

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Industry, Science and Technology

Industry Research and Development Act 1986

*Industry Research and Development (Access to Bushfire Construction Standards Program)
Instrument 2020*

Purpose and Operation

Section 33 of the *Industry Research and Development Act 1986* (the IR&D Act) provides a mechanism for the Minister to prescribe programs, by disallowable legislative instrument, in relation to industry, innovation, science or research, including in relation to the expenditure of Commonwealth money under such programs.

The statutory framework provided by s33 of the IR&D Act enables a level of flexibility to provide authority for Commonwealth spending activities in relation to industry, innovation, science and research programs. This allows the Government to respond quickly and appropriately to the need to implement innovative ideas and pilot programs on an ongoing basis and as opportunities arise. Prescribing programs in legislative instruments provides transparency and parliamentary oversight of Government programs and spending activities, whilst reducing administrative burden on the Commonwealth.

Once a program is prescribed by the Minister under s33, subsection 34(1) allows the Commonwealth to make, vary or administer arrangements in relation to activities under the prescribed program. Arrangements may include contracts, funding agreements or other arrangements, and may provide for money to be payable by the Commonwealth to one or more third parties. The power conferred on the Commonwealth by subsection 34(1) may be exercised on behalf of the Commonwealth by a Minister or an accountable authority of a non-corporate entity, or by their delegate (under s36).

The purpose of the *Industry Research and Development (Access to Bushfire Construction Standards Program) Instrument 2020* (the Legislative Instrument) is to prescribe the Access to Bushfire Construction Standards Program (the Program). The funding for the Program has been secured through the Department of Industry, Science, Energy and Resources (the Department) 2019-20 Budget. The Program provides up to a maximum of \$132,000 (GST inclusive) to Standards Australia as part of the Government's commitment to facilitating public access to Australian Standard AS 3959: 2018 – *Construction of buildings in bushfire-prone areas* (the Australian Standard), as in force from time to time.

The reference to the Australian Standard, as in force from time to time, in the Legislative Instrument does not attract the rules of incorporation by reference in section 14 of the *Legislation Act 2003*. This is because the Legislative Instrument does not 'make provision' in relation to any matter by 'applying, adopting or incorporating' the Australian Standard. The Legislative Instrument refers to the Australian Standard in order to describe the purpose of

the procurement, but does not incorporate any of the requirements of the Australian Standard into the law.

The Australian Standard specifies requirements for the construction of buildings in bushfire-prone areas in order to improve their resistance to bushfire attack from burning embers, radiant heat, flame contact and combinations of the three attack forms. It is referenced in the National Construction Code, which is called up in state and territory legislation (making it mandatory).

Like most developed economies, the provision of standards in Australia is based on a user pays model, which supports the development, maintenance and distribution of current and future standards. Standards Australia uses two different distribution channels – SAI Global, and Techstreet.

The purpose of the Program will be to facilitate public access, through Standards Australia's distributors, to the digital version of this Australian Standard. This access will be provided free of charge to any member of the public interested in viewing the Australian Standard.

Following the 2019-20 bushfires, facilitating access to the Australian Standard will assist with rebuilding and reconstruction efforts in bushfire-affected areas. More generally, it will also enable interested Australians to better understand how buildings can be designed and constructed with bushfire safety in mind.

Funding authorised by this Legislative Instrument comes from Program 3, Outcome 1, as set out in the Portfolio Budget Statements 2019-20, Budget Related Paper No. 2, Industry, Innovation and Science Portfolio (<https://www.industry.gov.au/sites/default/files/2019-04/2019-20-department-of-industry-innovation-and-science-pbs.pdf>) at page 28.

The Program is a limited tender procurement administered by the Department in accordance with the *Commonwealth Procurement Rules* (<https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules>). As Standards Australia has exclusive rights to maintain and distribute the standards that it produces, a limited tender is necessary.

The Program delegate for this procurement is the Strategic Policy Division General Manager responsible for administering the Program.

As this will be a targeted procurement with a particular service provider, there are no selection criteria, and the Program will not be subject to merits review.

Persons who have complaints about the Program will have recourse to the Department. The Department investigates any complaints about the Program in accordance with its complaints policy and procedures. If a person is not satisfied with the way the Department handles the complaint, they may lodge a complaint with the Commonwealth Ombudsman.

