

EXPLANATORY STATEMENT

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

Industry Research and Development Act 1986

Industry Research and Development (Digital Directors 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 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 (Digital Directors Program) Instrument 2020* (the Legislative Instrument) is to prescribe the Digital Directors Program (the Program). Funding for the Program has been secured through the Department of Industry, Science, Energy and Resources 2020-21 Budget. The Program will fund the Australian Institute of Company Directors (AICD) to develop a training package for directors and leaders of Australian organisations to improve their digital literacy and digital investment decision making skills, to promote a target for the number of directors on the board of an Australian business with a digital (science, technology, engineering or mathematics (STEM)) background by the end of 2030, and monitor and report on the progress of ASX 200 companies towards meeting that target. The AICD is a not-for-profit membership organisation of Australian directors, providing governance advice and professional development assistance to members.

The purposes of the Program are to:

- (a) signal the importance of digital and technological skills of directors on the boards of Australian businesses and leaders of Australian organisations; and
- (b) increase the representation on those boards of directors with those skills.

The types of activities expected to be funded include:

- developing online and other training materials for directors on the boards of Australian businesses and leaders of Australian organisations;
- promoting and providing these training materials to other relevant organisations;
- promoting a target for the number of directors on the board of an Australian business with a digital (STEM) background by the end of 2030; and
- monitoring and reporting against this target for ASX 200 companies until 2030.

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 the *Portfolio Budget Statements 2020-21, Budget Related Paper No. 1.9, Industry, Science, Energy and Resources Portfolio* (<https://www.industry.gov.au/about-us/finance-reporting/budget-statements>) on page 31.

The Program will be delivered by the Department's Business Grants Hub, which is a specialised design, management and delivery body with extensive expertise and capability in delivering similar programs. The Program is 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 will provide an ad hoc grant to the AICD. An ad hoc grant is appropriate as the nature of the Program is specifically dependent on the capability and established network of the AICD.

The AICD will be required to provide a project proposal and supporting information that clearly demonstrates:

- value for money;
- achievable timeframes and budget (as identified in supporting documents);
- appropriate and realistic costings (the level and detail of the costing should be commensurate with the value of the project).

A senior executive in the Department will make the final decision to approve grant funding.

Given the nature of the Program, external merits review is not appropriate for decisions about the provision of the grant. However, persons who are otherwise 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.

Corporations power

The Legislative Instrument specifies that the legislative power in respect of which the instrument is made is section 51(xx) of the Constitution (the 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’ (together, constitutional corporations).

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 some constitutional corporations (namely, trading or financial corporations) benefits which are directed to assisting those corporations in the conduct of their ordinary activities, and imposes terms and conditions on those corporations under the grant agreements in accordance with section 35 of the IR&D Act, in relation to receipt of the benefits under the Program.

In particular, the Program provides funding to a trading or financial corporation to assist it to develop and deliver training to organisational leaders to improve their digital literacy and digital investment decision-making skills. Eligibility to receive funding under the Program is limited to the AICD.

Communications power

The Legislative Instrument specifies that the legislative power in respect of which the instrument is made is the communications power (section 51(v) of the Constitution). Section 51(v) of the Constitution empowers the Parliament to make laws with respect to 'postal, telegraphic, telephonic and other like services'.

Funding provided under the Legislative Instrument will enable the AICD to develop training material, some of which is to be delivered online. Further, a portion of the training activities relate to functions related or incidental to enhancing the online capabilities of organisational leaders and their knowledge of the economic potential of online technology, as well as appropriate online marketing models and tools. This training is targeted at assisting organisational leaders to improve their understanding of communications systems, including funding training to assist directors to use online digital technology and will be partially delivered via web-based applications and mobile devices.

Census power

The Legislative Instrument specifies that the legislative power in respect of which the instrument is made is the census and statistics power (section 51(xi) of the Constitution). Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

In that regard, funding provided under the Legislative Instrument will support the collection, compilation, analysis and reporting of statistical information regarding the percentage of Australian board directors who have a digital (STEM) background, and how this percentage changes until 2030.

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.

AICD were consulted in the development of the Program.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 42660).

Details of the *Industry Research and Development (Digital Directors Program) Instrument 2020*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Digital Directors 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 item provides for definitions of terms used in the Legislative Instrument.

Section 5 – Digital Directors Program

This section prescribes the Digital Directors Program (the Program) for the purposes of s 33 of the IR&D Act.

The Program will provide funding to the Australian Institute of Company Directors to develop a training package for directors and leaders of Australian organisations to improve their digital literacy and digital investment decision making skills, to promote a target for the number of directors on the board of an Australian business with a digital (science, technology, engineering or mathematics (STEM)) background by the end of 2030, and monitor and report on the progress of ASX 200 companies towards meeting that target.

Section 6 – Specified Legislative Power

This section specifies that the legislative powers in respect of which the Legislative Instrument is made are the powers of the Parliament to make laws with respect to postal, telegraphic, telephonic, and other like services (paragraph 51(v) of the Constitution), foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (paragraph 51(xx) of the Constitution) and census and statistics (paragraph 51 (xi) of the Constitution).

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Industry Research and Development (Digital Directors Program) Instrument 2020

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

The purpose of the *Industry Research and Development (Digital Directors Program) Instrument 2020* (the Legislative Instrument) is to prescribe the Digital Directors Program (the Program).

The purpose of the Program is to signal the importance of digital and technological skills of directors on the boards of Australian businesses and leaders of Australian organisations and increase the representation on those boards of directors with those skills.

The Program will do this by providing the Australian Institute of Company Directors with funding to develop a training package for directors and leaders of Australian organisations to improve their digital literacy and digital investment decision making skills, promote a target for the number of directors on the board of an Australian business with a digital (science, technology, engineering or mathematics (STEM)) background by 2030, and monitor and report on the progress of ASX 200 companies towards meeting the target.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Karen Andrews MP

Minister for Industry, Science and Technology