

EXPLANATORY STATEMENT

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

Industry Research and Development Act 1986

Industry Research and Development (Boosting Australia's Diesel Storage 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 (Boosting Australia's Diesel Storage Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Boosting Australia's Diesel Storage 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 will provide \$200 million as part of the Australian Government's commitment to increase Australia's fuel security by providing matched funding to industry to construct new diesel storage. This will assist industry in meeting the increased diesel levels under the minimum stockholding obligation. The Program will support industry by providing up to 50 per cent of their capital expenditure costs, through a grant, for the construction of the new diesel storage.

Funding will be available to undertake eligible projects to construct new domestic diesel storage for successful entities that are incorporated in Australia and to incorporated trustees

on behalf of a trust, where that entity or trustee is a trading or financial corporation to which paragraph 51(xx) of the Constitution applies.

Funding authorised by this Legislative Instrument comes from Program 3.1, Outcome 3, as set out in the *Portfolio Budget Statements 2020-2021, 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 70.

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

The Program is an open competitive, merits-based 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 and assessment criteria are outlined in the Program Grant Opportunity Guidelines, available at <https://business.gov.au/grants-and-programs/boosting-australias-diesel-storage-program#key-documents>.

Spending decisions will be made by the Minister for Energy and Emissions Reduction, taking into account the recommendations of the assessment committee, and the availability of grant funds.

Grants will be a minimum of \$6 million up to a maximum of \$33.3 million. The grant amount may be up to half of eligible project costs. No more than 50 per cent of eligible project costs can be funded from Commonwealth, state, territory or local government grants. The Minister will not approve funding if there are insufficient program funds available across relevant financial years for the Program.

The Program involves the allocation of finite resources between competing applicants with guidelines published and applications submitted online through a process open to all eligible entities. There is a robust and extensive grant 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.

Applications will be assessed against the eligibility criteria and assessment criteria set out in the Program guidelines in two stages. First, applications will be assessed by AusIndustry against the eligibility criteria. Second, an assessment committee will consider eligible applications against the assessment criteria and compare them against each other. The assessment will include an overall consideration of value for money, taking into consideration the spread of projects nationally to support Australia's fuel security needs, which includes retaining a sovereign refining capacity.

The assessment committee will comprise representatives from Australian Government agencies. The assessment committee will seek input from independent technical experts to

support its assessment of applications and will make recommendations to the Minister on the merits of each eligible application. The Minister will make the final decision about which grants to approve, the grant funding to be awarded, and any conditions attached to the offer of grant funding.

Both successful and unsuccessful applicants will be informed in writing. Unsuccessful applicants may not be notified until grant agreements have been executed with successful applicants.

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

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.

Only 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 (such as increasing their capacity to store diesel fuel through the construction of new storage). 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.

Trade and commerce power

Section 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 is aimed at increasing Australia’s onshore diesel storage to enhance fuel security and protect consumers and industry from fuel supply chain disruptions. This will support interstate and international trade and commerce in a range of areas which rely heavily on the availability of diesel fuel, such as critical infrastructure, transport and other industries.

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 Industry, Science, Energy and Resources conducted an open and non-binding Request for Information on Potential Opportunities to Increase Australia’s Fuel Storage from June to July 2020. The submissions to the Program helped inform the design of the Boosting Australia’s Diesel Storage Program. Participation or otherwise in the Request for Information did not impact entities’ subsequent participation, nor assessment of their applications, in the Program.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 20489).

Details of the *Industry Research and Development (Boosting Australia's Diesel Storage Program) Instrument 2021*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Boosting Australia's Diesel Storage 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 Boosting Australia's Diesel Storage Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides for grants to support activities that increase Australia's onshore diesel oil storage capacity through the construction of new diesel oil storage.

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

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 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 (Boosting Australia's Diesel Storage 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

This Legislative Instrument provides legislative authority to commit Commonwealth funds for the Program. The Program provides matched grant funding to industry to construct new onshore diesel storage, or conduct related activities.

The Program provides \$200 million as part of the Australian Government's commitment to increase Australia's fuel security through supporting the construction of new diesel storage. This will assist industry in meeting the increased diesel levels under the minimum stockholding obligation. The Program will support industry by providing up to 50 per cent of their capital expenditure costs, through a grant, for the construction of new diesel storage. The Program is also intended to support job creation in local industries.

Funding will be available to undertake eligible projects to construct new domestic diesel storage for successful entities that are incorporated in Australia and to incorporated trustees on behalf of a trust, where that entity or trustee is a trading or financial corporation to which paragraph 51(xx) of the Constitution applies.

Human rights implications

This Legislative Instrument positively engages the right to an adequate standard of living and right to health, as maintaining an adequate supply of diesel is critical for the distribution of food and medicine and the functioning of emergency services.

Conclusion

This Legislative Instrument is compatible with human rights as it has a minor positive effect on the applicable human rights.

**The Hon Angus Taylor MP |
Minister for Energy and Emissions Reduction**