The Communications Power

The Legislative Instrument specifies that the legislative power in respect of which it is made is the communications power (paragraph 51(v) of the Constitution). Paragraph 51(v) of the Constitution empowers the Parliament to make laws with respect to ‘postal, telegraphic, telephonic and other like services’.

In that regard, funding provided under the Legislative Instrument will enable Australians to access the digital version of Australian Standard AS 3959: 2018 – *Construction of buildings in bushfire-prone area* (as in force from time to time), at no cost, over the internet.

Implied nationhood power (i.e. the express incidental power and executive power)

The Legislative Instrument specifies that the legislative power in respect of which it is made is the implied nationhood power. The express incidental power in paragraph 51(xxxix) of the Constitution empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested in the Parliament, the executive or the courts by the Constitution. Section 61 of the Constitution supports activities that are peculiarly adapted to the government of a nation and cannot be carried out for the benefit of the nation otherwise than by the Commonwealth.

In that regard, funding provided under the Legislative Instrument will assist in the reconstruction efforts as part of the Commonwealth’s response to the 2019-20 bushfires, an unforeseen natural disaster of immediate national significance.

Authority

Section 33 of the *Industry Research and Development Act 1986* provides authority for the Legislative Instrument.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, the Attorney-General’s Department has been consulted on this Legislative Instrument. Consultation has also occurred with the Australian Building Codes Board and Standards Australia.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 26253).

Details of the *Industry Research and Development (Access to Bushfire Construction Standards Program) Instrument 2020*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Access to Bushfire Construction Standards Program) Instrument 2020*.

Section 2 – Commencement

This section provides that the Legislative Instrument commences on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

This section specifies the provision of the *Industry, Research and Development Act 1986* (the Act) under which the Legislative Instrument is made.

Section 4 – Definitions

This section provides for definitions of terms used in the Legislative Instrument.

Section 5 – Prescribed program

This section prescribes the Access to Bushfire Construction Standards Program (the Program) for the purposes of subsection 33(1) of the Act.

The Program is to make payments of up to \$132,000 (GST inclusive) to Standards Australia, for the purpose of making Australian Standard AS 3959: 2018 – *Construction of buildings in bushfire-prone areas*, as in force from time to time, freely and publicly available in digital form.

Section 6 – Specified Legislative Power

This section specifies that the legislative power in respect of which the Legislative Instrument is made is the power of the Parliament to make laws with respect to ‘postal, telegraphic, telephonic, and other like services’ (paragraph 51 (v) of the Constitution) and the power of the Parliament to make laws with respect to measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation (section 61 and paragraph 51(xxxix) of the Constitution).

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 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

This Legislative Instrument provides legislative authority to commit Commonwealth funds for the Access to Bushfire Construction Standards Program (the Program).

The Program is to make payments of up to \$132,000 (GST inclusive) to Standards Australia, for the purpose of making Australian Standard AS 3959: 2018 – *Construction of buildings in bushfire-prone areas*, as in force from time to time, freely and publicly available in digital form.

Following the 2019-20 bushfires, facilitating access to the Australian Standard will assist with rebuilding and reconstruction efforts in bushfire-affected areas. More generally, it will also enable interested Australians to better understand how buildings can be designed and constructed with bushfire safety in mind.

Human rights implications

This Legislative Instrument engages the following right:

- the right to an adequate standard of living – article 11.1 of the *International Covenant on Economic, Social and Cultural Rights*.

In this regard the Legislative Instrument promotes a person's right to an adequate standard of living, which includes housing. This is particularly important following the 2019-20 bushfires, which have necessitated the reconstruction of a significant number of homes and buildings in bushfire-affected areas. In order to ensure that new housing and buildings are constructed to an adequate, modern standard of bushfire resistance, access to the latest bushfire construction standard will be made available at no cost to users. Living in structures designed according to the latest bushfire standard will contribute to improving the safety and standard of living of occupants during future bushfire events.

The Legislative Instrument does not engage any other applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights because it promotes the protection of human rights.

The Hon Karen Andrews MP
Minister for Industry, Science and Technology