

REPLACEMENT EXPLANATORY STATEMENT

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

Industry Research and Development Act 1986

Industry Research and Development (Ferretti International Whyalla Steel Processing and Galvanising Plant 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 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 (Ferretti International Whyalla Steel Processing and Galvanising Plant Program) Instrument 2020* (the Legislative Instrument) is to prescribe the Ferretti International Whyalla Steel Processing and Galvanising Plant Program (the Program). The funding for the Program has been secured through the Department of Industry, Science, Energy and Resources (the Department) 2020-2021 Budget. The Program funding will allow an expanded range of steel to be processed in the Spencer Gulf, with flow-on benefits to the region.

The Program provides up to \$15 million of funding in the 2020-21 financial year for Ferretti International Ottoway Pty Ltd (Ferretti International) to undertake activities supporting the construction of a new facility to process, galvanise and construct an expanded range of steel products, including steel transmission towers, in Whyalla. Activities under the Program will include the construction of access roads, initial site works, erection of buildings, and the purchase of steel galvanising plant and equipment. Finalisation of the construction of the new facility is not expected to occur until financial year 2022-23.

The grant is expected to result in an expansion in capability of the South Australian steel fabrication and manufacturing sectors, increased domestic manufacturing capacity to

contribute to the upgrade and expansion of transmission networks across Australia, and economic stimulus in the Whyalla and Spencer Gulf regions.

Funding authorised by this Legislative Instrument comes from Program 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/sites/default/files/2020-10/2020-21-department-of-industry-science-energy-and-resources-pbs.pdf>) at page 23.

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 provides \$15 million through an ad-hoc, non-competitive grant to support Ferretti International to undertake its own activities in the development of a transmission tower manufacturing plant. 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-and-guidelines>). As this is a ad-hoc grant to an identified recipient, there are no selection criteria.

Spending decisions will be made by the Program Delegate who is the General Manager responsible for administering the Program, taking into account the recommendations of the Department.

As this is a one-off grant to an identified recipient, the Program will not be subject to merits review. Ferretti International has the required technical expertise and capability, including collaborative networks at the international, national and Whyalla regional level to allow it to effectively deliver the project. Ferretti International received \$600,000 in funding through the Ferretti International Whyalla Transmission Towers Manufacturing Feasibility Study Program to undertake a feasibility study into the establishment of a transmission towers manufacturing facility in 2019.

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.

The Legislative Instrument specifies that the legislative powers in respect of which the Instrument is made are the corporations power (s 51(xx) of the Constitution) and the trade and commerce power (s 51(i) of the Constitution).

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 confers on a trading corporation (Ferretti International) benefits which are directed to assisting Ferretti International in the conduct of its ordinary activities (namely to develop a transmission tower manufacturing plant in Whyalla). The Program will impose terms and conditions 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.

Trade and commerce power

The trade and commerce power empowers the Parliament to make laws which relate to trade and commerce with other countries, and among the States.

The Program prescribed by the Legislative Instrument is aimed at supporting the development of a transmission tower manufacturing plant in Whyalla that will foster interstate and international trade and commerce. It is expected that steel products to be manufactured at the new facility would be sold interstate and potentially overseas.

Authority

Section 33 of the IR&D Act provides authority for the Legislative Instrument.

Consultation

The Department consulted Ferretti International to understand the outcomes expected from the upgrade of Ferretti International's Whyalla facilities, as well as the activities necessary to be undertaken to complete the upgrade. The Program was further informed by the outcomes

of a feasibility study that Ferretti International had undertaken into developing a transmission tower manufacturing plant in Whyalla in early 2020. These consultations informed the design of the Program. The Department is also informed by extensive and ongoing engagement it has with the steel sector, and state and territory governments.

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

Regulatory Impact

It is estimated that the Program will have a minimal regulatory burden (OBPR Reference 43273).

Details of the *Industry Research and Development (Ferretti International Whyalla Steel Processing and Galvanising Plant Program) Instrument 2020*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Ferretti International Whyalla Steel Processing and Galvanising Plant Program) Instrument 2020* (the Legislative Instrument).

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 – Prescribed Program

This section prescribes the Ferretti International Whyalla Transmission Towers Manufacturing Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides financial assistance to Ferretti International Ottoway Pty Ltd to support the construction of a new facility to upgrade its steel processing and galvanising plant, and to manufacture electricity transmission towers in Whyalla, South Australia.

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 trade and commerce with other countries and among the States (s51(i) of the Constitution) and foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (s51(xx) 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 (Ferretti International Whyalla Steel Processing and Galvanising Plant 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

This instrument provides legislative authority to commit Commonwealth funds for the Ferretti International Whyalla Steel Processing and Galvanising Plant Program (the Program).

The Program provides up to \$15 million of funding in the 2020-21 financial year for Ferretti International Ottoway Pty Ltd to undertake activities that support the construction of a new facility to process, galvanise and construct an expanded range of steel products, including steel transmission towers, in Whyalla. Activities under the Program that may be eligible for funding include the construction of access roads, initial site works, erection of buildings, and the purchase of steel galvanising plant and equipment. Finalisation of the construction of the new facility is not expected to occur until financial year 2022-23.

The grant is expected to result in an expansion in capability of the South Australian steel fabrication and manufacturing sectors, increased domestic manufacturing capacity to contribute to the upgrade and expansion of transmission networks across Australia, and economic stimulus in the Whyalla and Spencer Gulf regions.

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 Christian Porter MP
Minister for Industry, Science and Technology