

## **EXPLANATORY STATEMENT**

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

*Industry Research and Development Act 1986*

*Industry Research and Development (Supporting Critical Transmission Infrastructure 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 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 (Supporting Critical Transmission Infrastructure Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Supporting Critical Transmission Infrastructure Program (the Program). As Australia's electricity generation transitions from a largely centralised generation fleet, and more distributed generation sources enter the system, electricity transmission networks will play an increasingly important role in allowing resources to be shared across geographic areas and between states and territories.

The purpose of the Program is to support electricity transmission projects that have potential to benefit electricity price, reliability and/or security outcomes. The eligibility criteria relating to the program include the requirement that the project relates to the development of an electricity interconnector; or the applicant is a corporation to which paragraph 51(xx) of the Constitution applies, or is owned or controlled by such a corporation; or the project relates to the development of electricity transmission infrastructure outside the geographical limits of

Australia; or the support is provided through a grant of financial assistance to a State; or the project is located in a Territory.

Transmission projects that may be supported include (initially):

- HumeLink (which will increase the capacity of the southern NSW transmission system)
- VNI West (which will link New South Wales to Victoria)
- Project EnergyConnect (which will link South Australia to New South Wales) and
- Marinus Link (which will provide a second link between Tasmania and Victoria).

These initial projects have been identified as eligible for support under the Program because they relate to the development of electricity interconnectors or electricity transmission, and were identified by the Australian Energy Market Operator in its 2020 Integrated System Plan (published 30 July 2020, accessible online at <https://aemo.com.au/-/media/files/major-publications/isp/2020/final-2020-integrated-system-plan.pdf?la=en>) as being critical to deliver low cost, reliable and secure energy to consumers.

Support to be provided to eligible projects may include financial assistance for the early works phase of a project (for instance, the design and approvals phase of the project). Support may also be provided in cases where the current development of works on a relevant transmission project will have efficiency benefits for later relevant projects. The type and terms of any support provided for in the Legislative Instrument will be negotiated individually with relevant parties, so as to ensure that the most appropriate form of support is provided. The type of support could take a number of forms including:

- an arrangement under which the Commonwealth agrees to cover certain costs associated with the project's early works in the event those costs are not ultimately recoverable from consumers
- a loan (including a concessional or convertible loan)
- equity payments (or a combination of loan and equity) or
- a grant.

In appropriate cases, the support will be provided indirectly, via an arrangement with the relevant State (for example, where a State agrees to support a particular project and the Commonwealth separately agrees to reimburse the State a proportion of the amount the State is required to pay under the support agreement).

Any grants provided under this Program will be administered in accordance with the *Commonwealth Grant Rules and Guidelines 2017* (<https://www.legislation.gov.au/Details/F2017L01097>).

The decision as to what form the financial support will take, and the amount of financial support, for a particular project will be based on:

- project stage, delivery structure, and timeline;
- the parties involved in the delivery of the project, including any co-contributions from states, territories and/or external entities; and
- the risks associated with the project, including financial exposure of the Commonwealth.

Spending decisions will be made by the Minister for Energy and Emissions Reduction, taking into account the recommendations of the Department of Industry, Science, Energy and Resources (the Department) based on the above considerations. Funding will be secured through the Department's Budget on an as needs basis.

The Program will not be subject to external merits review as it involves the allocation of resources to entities where detailed negotiations would have occurred with those entities to come to an arrangement that both the entity and the Commonwealth are comfortable with, and which support the implementation of policy decisions made by government about the delivery of the Program.

Persons who are affected by decisions or who have complaints about the Program will have recourse to the Department. The Department will investigate any complaints 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.

### **Trade and commerce power (s 51(i))**

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'.

The Program will support projects (including the initial projects VNI West, Project EnergyConnect and Marinus Link) that will link transmission networks across State boundaries. These projects will increase the interconnection, and improve the reliability and security, of the national electricity grid, and thereby foster the trading of electricity, transmission services and related financial products between the States.

### **Corporations power (s 51(xx))**

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.

In that regard, the Program prescribed by the Legislative Instrument may confer on constitutional corporations, or an entity owned or controlled by such a corporation, benefits which are directed to assisting them in the conduct of their ordinary activities (in this case, activities related to electricity transmission). The Program would impose terms and conditions on such corporations under any agreement in accordance with s 35 of the Act, in relation to receipt of the benefits under the Program. The Program would also regulate the activities of the corporations through terms and conditions which would set out what the funding may be used for, and the circumstances in which it must be repaid.

### **External affairs power (s 51(xxix))**

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to ‘external affairs’.

The external affairs power supports legislation with respect to matters or things outside the geographical limits of Australia, including in Commonwealth offshore areas.

The Marinus Link project involves the construction of a transmission line in a Commonwealth offshore area, with necessary connecting onshore infrastructure. Support provided under the Program in respect of this project will fund the design and approvals phase of the project, enabling the project to reach a final investment decision.

### **Power to grant financial assistance to States (s 96)**

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’. Section 51(xxxvi) of the Constitution empowers the Parliament to make laws with respect to ‘matters in respect of

which this Constitution makes provision until the Parliament otherwise provides'. Together, these sections empower the Commonwealth to make laws with respect to granting of financial assistance to the States.

The terms and conditions on which any money may be payable by the Commonwealth under those arrangements will be set out in a written agreement between the Commonwealth and the State concerned; the State must comply with those terms and conditions (subsection 35(1) of the IR&D Act).

### **Territories power**

Section 122 of the Constitution empowers the Parliament to 'make laws for the government of any territory'.

Future territory-based projects may be eligible for support and may be considered if they are of sufficient merit.

### **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 the Legislative Instrument.

### **Regulatory Impact**

It is estimated that the regulatory burden is likely to be minor (OBPR reference number ID 43427).

**Details of the *Industry Research and Development (Supporting Critical Transmission Infrastructure Program) Instrument 2021***

**PART 1 – PRELIMINARY**

**Section 1 – Name**

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Supporting Critical Transmission Infrastructure 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 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 Supporting Critical Transmission Infrastructure Program for the purposes of section 33 of the IR&D Act.

Electricity transmission networks will play an increasingly important role in allowing resources to be shared across geographic areas and between states and territories. The Program provides financial support for electricity transmission projects that have potential electricity price, reliability or security benefits.

Support for projects may be provided by direct means to project proponents, or indirectly through agreement with States. The type and terms of any support will be negotiated individually with relevant parties, so as to ensure that the most appropriate form of support is provided.

**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:

- a) trade and commerce with other countries, and among the States (within the meaning of section 51(i) of the Constitution);

- b) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (within the meaning of section 51(xx) of the Constitution);
- c) external affairs (within the meaning of section 51(xxix) of the Constitution);
- d) matters in respect of which the Constitution makes provision until the Parliament otherwise provides (within the meaning of section 51(xxxvi) of the Constitution), together with section 96 of the Constitution
- e) the government of a Territory (within the meaning of section 122 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 Act. The eligibility criteria require that the project relates to the development of an electricity interconnector; or the applicant is a corporation to which paragraph 51(xx) of the Constitution applies, or is owned or controlled by such a corporation; or the project relates to the development of electricity transmission infrastructure outside the geographical limits of Australia; or the support is provided through a grant of financial assistance to a State; or the project is located in a Territory.

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

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

*Industry Research and Development (Supporting Critical Transmission Infrastructure 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 Supporting Critical Transmission Infrastructure Program (the Program). The Program provides financial support for electricity transmission projects that have potential electricity price, reliability or security benefits.

### **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**