

EXPLANATORY STATEMENT

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

Industry Research and Development Act 1986

Industry Research and Development (Refinery Upgrades 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 (Refinery Upgrades Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Refinery Upgrades Program (the Program). The funding for the Program has been secured through the Department of Industry, Science, Energy and Resources (the Department) 2021-2022 Budget. The Program provides \$302 million as part of the Australian Government's commitment to assist major domestic refineries to undertake infrastructure upgrades to produce ultra low sulfur gasoline (≤ 10 ppm) and create Euro-6d equivalent gasoline and diesel standards that are appropriate for Australia by the end of 2024.

The purpose of the Program is to support upgrades at the major domestic refineries to assure the domestic production and supply of better quality fuel, and allow for the earlier introduction of ultra-low sulfur gasoline from 2024, instead of 2027. The Program will help ensure refining capability remains in Australia, safeguard Australia's liquid fuel security and maintain associated fuel security benefits. Bringing forward improved fuel quality standards from 2027 to 2024 will provide health and economic benefits to Australians.

Funds will be provided through two rounds:

1. **Desulfurisation grants:** This round will support domestic production of ultra-low sulfur (≤ 10 parts per million) gasoline, with the option of supporting further improvements to create Euro-6 equivalent gasoline and diesel standards that are appropriate for Australia, as well as efficiency measures to improve refinery viability. The total funding for this round will be \$250 million. Funding will be available for enabling Euro-6 equivalent fuels improvements if the desulfurisation project does not expend all available funds.
2. **Enabling Euro 6d Equivalent Fuels grants:** This round will support domestic production of fuel that supports the creation of Euro-6d equivalent gasoline and diesel standards that are appropriate for Australia, with the option of supporting efficiency measures to improve refinery viability if funding is available. The total funding for this round will be \$52 million, plus any unspent funds from the desulfurisation grants round.

Funding will be available to the entities with ownership of the Lytton refinery in Queensland and the Geelong refinery in Victoria to undertake planning and infrastructure upgrades.

Activities that may be funded through the program include:

- planning, design and engineering;
- site preparation activities directly related to the project;
- upgrading infrastructure; and
- designing, buying, constructing, installing and/or commissioning of infrastructure including plant and equipment.

As a condition of receiving the funding under the Program, refiners must commit to continue operations until 30 June 2027. The grant agreement for this Program will include repayment obligations to allow the Government to recover funds paid to a refiner if that entity's refinery ceases to operate before this date.

Funding authorised by this Legislative Instrument comes from Program 3.1, supporting reliable, secure and affordable energy in Outcome 3 as set out in the *Portfolio Budget Statements 2021-22, Budget Related Paper No. 1.9 Industry, Science, Energy and Resources Portfolio* (<https://www.industry.gov.au/sites/default/files/2021-05/2021-22-department-of-industry-science-energy-and-resources-pbs.pdf>) at page 57.

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

The Program is a closed, non-competitive grants program. The Program is 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 and eligible activities are outlined in the Program

guidelines which will be available on GrantConnect. Note that first time users of GrantConnect will need to create login details to access the Program guidelines.

Spending decisions will be made by the Minister for Energy and Emissions Reduction taking into account the recommendations of the Department.

The desulfurisation grants are expected to be up to \$125 million to support up to half of eligible project expenditure per grantee (i.e. per refinery). However, if one of the potential grantees does not seek support, the remaining grantee may be eligible to apply for the total Round 1 funding of \$250 million. In this circumstance, a new grant guideline and application process would be sought.

The enabling Euro-6d equivalent fuels grants will be up to a maximum of \$26 million to support up to 100 per cent of eligible project expenditure per grantee (i.e. per refinery). Funding for Euro-6d equivalent fuels grants will be made available if the Government decides, likely in 2022, to implement additional parameter changes in 2024.

The Program is a closed, non-competitive grant that involves the allocation of finite resources between 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. An assessment committee will then consider eligible applications against the merit criteria. The committee may comprise representatives from the Australian Government and other independent technical experts. The assessment 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. The projects to be funded under the Program are likely to be large and complex and therefore it is expected that applications will include more detailed evidence.

After considering the applications, the assessment 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 assessment committee's recommendations, and the availability of grant funds.

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 power in respect of which the Legislative Instrument is made is the following:

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’.

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 constitutional corporations that currently refine fuel to undertake infrastructure upgrades to their petroleum refineries in order to enable those corporations to continue their ordinary activities when upcoming improved fuel quality standards commence.

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.

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.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 43742).

Details of the *Industry Research and Development (Refinery Upgrades Program) Instrument 2021*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Refinery Upgrades 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.

Section 5 – Prescribed Program

This section prescribes the Program for the purposes of section 33 of the IR&D Act.

The Program provides grants to support upgrades at the major domestic refineries in order to assure the domestic production and supply of better quality fuel and allow for the introduction of ultra-low sulfur gasoline from 2024.

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

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; must confirm in writing that the petroleum refinery to be upgraded is expected to continue to operate until at least 30 June 2027; and must declare in writing the understanding that, when an arrangement under section 34 of the Act for the program is entered into, the applicant will consent to obligations requiring the applicant to make repayments if the petroleum refinery ceases to operate before 1 July 2027.

A key objective of the Program is to ensure the major refineries continue operation until 30 June 2027. The grant agreement will include provisions enabling the Government to recoup funds if a refinery ceases operation before this date. Eligibility criteria (b) and (c) are included in the Legislative Instrument to further ensure these repayment obligations are enforceable.

Statement of Compatibility with Human Rights

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

Industry Research and Development (Refinery Upgrades 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 Legislative Instrument establishes the Refinery Upgrades Program to co-invest in upgrades at the major domestic refineries in order to assure the domestic production and supply of better quality fuel and allow for the introduction of ultra-low sulfur gasoline from 2024.

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