objective remains unchanged, the department considers it is unnecessary to carry out additional consultations.

Funding of $871.1 million over three years from 2022-23 for the SRSS will come from Program 3.5: Onshore Compliance and Detention, which is part of Outcome 3. Details are set out in the *Portfolio Budget Statements 2022-23, Budget Related Paper No. 1.10, Home Affairs Portfolio* at page 54. Funding for this item is included as part of the SRSS.

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 aliens power (section 51(xix)); and
* the race power (section 51(xxvi)).

*Aliens power*

Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to ‘naturalization and aliens’.

Funding will be provided under the SRSS – special purpose visa holders to provide support to non-citizens claiming to be affected by the decision of the High Court in *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 who have been granted a SPV.

*Race power*

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to ‘the people of any race for whom it is deemed necessary to make special laws’.

Funding will be provided under the SRSS – special purpose visa holders to provide support to Aboriginal and Torres Strait Islander non-citizens affected by the decision of the High Court in *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 who have been granted a SPV.

**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 (Home Affairs
Measures No. 1) Regulations 2023***

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 (Home Affairs Measures No. 1) Regulations 2023* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on the Status Resolution and Support Services—special purpose visa holders to be administered by the Department of Home Affairs.

The Status Resolution and Support Services (SRSS) is an existing program established in 2015 to provide targeted support to eligible individuals while they resolve their immigration status. Following the High Court decision in *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152 with regards to persons who are not Australian citizens and who claim to be an Aboriginal or Torres Strait Islander person (the *Love* and *Thoms* cohort), a special purpose visa (SPV) has been granted to certain individuals in the *Love* and *Thoms* cohort.

SPV holders are not able to access government entitlements or services, with the exception of Medicare. SRSS has been extended to provide access to some government services to reduce the risk of harm to those certain individuals, including the risk of destitution and homelessness. The SRSS will be tailored to individual circumstances, and will be provided for the shortest reasonable time where a genuine need has been identified and evidenced.

Legislative authority under new table item 588 is required to provide needs-based support and assistance to holders of a SPV who are seeking to resolve their immigration status, or for whom there is currently no available pathway by which they can more permanently resolve their immigration status.

Funding of $871.1 million over three years from 2022-23 for the SRSS will be available for SPV holders.

**Human rights implications**

This disallowable legislative instrument engages the following human rights:

* the right to social security – Article 9 of the [*International Covenant on Economic, Social and Cultural Rights* (ICESCR)](http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/CFB1E23A1297FFE8CA256B4C000C26B4), read with Article 2; and
* the right to an adequate standard of living, including food, water and housing – Article 11 of the [ICESCR](http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/CFB1E23A1297FFE8CA256B4C000C26B4).

*Right to social security*

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.

For those granted a special purpose visa, access to social security benefits will not be available as it is generally reliant on Australian citizenship or permanent residence. The SRSS program will provide access to supports as needed.

Article 9 of the ICESCR requires each State Party to the Covenant to recognise the right of everyone to social security, including social insurance.

This disallowable legislative instrument will provide access as needed to individuals who hold a special purpose visa. As an existing program, the SRSS provides targeted, needs-based support to eligible individuals. Until pathways to permanent resident visas or Australian citizenship are created through regulatory and legislative amendments respectively, access to SRSS can be considered on a case-by-case basis.

If eligible, and depending on the individual’s needs, support services may include income support and rental assistance allowance, amongst others. Financial assistance is based on a percentage of relevant Government payments. This approach to income support is consistent with the current SRSS program policy parameters.

*Right to adequate standard of living, including food, water and housing*

Article 11 of the ICESCR requires each State Party to the Covenant to recognise the right of everyone to an adequate standard of living for persons and their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.

In providing access to the SRSS program to this cohort, this disallowable legislative instrument assists in promoting the right to an adequate standard of living. This is because the SRSS program can provide urgent and emergency accommodation, financial hardship assistance and income support where an individual is eligible. This includes the provision of urgent and emergency accommodation for a short period due to the emergence of unforeseen and sudden circumstances.

While providing SRSS to this cohort is an expansion of the SRSS program, eligibility consideration will continue to be based on an individual’s needs and will align with the current SRSS program policy parameters.

**Conclusion**

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

**Senator the Hon Katy Gallagher**

**Minister for Finance**