

*Industry Research and Development (Thermochemical Conversion Technology Trial Facility 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 a 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 section 33 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 section 33, 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 section 36).

The purpose of the *Industry Research and Development (Thermochemical Conversion Technology Trial Facility Program) Instrument 2020* (the Legislative Instrument) is to prescribe the Thermochemical Conversion Technology (TCCT) Trial Facility Program (the Program). The funding for the Program is secured through the Department of Industry, Science, Energy and Resources 2020-21 Budget.

The Program provides up to \$8 million to ARI Global Technologies Australasia Pty Ltd (ARI Australasia) to conduct preliminary work and preparations to establish a cost-effective, viable asbestos destruction facility in Australia that complies with all relevant regulatory requirements and addresses key pre-construction planning, issues and risks.

Asbestos disposal has been a significant challenge in communities around the country, with asbestos buried in licensed landfill sites across Australia. While this approach is generally considered safe, the land may no longer be used for other purposes and, in some circumstances, the asbestos is uncovered in an unmanaged way.

State governments are responsible for waste management so a key test of whether the proposal is viable is state regulatory approvals. This grant supports the steps required to work through the regulatory approval process, including site identification and purchase.

Funding authorised by this Legislative Instrument comes from Program 1.2: Growing innovative and competitive businesses, industries and regions, Outcome 1, as set out in pages 33 and 36 of the *Portfolio Budget Statements 2020–21, Budget Related Paper No. 1.9, Industry, Science, Energy and Resources Portfolio* at <https://budget.gov.au/2020-21/content/bp2/index.htm>.

The Program will be delivered by the Department of Industry, Science, Energy and Resources (the Department).

The funding will be delivered as an ad hoc, staged grant and will be administered by the Department in accordance with the *Commonwealth Grant Rules and Guidelines 2017* (<https://www.finance.gov.au/sites/default/files/2019-11/commonwealth-grants-rules-and-guidelines.pdf>).

The Program involves the allocation of finite resources through an ad hoc grant to a single applicant. In addition, there is a robust and extensive assessment process, an enquiry and feedback process, and a complaints mechanism if the applicant is affected. Therefore, external merits review does not apply to decisions about the provision of grants under the Program.

Persons who are affected by decisions or 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.

Spending decisions will be made by the Minister for Energy and Emissions Reduction, taking into account the recommendations of the Department of Industry, Science, Energy and Resources.

ARI Australasia will be advised of the outcome in writing following the Minister's decision about whether to approve each stage of the grant.

The Legislative Instrument specifies that the legislative powers in respect of which the Instrument is made are the following:

### **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 Commonwealth legislation which gives effect to Australia's obligations under international treaties. Australia has obligations under the following treaties:

- the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* [1992] ATS 7 (the Basel Convention), particularly Articles 1, 2 and 4; and
- the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5 (the ICESCR), particularly Articles 2 and 12.

### *Basel Convention*

The primary aim of the Basel Convention is to protect human health and the environment from the adverse impacts of hazardous wastes. The scope of the Basel Convention is set out in Article 1, including the definition of “hazardous waste”. Among other things, the Basel Convention obliges Parties to manage and dispose of hazardous wastes (Art 4(2)(b)), and to ensure that such wastes are ‘managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes’ (Art 2(8)). In that regard, funding under the Legislative Instrument will support ARI Australasia to carry out steps preliminary to the construction and operation of a TCCT trial facility that, once operational, will treat and safely dispose of asbestos waste – a “hazardous waste” for the purposes of the Basel Convention.

### *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

The ICESCR sets up a framework to protect the economic, social and cultural rights of individuals. Article 2 requires Parties to take steps to fully realise the ICESCR’s rights. Article 12 recognises everyone’s right to the enjoyment of the ‘highest attainable standard of ... health’ and provides that the steps to be taken by Parties to achieve this right include those necessary to improve ‘all aspects of environmental and industrial hygiene’. In that regard, the Legislative Instrument will fund preparatory work for the construction of a TCCT trial facility that, when operational, will remove asbestos waste from the environment and ensure its safe disposal. This will assist in reducing exposure to a harmful substance that poses a serious risk to human health.

### **Corporations power**

Section 51(xx) of the Constitution empowers the Parliament to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.

In *Williams v Commonwealth* (2014) 252 CLR 416 (*Williams No 2*), the High Court, considering section 32B of the *Financial Management and Accountability Act 1997* (the FMA Act), held (at [50]) that:

A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading or financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation.

