

## **EXPLANATORY STATEMENT**

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

*Industry Research and Development Act 1986*

*Industry Research and Development (Moon to Mars 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 (Moon to Mars Program) Instrument 2020* (the Legislative Instrument) is to prescribe the Moon to Mars Program (the Program).

Funding for the Program was provided through the 2019-20 Appropriation Bills. The Program provides \$150 million over five years from 2020-21 as part of the Australian Government's commitment to support Australian businesses and organisations, including universities and research institutions to participate in international space supply chains and markets, including joining the National Aeronautics and Space Administration's (NASA's) inspirational endeavour to go forward to the Moon and then go on to Mars (Moon to Mars campaign).

The Program aligns with and contributes to fulfilling the goals of Advancing Space: Australian Civil Space Strategy 2019-2028 (the civil space strategy), at the date on which this Legislative Instrument commences. The civil space strategy is a policy document that is

freely available on the Department's website (<https://www.industry.gov.au/data-and-publications/australian-civil-space-strategy-2019-2028>) and explains the Australian Government's plan for the space sector to 2028. The Program is consistent with the National and International pillars of the civil space strategy by opening doors for Australian businesses and organisations to access international space supply chains, creating jobs in Australia and supporting the growth of industries across the economy through the development and application of space technologies. Through this Program, Australian businesses and organisations will join with NASA and other international partners to bring Australian capabilities to space, the Moon and on to Mars and beyond.

The Program will be delivered through a mix of grants and procurement processes appropriate to each specific element or component.

Funding will be provided through three separate elements of the Program as follows:

- **Trailblazer:** This element will provide funding through one or more grants to Australian businesses and organisations to develop or enhance products, capabilities and services that have the capacity to contribute to NASA's Moon to Mars campaign.
- **Demonstrator:** This element will provide funding through grants to Australian businesses and organisations for developing demonstrator and pilot projects that showcase Australia's capabilities and skills to the international space industry that have the potential to support NASA's Moon to Mars campaign.
- **Supply Chain:** This element comprises two components.
  - The Supply Chain Capability component will provide funding through grants to Australian businesses and organisations to develop or enhance products, capabilities and services that could be sold into international space supply chains and markets. The funding aims to improve skills, capacity and capabilities that are applicable to the international space industry and that could be used to support NASA's Moon to Mars campaign. This may involve grants to support the development and sale of Australian products, capabilities and services into national supply chains, with the view of fostering greater Australian space exports into international supply chains and markets.
  - The Supply Chain Facilitation component will provide funding to facilitate the involvement and participation of Australian businesses and organisations in international supply chains, opportunities and networks that could support NASA's Moon to Mars campaign. This component will include delivery through one or more procurements. Spending decisions will be made by a delegate of the Accountable Authority.

Funding authorised by this Legislative Instrument comes from Program 1.2: Growing Business Investment and Improving Business Capability, Outcome 1. Details are set out in the Growing Australia's Space Industry measure in the *Portfolio Additional Estimates Statements 2019-20*, Industry, Science, Energy and Resources portfolio (<https://www.industry.gov.au/about-us/finance-reporting/budget-statements>) at page 38.

### Procurements under the Program:

The Supply Chain Facilitation component includes funding through procurements on AusTender, in accordance with the *Commonwealth Procurement Rules* (<https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules>).

Under the Program, covered procurements will be subject to the *Government Procurement (Judicial Review) Act 2018*.

### Grants under the Program:

Grants will be open to Australian businesses and organisations. Grant guidelines and program advice will specify eligibility for each grant opportunity. A co-contribution requirement for grants will be set out in grant opportunity guidelines, where appropriate.

The Program is administered by the Department in accordance with the *Commonwealth Grant Rules and Guidelines 2017* (<https://www.finance.gov.au/government/commonwealth-grants/commonwealth-grants-rules-guidelines>).

Grants under the Program will be delivered by the Department's Business Grants Hub. Business Grants Hub is a specialised design, management and delivery body with extensive expertise and capability in delivering similar programs.

