

EXPLANATORY STATEMENT

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

Industry Research and Development Act 1986

Industry Research and Development (Port Kembla Gas Generator Investment Development Grant 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 (Port Kembla Gas Generator Investment Development Grant Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Port Kembla Gas Generator Investment Development Grant 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 will provide up to \$30 million as part of the Australian Government's commitment to supporting the Port Kembla gas generator project to reach a final investment decision (FID). The objectives of the grant program are to:

- support development, design and procurement, and commercialisation stages of project development for the Port Kembla gas generator project; and
- support the Port Kembla gas generator project to progress to FID.

The intended outcomes of the Program are:

- the business case for the Port Kembla gas generator is finalised; and
- early works which facilitate the project's progression to FID are completed.

The eligible entity for the Program is Australian Industrial Power Pty Ltd (ABN 31 645 593 497).

Funding authorised by this Legislative Instrument comes from Program 3.1, *Supporting Reliable Energy Infrastructure*, Outcome 3: *Support the affordable, reliable, secure and competitive operation of energy markets for the long term benefit of the Australian community through improving Australia's energy supply, efficiency, quality, performance and productivity*, as set out in the Department's Portfolio Additional Estimates Statement/Budget 2019-20, as set out in the *Portfolio Budget Statements 2021-22, 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 Business Grants Hub, 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 targeting a single identified recipient. 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 grant opportunity guidelines available on GrantConnect.

The funding will be a maximum of \$30 million. The grant amount will be up to 100 percent of eligible project expenditure.

The Program involves the allocation of finite resources to an identified single applicant. In addition, there is a robust and extensive assessment process, an enquiry and feedback process, and an existing complaints mechanism (described further below). Therefore, external merits review will not apply to decisions about the provision of grants under the Program.

The application will be assessed against the eligibility criteria and assessment criteria set out in the grant opportunity guidelines by departmental staff with advice from independent experts as required.

The application must address the eligibility and assessment criteria, and provide relevant supporting information. As a relatively large and complex project, detailed evidence and supporting information will be required. The Department may request additional information from the applicant to support assessment.

After considering the application, the Department will make recommendations to the Minister for Energy and Emissions Reduction regarding the application. The Minister for Energy and Emissions Reduction will make the final decision about whether to approve the grant, taking into consideration the Department's recommendations, and the availability of grant funds. The Minister for Energy and Emissions Reduction will not approve funding if there are insufficient Program funds available across relevant financial years for the Program.

The applicant will be informed of the outcome of the application. If the applicant is unsuccessful, they will have an opportunity to discuss the outcome with the Department.

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.

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, developing the Port Kembla gas generator). The Program will impose terms and conditions on the corporation under a grant agreement in accordance with section 35 of the IR&D Act, in relation to the 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 may need to 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 44232).

Details of the *Industry Research and Development (Port Kembla Gas Generator Investment Development Grant Program) Instrument 2021*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Port Kembla Gas Generator Investment Development Grant 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 Port Kembla Gas Generator Investment Development Grant Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides up to \$30 million as part of the Australian Government's commitment to supporting the Port Kembla gas generator project to reach a final investment decision.

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 (within the meaning of paragraph 51(xx) of the Constitution).

Statement of Compatibility with Human Rights

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

Industry Research and Development (Port Kembla Gas Generator Investment Development Grant 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

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The eligible entity for the Program is Australian Industrial Power Pty Ltd (ABN 31 645 593 497).

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