However, the relevant provisions of the IR&D Act are substantially different to the

provisions considered by the High Court in *Williams No 2*. Section 34 of the IR&D Act corresponds to section 32B of the FMA Act considered by the High Court in *Williams No 2*. However, the FMA Act contained no provision in terms equivalent to those of section 35 of the IR&D Act.

Subsection 35(2) of the IR&D Act limits the arrangements made under section 34 so that, where a party to an arrangement made under section 34 is a constitutional corporation, the arrangement must be subject to a written agreement containing terms and conditions under which money is payable by the Commonwealth. The corporation must comply with the terms and conditions. The activities of the corporation are therefore regulated through the terms and conditions made under each agreement pursuant to subsection 35(2).

Further, subsection 35(3) provides that the agreement must provide for circumstances in which the corporation must repay amounts to the Commonwealth. The Program prescribed by the Legislative Instrument singles out and confers on ARI Australasia benefits directed at assisting it in the conduct of its ordinary activities. Namely, the Program supports ARI Australasia, as the Australian licensee of TCCT, in its provision of TCCT services. These services, along with other waste-related goods and services, constitute the ordinary activities of ARI Australasia. The Program will impose terms and conditions on ARI Australasia under a grant agreement in accordance with section 35 of the IR&D Act, in relation to receipt of benefits under the Program. The terms and conditions will set out what the funding may be used for, and the circumstances in which it must be repaid.

### **Executive power and express incidental power, including the nationhood aspect**

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 by the Constitution in the Parliament, the executive or the courts. That paragraph, together with 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 be used to assess the viability of establishing a TCCT trial facility for the destruction of asbestos waste and if approved to proceed, to undertake preliminary work necessary for the construction and operation of a TCCT trial facility for the destruction of asbestos waste. If constructed, the facility will support Australia's national efforts regarding asbestos eradication. Furthermore, the 'trial' nature of the facility acts as a vehicle of investigation and inquiry into the future potential use of TCCT in other facilities as a means of protecting public health.

### **Consultation**

In accordance with section 17 of the *Legislation Act 2003*, the Attorney-General's Department has been consulted on this Legislative Instrument.

## **Regulatory Impact**

It is estimated that the regulatory burden is likely to be minor (OBPR reference number: 42780).

## **Details of the *Industry Research and Development (Thermochemical Conversion Technology Trial Facility Program) Instrument 2020***

### **Section 1 – Name of Instrument**

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Thermochemical Conversion Technology Trial Facility 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 IR&D 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 Thermochemical Conversion Technology (TCCT) Trial Facility Program (the Program) for the purposes of section 33 of the IR&D Act.

The intended outcomes of the Program are to establish the viability of a TCCT waste facility in Australia that complies with all relevant regulatory requirements and addresses key pre-construction planning, issues and risks.

### **Section 6 – Specified legislative powers**

This section specifies the legislative powers in respect of which the instrument is made are the powers of the Parliament to make laws with respect to the external affairs power (paragraph 51(xxix)), the corporations power (paragraph 51(xx)) and the implied nationhood power (paragraph 51(xxxix) and section 61 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 prescribes the Thermochemical Conversion Technology (TCCT) Trial Facility Program (the Program) for the purposes of s 33 of the *Industry Research and Development Act 1986*. The Program provides funding to ARI Global Technologies Australasia Pty Ltd (ARI Australasia) to conduct preliminary work and preparations to establish a cost-effective, viable TCCT waste facility in Australia that complies with all relevant regulatory requirements and addresses key pre-construction planning, issues and risks.

### **Human rights implications**

This Legislative Instrument positively engages the right to health under the International Covenant on Economic, Social and Cultural Rights (the ICESCR). The human health risks of asbestos exposure are well known. The Legislative Instrument will facilitate preparatory work for the construction of a TCCT trial facility that, if built and commissioned, will destroy asbestos waste and produce benign by-products. This process would divert asbestos-containing waste from the current landfill-based disposal method, thereby eliminating risk of landfill contamination from that waste. This, in turn, improves environmental and industrial hygiene, which ultimately positively impacts one's right to health.

### **Conclusion**

This Legislative Instrument is compatible with human rights. It positively engages the right to health and does not raise any other human rights issues.

**The Hon Angus Taylor MP**

**Minister for Energy and Emissions Reduction**