

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

*Financial Framework (Supplementary Powers) Amendment
(Foreign Affairs and Trade Measures No. 3) Regulations 2024*

The *Financial Framework (Supplementary Powers) Act 1997* (the FFSP 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 FFSP 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 sunset under section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (item 28A). If the Principal Regulations were subject to the sunset 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 FFSP 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 FFSP Act confers powers of delegation on Ministers and the accountable authorities of non-corporate Commonwealth entities, including subsection 32B(1) of the FFSP Act. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

Section 65 of the FFSP 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 (Foreign Affairs and Trade Measures No. 3) Regulations 2024* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on crisis related consular services administered by the Department of Foreign Affairs and Trade.

In providing consular services, the Commonwealth's objectives are to empower Australians to help themselves overseas, effectively prepare for and manage overseas crises, and deliver consular services focused on Australians most in need.

Although Australian citizens are prioritised for consular services, in the event of an overseas crisis, the Commonwealth may also provide consular services to Australian permanent residents and non-citizens, where it is in Australia's foreign policy and national interest to do so.

Crisis related spending is necessarily uncertain and does not lend itself to be strictly budgeted for. Should there be a need for additional support, funding will be agreed to by the Government and will be published in a future Budget process.

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 taken place with the Department of Foreign Affairs and Trade.

A regulatory impact analysis 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 (Foreign Affairs and Trade Measures No. 3) Regulations 2024*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Foreign Affairs and Trade Measures No. 3) Regulations 2024*.

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 crisis related consular services administered by the Department of Foreign Affairs and Trade (the department).

Table item 684 – Support for non-citizens during overseas crisis

New **table item 684** provides legislative authority for government spending to support non-citizens in an overseas crisis. It clarifies the scope of persons the department can assist during an overseas crisis.

Under the Consular and Passport Services program the department has responsibility for providing timely and responsive consular services. The program aims to empower Australians to help themselves overseas, effectively prepare for and manage overseas crises, and deliver consular services focused on Australians most in need.

In addition to routine consular services, the department's consular activities include supporting overseas crisis responses. Some overseas crises will require an exceptional response, including for:

- those in which large numbers of Australians have been killed or injured or face significant threat, for example terrorist attacks, major accidents, pandemics and natural disasters;
- political unrest which leads the department advising Australians to leave a country and which might require the assisted departure or evacuation of Australians, including if commercial options are not available; and
- events which cause major disruption and hardship to large numbers of Australians

The assistance will be guided by many considerations, and may include the need to:

- deploy expert teams to support affected Australians;
- liaise with the families of any Australians killed or injured;
- work with local authorities to support affected Australians;
- provide travel advice and crisis updates; and
- support Australians trying to leave the area and put them in contact with their families.

In an overseas crisis, the department may provide support to Australian citizens and permanent residents of Australia. While the Australian Government's Consular Services Charter prioritises assistance to 'Australians most in need', during an overseas crisis-response, community expectation of the Government's role in assisting Australians to reach safety has broadened to include permanent residents and non-citizen family members. The community also expects that government would avoid splitting family groups when offering assistance to evacuate Australians from dangerous locations. Support may also be provided to other non-citizens where it is in Australia's foreign policy and national interest to do so, for example where there is a reciprocal arrangement with another country.

Consular activities are a regular and ongoing function of the department. Expenditure on consular services may occur through various forms, such as financial assistance directly to consular clients, engagement of an external service provider or other procurement arrangements.

Funding amount and arrangements, merits review and consultation

Crisis related spending is necessarily uncertain and does not lend itself to be strictly budgeted for. Should there be a need for additional support, funding will be agreed to by the Government and will be published in a future Budget process, including in the department's Portfolio Budget Statements or Portfolio Additional Estimates Statements. Funding for the item will come from Program 2.1 for Consular Services, which is part of Outcome 2.

The department expects to procure services necessary to deliver its consular functions, including overseas crisis response functions, to ensure the continued provision of timely and responsive consular services. Procurement processes will be conducted in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the *Public Governance, Performance and Accountability Rule 2014*, the *Commonwealth Procurement Rules* (CPRs) and the Department's Accountable Authority Instructions.

A range of procurement methods will be considered such as open and limited tenders or procurements under existing arrangements. The selection of which procurement method used will be dependent on the activity. Final spending decisions will be made by the Secretary of the department or an appropriate delegate, including:

- Deputy Secretary, International Security, Legal and Consular Group;
- First Assistant Secretary, Consular and Crisis Management Division; and
- Assistant Secretary, Crisis Preparedness and Management Branch.

Any procurement arrangements will be finalised in accordance with the CPRs, the PGPA Act and the *Financial Framework (Supplementary Powers) Act 1997*.

Procurement decisions will be based on value for money, including capability and capacity to deliver, and price and risk considerations. The department will undertake a limited tender through appropriate panels if applicable or via open procurement on AusTender if required. Procurement outcomes are generally published on AusTender (www.Tenders.gov.au), with information withheld, for example, if specific commercial in confidence clauses are negotiated by the successful supplier (in which case the department will seek legal and procurement advice).

Any procurement decisions made in connection with the consular services program and crisis support will not be 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 already allocated at that time would be affected if the original decision was overturned. 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 urgent consular assistance during crises overseas.

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 *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. Further, the right to review under s 75(v) of the Constitution and review under s 39B of the *Judiciary Act 1903* may be available.