Selection processes will be determined within the design phase in line with the *Commonwealth Grant Rules and Guidelines 2017*, and clearly set out for each grant opportunity in grant opportunity guidelines.

Eligibility of grant applications will be assessed by Business Grants Hub against the eligibility criteria set out in grant opportunity guidelines. An assessment committee will then consider eligible applications against the assessment criteria. The eligibility and assessment criteria for each grant opportunity will be available on [business.gov.au](https://business.gov.au). The assessment process will include scoring each application out of 100. The committee may comprise representatives from the Australian Government, the Australian Space Agency, and other independent experts. The committee may seek additional advice from independent technical experts.

Applications must address the eligibility and assessment criteria, and provide relevant supporting information. The amount of detail and supporting evidence required will be relative to the project size, complexity and funding amount requested. Larger and more complex projects should include more detailed evidence. To be competitive, applications must score highly against each assessment criterion.

After considering the applications, the assessment committee will make recommendations to the IR&D Act delegate regarding those applications suitable for funding. The IR&D Act delegate will make the final decision about which grants to approve, taking into consideration the assessment committee's recommendations, and the availability of grant funds. The IR&D

Act delegate will not approve funding if there are insufficient Program funds available across relevant financial years for the Program.

Both successful and unsuccessful applicants will be informed in writing. Unsuccessful applicants have an opportunity to discuss the outcome with the Department, and can submit a new application for the same or similar project when there are future funding rounds. Where this occurs, applicants should include new or more information to address the weaknesses identified in their previous application.

There may be instances where there is clear justification to limit grant opportunities to a small number of potential grantees or provide ad hoc grants, due to the context and specialised requirements of the grant activity under question. If used, the Program delegate (Manager-level, with responsibility for the Program) will document the range of issues considered in determining these selection process, including balancing the nature and needs of potential grantees, maximising access to grants and policy outcome concerns against the advantages and disadvantages, risk analysis, timeliness and cost-effectiveness of the proposed process.

The Program involves the allocation of finite resources. In addition, there will be a robust selection process, an enquiry and feedback process, and an existing complaints mechanism for affected applicants. Therefore, external merits review does not apply to decisions about the provision of grants under the Program.

Persons who are otherwise affected by decisions or who have complaints about the Program will also 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.

### **Trade and commerce power**

Paragraph 51(i) of the Constitution empowers the Parliament to make laws with respect to ‘trade and commerce with other countries, and among the States’.

In that regard, the Program prescribed by the Legislative Instrument will promote trade and commerce with other countries by providing funding so that Australian businesses and organisations can showcase their potential to, and participate in, international space supply chains and markets. The Program will allow Australian businesses and organisations to develop and contribute products, capabilities or services to NASA exploration programs, including the Moon to Mars campaign. The Program will also fund businesses and organisations to develop products, capabilities or services that could be sold into international supply chains and markets, and facilitate participation by those Australian businesses and organisations in those supply chains and markets. Doing so is expected to build capability in national, interstate space supply chains so as to promote emerging Australian space exports.

## **Corporations power**

Paragraph 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.

Only constitutional corporations will be eligible to receive benefits under the Supply Chain Capability component of the Program prescribed by the Legislative Instrument. The benefits conferred by the Program will be directed to assisting those corporations in the conduct of their ordinary activities. In that regard, these funds will be used to assist constitutional corporations to develop and supply products, capabilities or services (that could ultimately be sold into international supply chains) to others in Australia, including those located within the same state. The Facilitation component of the Supply Chain element of the Program may also involve procurement of goods and services from foreign corporations to assist Australian businesses and organisations to enter international space supply chains.

The Program will impose terms and conditions on those corporations 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.

### **External affairs power**

Paragraph 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 places, persons, matters, or things outside the geographical limits of Australia.

In that regard, funding provided under the Legislative Instrument will facilitate or contribute toward international space projects and other space activities, which will occur outside of Australia.

