

EXPLANATORY STATEMENT

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

Industry Research and Development Act 1986

Industry Research and Development (Carbon Capture, Use and Storage Hubs and Technologies 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 for Industry, Energy and Emissions Reduction (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 Commonwealth entity, or by their delegate (under section 36).

The purpose of the *Industry Research and Development (Carbon Capture, Use and Storage Hubs and Technologies Program) Instrument 2021* (the Legislative Instrument) is to prescribe the Carbon Capture, Use and Storage Hubs and Technologies 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 \$250 million as part of the Australian Government's commitment to incentivise private investment in technologies identified in the Government's Technology Investment Roadmap and Low Emissions Technology statements, to grow new export industries, create jobs and reduce emissions.

The purpose of the Program is to:

- reduce carbon dioxide emissions to contribute to Australia's emissions reduction obligations;
- encourage industry investment and support domestic and international collaboration in developing, commercialising and deploying carbon capture, use and storage (CCUS) technologies at scale in Australia; and
- encourage and support the development of prospective hubs related to the capture, use or storage of carbon dioxide in Australia.

Funding is available through two streams:

- The Technologies stream will support the research, development and commercialisation of carbon capture and storage, and carbon utilisation technologies with export potential, and the identification of viable carbon dioxide storage sites.
- The Hubs stream will support the design and construction of shared CCUS infrastructure between multiple co-located emitters and viable carbon dioxide storage sites.

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 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 50.

The Program will be delivered by AusIndustry, a specialised design, management and delivery body within the Department, 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: www.business.gov.au/grants-and-programs/carbon-capture-use-and-storage-hubs-and-technologies-program-hubs-stream and www.business.gov.au/grants-and-programs/carbon-capture-use-and-storage-hubs-and-technologies-program-technologies-stream.

Spending decisions for each Program stream will be made by the Minister, taking into account the recommendations of the Program Committees (the Committees), which will consist of a Departmental representative and external technical, policy and industry experts.

Grants will be a minimum of \$1,000,000 and up to a maximum of \$30,000,000 for the Technologies stream, and a minimum of \$5,000,000 and up to a maximum of \$50,000,000 for the Hubs stream. The grant amount may be up to 50 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 for each stream 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, which include that the applicant is a constitutional corporation, a State or Territory or an authority or instrumentality of a State or Territory, or an authority of the Commonwealth. The Committees will then consider eligible applications against the merit criteria. This will include comparing the applications and scoring each application out of 100. The Committees will comprise of a representative from the Department and external technical, policy and industry experts. The Committees may also include representatives from Geoscience Australia or the Commonwealth Scientific and Industrial Research Organisation. The Committees may seek input from other independent experts or consider relevant departmental analysis and advice 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 Committees 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 Committees' 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 (paragraph 51(xx) of the Constitution).

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’ (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 and/or hub development). 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

The Legislative Instrument specifies that a legislative power in respect of which it is made is the external affairs power (paragraph 51(xxix) of the Constitution). Paragraph 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 [1994] ATS 2 (the UNFCCC), 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;¹
- 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;² 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.³

The Kyoto Protocol to the UNFCCC [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.' Article 10 of the Paris Agreement includes obligations to 'strengthen cooperative action on technology development and transfer.'

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

¹ See article 4.1(b).

² See article 4.1(c).

³ See article 4.2(a).

accounts. The funding for research, development and commercialisation of CCUS technologies and projects and hub development activities is an important step in delivering these emissions reductions. Opportunities to share the learnings of CCUS activities and partner with international participants will also contribute to technology transfer and development covered by article 10 of the Paris Agreement.

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 or hub development activities.

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 or hub development activities.

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 carbon dioxide for less than \$20 per tonne of carbon dioxide. The Statement also deemed carbon capture and use 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.

The Program is intended to complement other Australian Government programs to support carbon capture, use and storage. In particular, activities would not be supported both by this program as well as any grant funding provided by the Australian Renewable Energy Agency or any other Commonwealth grant program. The grant funding is also different to the role of the Emissions Reduction Fund in calculating and crediting the carbon abatement that results from activities which avoid emissions. Accordingly, activities funded under this program would not be excluded from participation in the Emissions Reduction Fund if they meet the relevant criteria to be an eligible offsets project under the Emissions Reduction Fund legislation.

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, state and international government agencies regarding the Program. Feedback from this engagement has been taken into account in developing the Program guidelines.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 43474)

Details of the *Industry Research and Development (Carbon Capture, Use and Storage Hubs and Technologies 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 Hubs and Technologies 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 UNFCCC, Kyoto Protocol and Paris Agreement are defined in the same way as in 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 Hubs and Technologies Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides funding to support:

- the research, development and commercialisation of carbon capture, use and storage projects and technologies;
- the identification of suitable locations for the storage of carbon dioxide; and

- the design and construction of shared infrastructure for the transport and storage of carbon dioxide.

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:

- (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:
 - (i) the UNFCCC, particularly Article 4;
 - (ii) the Kyoto Protocol, particularly Article 10; and
 - (iii) the Paris Agreement, particularly Articles 4 and 10;
- (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 include 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 Hubs and Technologies 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 Program provides \$250 million as part of the Australian Government's commitment to incentivise private investment in technologies identified in the Government's Technology Investment Roadmap and Low Emissions Technology statements, grow new export industries, create jobs and reduce emissions. The purpose of the Program is to:

- reduce carbon dioxide emissions to contribute to Australia's emissions reduction obligations;
- encourage industry investment and support domestic and international collaboration in developing, commercialising and deploying carbon capture, use and storage technologies at scale in Australia; and
- encourage and support 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 Industry, Energy and Emissions Reduction