

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Energy and Emissions Reduction

Industry Research and Development Act 1986

Industry Research and Development (Portland Aluminium Smelter Program)

Instrument 2021

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 (Portland Aluminium Smelter Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Portland Aluminium Smelter Program (the Program). The funding for the Program has been secured through the provision of additional funding to the Department of Industry, Science, Energy and Resources (the Department) in the 2020-2021 Budget.

The purpose of the Program is to:

- (a) ensure the smelter can provide grid reliability services to the national electricity market; and
- (b) contribute to the reliability and security of the National Electricity Market.

The Program provides up to \$19.2 million per year in funding to underwrite the participation of Portland aluminium smelter (Portland) in the Reliability and Emergency Reserve Trader (RERT) mechanism operated by the Australian Energy Market Operator. The Program will

operate in relation to Portland's RERT participation over the 2021-22 to 2024-25 financial years.

Payment will relate to Portland's RERT revenue for the previous financial year. Payment of the grant for each financial year will be subject to Portland participating fully in good faith in the RERT to the Commonwealth's satisfaction. This will include Portland fulfilling its obligations to provide the reserve in accordance with a RERT panel agreement with the Australian Energy Market Operator to ensure that Portland is available to rapidly reduce its demand when required, in order to maintain power system reliability and system security. Portland will also need to fulfil any additional grant agreement conditions related to participation in the RERT and remaining in operation.

The funding amount will be calculated after the end of each financial year after Portland has submitted the relevant documentation to the Department detailing its RERT activity for the previous financial year. The funding will be for any shortfall in Portland's RERT revenue up to \$19.2 million per year. If Portland receives RERT revenue equal to or exceeding \$19.2 million in a year, it will not receive any additional grant funding in that year.

Funding authorised by this Legislative Instrument comes from Program 3.1, Outcome 3. Details will be set out in the *Portfolio Budget Statements 2021-22, Budget Related Paper No. 1.9, Industry, Science, Energy and Resources Portfolio*.

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 an ad hoc grants program. The Program will be administered by the Department in accordance with the *Commonwealth Grant Rules and Guidelines 2017* (<http://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-and-guidelines.pdf>).

Eligibility criteria are outlined in the Grant Opportunity Guidelines, available at www.grants.gov.au.

The spending decision will be made by the Program Delegate, subject to the grantee providing a satisfactory proposal that meets the requirements of the Grant Opportunity Guidelines. As the Program involves funding to an identified recipient, decisions will not be subject to merits review.

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.

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 only applicant who will be eligible for benefits under the Program prescribed by the Legislative Instrument is a constitutional corporation. The funding conferred by the Program will be directed to assisting that corporation in the conduct of its ordinary activities (here, its operation of an aluminium smelter and participation in the RERT mechanism). The Program will impose terms and conditions on the corporation under an agreement in accordance with section 35 of the IR&D Act, in relation to receipt of funding 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.

Background

This Program delivers on the Australian Government's commitment to maintain reliable and secure energy. The intended outcome of the Program is to ensure grid reliability services to the national electricity market. The Program is designed as a short-term measure until broader energy market reforms are designed and delivered from 2025 onwards.

Authority

Section 33 of the IR&D Act 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. The Department of Foreign Affairs and Trade were also consulted on the Instrument and Explanatory Statement.

Alcoa Portland Aluminium Pty Ltd was consulted during policy development.

Regulatory Impact

It is estimated that there will be no regulatory burden (OBPR reference number 43068).

Details of the *Industry Research and Development (Portland Aluminium Smelter Program) Instrument 2021*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Portland Aluminium Smelter Program) Instrument 2021*.

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 Portland Aluminium Smelter Program (the Program) for the purposes of section 33 of the IR&D Act.

The purpose of the Program is to ensure grid reliability services to the National Electricity Market, contribute to the reliability and security of the electricity grid in Victoria and safeguard against impacts to electricity security in the event the Portland Aluminium Smelter (Portland) was to close.

It is intended the Program will do this by providing Portland with funding in the form of an ad hoc grant to underwrite revenue earned by Portland through its participation in the Reliability and Emergency Reserve Trader mechanism up to a maximum amount of \$19.2 million per year. The funding reflects the unique characteristics of Portland in the electricity grid in Victoria.

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 foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (paragraph 51(xx) of the Constitution).

Section 7 – Eligibility criteria relating to program

This section sets out the eligibility criteria relating to the Program for the purposes of subsection 33(4) of the Act. The eligibility criteria include that applicants must be trading or financial corporations to which paragraph 51(xx) of the Constitution applies.

Statement of Compatibility with Human Rights

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

*Industry Research and Development (Portland Aluminium Smelter Program) Instrument
2021*

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 (Portland Aluminium Smelter Program) Instrument 2021* is to prescribe the Portland Aluminium Program (the Program).

The purpose of the Program is to safeguard the national electricity grid against reliability and security impacts that may occur in Victoria if the Portland Aluminium Smelter (Portland) were to close.

The Program will do this by providing Portland with funding in the form of an ad hoc grant to underwrite revenue earned by Portland through its participation in the Reliability and Emergency Reserve Trader mechanism up to a maximum amount of \$19.2 million per year from the 2021-2022 financial year to the 2024-2025 financial year. The funding reflects the unique characteristics of Portland in the national electricity grid in Victoria. The Program is a short-term measure in place until 2025 when long term market reforms are expected to be implemented. The long term market reforms are anticipated to appropriately remunerate for the services provided by large loads to balance electricity supply and stabilise the electricity grid .

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 Angus Taylor MP

Minister for Energy and Emissions Reduction