

## **EXPLANATORY STATEMENT**

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

*Industry Research and Development Act 1986*

*Industry Research and Development (Carbon Capture, Use and Storage Development 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 (Carbon Capture, Use and Storage Development Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Carbon Capture, Use and Storage Development 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 provides \$50 million as part of the Australian Government's commitment to accelerate the deployment of carbon capture, use and storage (CCUS) technologies in Australia towards commercial operations. In particular, the Program provides funding to support pilot projects and pre-commercial activities for the capture of carbon dioxide for subsequent use or storage or the use or storage of carbon dioxide.

The purpose of the Program is to:

- reduce power and industrial emissions to contribute to meeting Australia's emissions reduction obligations;
- encourage industry investment in deploying these technologies in Australia; and
- encourage the development of prospective hubs related to the capture, use or storage of carbon dioxide around Australia.

Key activities the Program seeks to support include:

- Fostering of pilot CCUS projects or technologies that could expand into a regional CCUS hub in the near future, and bring together a network of multiple greenhouse gas emitters in close proximity for large-scale abatement;
- Research, development or demonstration projects that use or transform carbon dioxide to create carbon-derived or low-carbon products, including fuels, chemical and building materials;
- Pre-commercial activities in developing CCUS infrastructure; or
- Retrofitting of CCUS to new or existing assets to reduce emissions from new or ongoing processes.

Funding authorised by this Legislative Instrument comes from Program 2.1 Reducing Australia's greenhouse gas emissions, Outcome 2, 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/budget-statements#202021-portfolio-budget-statements> at page 61.

The Program will be delivered by AusIndustry, which is a specialised design, management and delivery body with extensive expertise and capability in delivering similar programs.

The Program is a competitive, merits based grants program. 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>). Eligibility and merit criteria are outlined in the Program guidelines, available at [business.gov.au](http://business.gov.au).

Spending decisions will be made by the Minister for Energy and Emissions Reduction, taking into account the recommendations of the Department and the Program Committee (the Committee), which consists of a Departmental representative and external technical, policy and industry experts.

Grants will be a minimum of \$500,000 and up to a maximum of \$25,000,000. The grant amount may be up to 100 per cent of eligible project costs.

The Program involves the allocation of finite resources between competing applicants. In addition, there is a robust and extensive assessment 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.

Applications will be assessed against the eligibility criteria and merit criteria set out in the Program guidelines in two stages. At first instance, applications will be assessed by AusIndustry against the eligibility criteria. The Committee will then consider eligible applications against the merit criteria. This will include comparing the applications and scoring each application out of 100. The Committee will comprise of a representative from the Department and external technical, policy and industry experts. The Committee may also include representatives from Geoscience Australia or the Commonwealth Scientific and Industrial Research Organisation. The Committee may seek input from independent experts to inform their assessments.

Applications must address the eligibility and merit criteria, and provide relevant supporting information. The amount of detail and supporting evidence should 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 merit criterion.

After considering the applications, the Committee will make recommendations to the Minister regarding those applications suitable for funding. The Minister will make the final decision about which grants to approve, taking into consideration the Committee's recommendations, and the availability of grant funds. The Minister 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 in future funding rounds, where available. Where this occurs, applicants should include new or more information to address the weaknesses identified in their previous application.

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.

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

### **Corporations power**

The Legislative Instrument specifies that a legislative power in respect of which it is made is the corporations power (section 51(xx) of the Constitution).

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.

Constitutional corporations will be eligible to receive benefits under 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 (generally involving CCUS). 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**

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to ‘external affairs’. The external affairs power supports legislation implementing Australia’s international obligations under treaties to which it is a party. Australia has obligations under the following treaties.

The United Nations Framework Convention on Climate Change (the “UNFCCC”) [1994] ATS 2, includes a range of obligations on Australia to take domestic actions that reduce Australia’s emissions of greenhouse gases. Relevantly, it provides that parties shall:

- formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;<sup>1</sup>
- promote and cooperate in the development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors including energy, transport, industry, agriculture, forestry and waste management sectors;<sup>2</sup> and
- adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.<sup>3</sup>

The Kyoto Protocol to the United Nations Framework Convention on Climate Change [2008] ATS 2 also includes obligations on Australia to take action to reduce emissions. For example, article 10(b) requires parties to formulate, implement and report upon climate change mitigation and adaptation programs.

The Paris Agreement [2016] ATS 24 was entered into by the parties to the UNFCCC to enhance its implementation. Under the Paris Agreement, Australia has a “nationally determined contribution” comprising a 2030 emissions reduction target of 26 to 28 per cent below 2005 levels. Relevantly, article 4.2 of the Paris Agreement provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve” and that “[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions”.