The external affairs power also supports legislation with respect to matters concerning Australia’s relations with other countries. In that regard, funding provided under the Legislative Instrument will enhance Australia’s relations with the United States of America and other international partners by enabling Australia to join and contribute towards NASA’s Moon to Mars campaign.

### **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 in the Parliament, the executive or the courts by the Constitution. 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 support the Commonwealth to facilitate Australian space industry participation in space activities in a manner that requires national coordination. The Australian Space Agency has partnered with NASA to allow Australian businesses and organisations to participate in its Moon to Mars campaign. The activities that will address identified skills, capacity and capability gaps in the Australian space sector and form a core part of the Australian Government’s National Civil Space Priority Areas in the civil space strategy.

### **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 on the design of the Program occurred with stakeholders, including potential Program participants, reaching over 550 participants Australia-wide, in February and March 2020. Over 70 submissions were received from government, business, researchers and

individuals. Non-confidential submissions and a summary and response to feedback report is available on the Consultation Hub (<https://consult.industry.gov.au/space/m2m/>).

### **Regulatory Impact**

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 24686).

## **Details of the *Industry Research and Development (Moon to Mars Program) Instrument 2020***

### **Section 1 – Name**

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Moon to Mars 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 Moon to Mars Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides funding for activities that will support Australian businesses and organisations, including universities and research institutions, to participate in international space supply chains and markets, including joining the National Aeronautics and Space Administration's (NASA's) campaign to go forward to the Moon and then go on to Mars.

Funds will be used to:

- provide support to Australian businesses and organisations to develop or enhance products, capabilities and services that have the capacity to contribute to NASA's exploration programs to the Moon, Mars or other celestial bodies (Trailblazer)
- provide support to Australian businesses and organisations to develop or enhance prototypes (demonstrator and pilot projects) that could be sold into international space supply chains and markets if successfully commercialised. In doing so, this funding will support those businesses and organisations to showcase Australia's capabilities and skills to the international space industry that have the potential to support NASA's exploration programs to the Moon, Mars or other celestial bodies (Demonstrator)
- provide support to Australian businesses and organisations to develop or enhance products, capabilities and services that could be sold into international space supply



chains and markets which could be used to support NASA's exploration programs to the Moon, Mars or other celestial bodies (Supply Chain - capability)

- facilitate the participation of Australian businesses and organisations in international space supply chains and markets. This could include supporting Australian businesses and organisations to identify opportunities and develop networks, including facilitating the delivery of Australian products and services that could support NASA's exploration programs to the Moon, Mars or other celestial bodies, into international space supply chains and markets (Supply Chain – facilitation)

## **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 trade and commerce with other countries, and among the States (within the meaning of paragraph 51(i) of the Constitution); foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); external affairs (within the meaning of paragraph 51(xxix) of the Constitution) and measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation other than by the Commonwealth (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*

*Industry Research and Development (Moon to Mars 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 Legislative Instrument is to prescribe the Moon to Mars Program (the Program). The Program funds activities that will accelerate the growth of Australia's emerging space sector, by supporting Australian businesses and organisations to participate in national and international space supply chains and markets, including joining the National Aeronautics and Space Administration's (NASA's) endeavour to go forward to the Moon and then go on to Mars. It will:

- support targeted growth and transformation in the space industry
- align with agreed Australian Government priority areas (reflecting national strengths and opportunities)
- leverage investment opportunities
- produce broader economic benefits and spill-overs beyond the space sector.

Types of activities supported by the Program include, but are not limited to, support to Australian businesses and organisations to improve space skills, and capabilities; support to facilitate the delivery of Australian space products and services into international supply chains and markets; support to develop demonstrator and pilot projects that showcase Australia's capabilities and skills to the international space industry, and support for the development or enhancement of products, capabilities and services that have the potential to contribute to NASA's exploration programs to the Moon, Mars or other celestial bodies.

### **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**