The department has a Complaints Handling Policy (available at <https://www.dfat.gov.au/about-us/publications/complaint-handling-procedures-procurement>) that sets out the process for responding to any procurement complaints received. This includes investigations to resolve the complaint by reaching a fair and independent view on the issues raised by the complainant. If the department finds a complaint has merit and the complainant has been inconvenienced or disadvantaged through their interactions with the department, an apology or other form of suitable remedy such as providing additional information, changing or reconsidering a decision or expediting action may be appropriate.

If the complainant is still not satisfied with the response, they may seek an internal review of how the complaint was managed. If the complainant is still dissatisfied, the option to seek independent review is available from the Commonwealth Ombudsman or the Federal Court. In this case, all information about the complaint and proposed resolution must be provided by the department, when requested.

The review and audit process undertaken by the Australian National Audit Office also provides a mechanism to review the department's spending decisions and report any concerns to the Parliament. These requirements and mechanisms help to ensure the proper use of Commonwealth resources and appropriate transparency around decisions relating to making, varying or administering arrangements to spend relevant money.

The department, as the lead agency on coordinating whole-of-government response to overseas crises under the Australian Government Crisis Management Framework, consults widely and regularly on contingency planning and preparedness for possible overseas crisis scenarios. This includes formal consultation rounds with stakeholder agencies as part of policy and planning development, as well as community consultation and outreach with groups likely to be impacted in the event of a deterioration of security in at-risk regions.

Constitutional considerations

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 external affairs power (section 51(xxix)).

Aliens power

Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to 'naturalization and aliens'. During an overseas crisis the scope of the department's consular services including crisis response service, may include support for non-citizen family members of Australian citizens and permanent residents and other non-citizens in need.

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 with respect to matters or things outside the geographical limits of Australia.

The provision of consular services, including crisis response services, will support Australian citizens and permanent residents, as well as their non-citizen family members and other non-citizens who are overseas and in need to support during an overseas crisis. This could include support services delivered from an overseas location, such as assisted departure and working with local authorities. The spending allows the effective preparation for and response to complex overseas crises, ensuring the Australian Government can also assist non-citizens during a crisis where it is in Australia's national interest to do so.

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 FFSP Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal 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 Principal Regulations specify the arrangements, grants and programs. The powers in the FFSP 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 (Foreign Affairs and Trade Measures No. 3) Regulations 2024* (the Regulations) amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on crisis related consular services administered by the Department of Foreign Affairs and Trade (the department).

Under the Consular and Passport Services program the department has responsibility for providing timely and responsive consular services. In addition to routine consular services, the department's consular activities include supporting crisis responses. The support is provided to non-citizen family members of Australians and other non-citizens during an overseas crisis.

While the Australian Government's Consular Services Charter prioritises assistance to 'Australians most in need', during an overseas crisis-response, community expectation of the Government's role in assisting Australians to reach safety has broadened to include permanent residents and non-citizen family members. The community also expects that government should avoid splitting family groups when offering assisted departures to move Australians from dangerous locations. Support may also be provided to other non-citizens where it is in Australia's foreign policy and national interest to do so, for example where there is a reciprocal arrangement with another country.

Australia's human rights obligations apply to persons in Australia's territory and subject to Australia's jurisdiction. Australia generally does not owe international human rights law obligations extraterritorially. However, Australia's obligations may be engaged where Australia exercises effective control over persons, or over the territory in which those persons are located. The threshold for effective control is high.

Human rights implications

This disallowable legislative instrument may positively engage the following rights:

- the right to life – Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the rights relating to families and children – Articles 17 and 23 of the ICCPR and Articles 3 and 10 of the *Convention on the Rights of the Child* (CRC) read with Article 4.

Right to life

Article 6 of the ICCPR provides that everyone has the inherent right to life and that no one shall be arbitrarily deprived of life.

During an overseas crisis the department may deliver various services to affected Australian citizens, permanent residents and non-citizens (including family members of Australians). This could include working with local authorities to provide support to affected Australians in the area, advising of options to leave the area and in exceptional circumstances it could include arranging evacuation from the area.

To the extent these human rights obligations applied, in supporting Australians to leave dangerous locations, or obtain essential support in, a crisis affected area, expenditure on consular services could promote the right to life.

Rights relating to the families and children

Articles 17 of the ICCPR provides:

- (1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- (2) *Everyone has the right to the protection of the law against such interference or attacks.*

Article 23 of the ICCPR provides:

- (1) *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Article 4 of the CRC requires the States Parties to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights' in the CRC.

Article 3(1) of the CRC states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 10(1) of the CRC states that:

In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

Community expectation in relation to the delivery of consular services has evolved. This is particularly the case in relation to delivery of consular services during a crisis. The expectation is that assistance be extended to the families of Australian citizens.

A key focus of extending consular services to non-Australian family members is to ensure that families can be kept together. To the extent Australia's human rights obligations were engaged, expenditure on consular and crisis support services would:

- promote the rights relating to families and children;
- work to ensure that family members can stay together (even in cases where the whole family are not Australian citizens), in line with the Articles 17 and 23 of the ICCPR, and the CRC; and
- work to ensure that parents/children are not separated in the event that only one is an Australian national in line with Articles 17 and 23, as well as Articles 3(1) and 10(1) of the CRC.

Conclusion

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

**Senator the Hon Katy Gallagher
Minister for Finance**