The activity of CCUS has the potential to result in significant reductions of Australia’s greenhouse gas emissions that would contribute to these obligations. Certain types of capture and storage of carbon dioxide are directly reflected in reduced emissions in our national greenhouse gas accounts. Other CCUS activities, such as certain utilisations of carbon dioxide created from industrial processes, avoid emissions that would otherwise occur without the CCUS activity and thus contribute to Australia’s national greenhouse gas accounts. The funding for pilot projects and pre-commercial CCUS activities is an important step in delivering these emissions reductions.

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<sup>1</sup> See article 4.1(b).

<sup>2</sup> See article 4.1(c).

<sup>3</sup> See article 4.2(a).

### **Territories power**

Section 122 of the Constitution empowers the Parliament to ‘make laws for the government of any territory’. Funding provided under the Legislative Instrument may be provided to a territory government or an agency, authority or instrumentality of a territory government involved in CCUS.

### **Power to grant financial assistance to states**

Section 96 of the Constitution empowers the Parliament to ‘grant financial assistance to any State on such terms and conditions as the Parliament thinks fit’. Funding provided under the Legislative Instrument may be provided to a state government or an agency, authority or instrumentality of a state government involved in CCUS.

### **Background**

In the Low Emission Technology Statement, released on 22 September 2020, the Government highlighted that carbon capture and storage was a priority technology and established an economic stretch goal to compress, transport and store CO<sub>2</sub> for less than \$20 per tonne of CO<sub>2</sub>. The Statement also deemed carbon capture and use (CCU) or carbon recycling technologies as an emerging technology, with an important role to play in Australia’s transition to lower emissions. The Program plays a key role in supporting the development of priority and emerging CCUS technologies to support the development and deployment of projects in these technology areas.

### **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 has engaged with industry and research stakeholders, Commonwealth and state and territory government agencies regarding the Program.

### **Regulatory Impact**

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 43409).

## **Details of the *Industry Research and Development (Carbon Capture, Use and Storage Development Program) Instrument 2021***

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

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Carbon Capture, Use and Storage Development 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 item provides for definitions of terms used in the Legislative Instrument.

The Paris Agreement, Kyoto Protocol and United Nations Framework Convention on Climate Change are defined in the same way as other Commonwealth legislation and are available from the Australian Treaty Series at <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/>. These treaties are defined for the purpose of specifying the external affairs power as a relevant legislative power for the Legislative Instrument under subsection 33(3) of the IR&D Act.

The text of the treaties is not applied, adopted or incorporated by the Legislative Instrument and so subsection 14(2) of the *Legislation Act 2003* does not apply to limit the reference to these treaties as in force for Australia from time to time. Australia continues to implement the obligations under these treaties as amended over time, such as in relation to Australia's ratification of the Doha Amendment to the Kyoto Protocol, which commenced on 31 December 2020.

### **Section 5 – Prescribed Program**

This section prescribes the Carbon Capture, Use and Storage Development Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides grants to support pilot and pre-commercial activities for capture and subsequent use or storage of carbon dioxide, and the use or storage of carbon dioxide.

## **Section 6 – Specified Legislative Power**

This section specifies that the legislative powers in respect of which the Legislative Instrument is made is the power of the Parliament to make laws with respect to:

- (a) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution);
- (b) external affairs (within the meaning of paragraph 51(xxix) of the Constitution) as it relates to measures that would assist Australia to meet its obligations under one or more of the following:
  - (ii) the Kyoto Protocol, particularly Article 10;
  - (iii) the Paris Agreement, particularly Article 4;
  - (iv) the United Nations Framework Convention on Climate Change, particularly Article 4;
- (c) matters in respect of which this Constitution makes provision until the Parliament otherwise provides (within the meaning of paragraph 51(xxxvi) of the Constitution), together with section 96 of the Constitution;
- (d) the government of a Territory (within the meaning of section 122 of the Constitution).

The relevance of these powers is discussed in the introduction to this statement.

## **Section 7 – Eligibility Criteria**

This section sets out the eligibility criteria relating to the Program for the purposes of subsection 33(4) of the IR&D Act. The eligibility criteria relating to the program includes the requirement that an applicant is any of the following:

- (a) a constitutional corporation;
- (b) a State, or an agency, authority or instrumentality of a State;
- (c) a Territory, or an agency, authority or instrumentality of a Territory;
- (d) an authority of the Commonwealth.

These criteria reflect the different heads of legislative power relied upon by the instrument.

## **Statement of Compatibility with Human Rights**

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

*Industry Research and Development (Carbon Capture, Use and Storage Development 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 (Carbon Capture, Use and Storage Development Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Carbon Capture, Use and Storage Development Program (the Program).

The Program provides \$50 million as part of the Australian Government's commitment to accelerate the deployment of carbon capture, use and storage (CCUS) technologies in Australia towards commercial operations. The purpose of the Program is to:

- reduce power and industrial emissions to contribute to meeting Australia's emissions reduction obligations;
- encourage industry investment in deploying these technologies in Australia; and
- encourage the development of prospective hubs related to the capture, use or storage of carbon dioxide around Australia.

### **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**