

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 (Strengthening Business Program) Instrument 2022

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 (Strengthening Business Program) Instrument 2022* (the Legislative Instrument) is to prescribe the expanded Strengthening Business Program (the Program). The existing Program (known as the Strengthening Business—Business Advice for Recovery and Resilience Program) provides funding for the engagement of business facilitators to provide business advice services to small-to-medium-sized businesses in identified Local Government Areas (LGAs) adversely affected by the 2019-2020 bushfire emergency (the bushfire emergency) in South Australia, Victoria and New South Wales (NSW). The Legislative Instrument will expand the Program to also provide business advice services to small-to-medium-sized businesses in existing LGAs, and new LGAs in Queensland (QLD) and NSW, which are adversely affected by flooding events, or impacts of the coronavirus known as COVID-19 (COVID-19).

Businesses affected by flooding or bushfires will be prioritised in the delivery of the Program and, where it can be accommodated within the available resources, support will also be made available to businesses impacted by COVID-19. LGAs are determined in consultation with the National Recovery and Resilience Agency (NRRRA) and relevant state governments.

Funding is provided to the Department of Industry, Science, Energy and Resources (the Department) to continue to engage business facilitators through the established framework of the Department's Entrepreneurs' Programme (EP), to support small-to-medium-sized businesses in LGAs adversely affected by 2019-2020 bushfire emergency, COVID-19 or flood emergencies.

The existing Program was funded for two years, from 1 July 2020 to 30 June 2022 at the cost of \$12.8 million. Through MYEFO 2021-22, the Program was funded for an extra year, from 1 July 2022 to 30 June 2023, at the cost of \$6.9 million. In response to the 2022 flooding emergency in northern NSW and Southern Queensland, the Program was expanded into Queensland and additional locations in New South Wales at an additional cost of \$7.1 million until 30 June 2023, as announced by the Prime Minister on 9 March 2022 (<https://www.pm.gov.au/media/more-support-nsw-and-queensland-flood-zones>).

\$6.9 million of the funding authorised by this Legislative Instrument comes from the Mid-Year Economic and Fiscal Outlook 2021-22 (<https://budget.gov.au/2021-22/content/myefo/download/myefo-2021-22.pdf>) at page 270 of Appendix A. The additional \$7.1 million of funding authorised by this Legislative Instrument, which was announced by the Prime Minister on 9 March 2022 in response to the 2022 flooding emergency, will come from the upcoming 2022-23 Budget.

The Program will fund the engagement of business facilitators to provide tailored business advice to small-to-medium-sized businesses adversely affected by the 2019-20 Black Summer bushfire emergency, flood emergencies, and where it can be accommodated within available resources, COVID-19, to support them to stay viable and strengthen their processes and strategies for the future, or exit the industry if that is determined to be the most appropriate action. The Program is administered by the Department in accordance with the principles and eligibility criteria available at <https://www.business.gov.au/Grants-and-Programs/Strengthening-Business>.

The Program will continue to be delivered through EP, which provides a suite of services tailored to small-to-medium-sized businesses to help them achieve their vision and grow. These services are provided through a dedicated national network of over 170 independent, expert facilitators. EP facilitators provide their businesses with rich and timely insights, access to regional and national business networks, and strong granting opportunities that support their trajectory over the short, medium and long term.

Spending decisions will be made by the Program Delegate, who is the AusIndustry General Manager responsible for administering the Program, pursuant to the department's delegation framework under section 36 of the IR&D Act. To be eligible to receive funding under the Program, funding recipients must be foreign, trading or financial corporations to which paragraph 51(xx) of the Constitution applies.

Spending will occur through a variation of existing EP contracts the Department has with a number of Delivery Partners that provide expert business advisory and facilitation services to small-to-medium-sized businesses. In making spending decisions, the Program Delegate will consider the proposals and recommendations of the Delivery Partners, and the recovery needs of communities impacted by the bushfire emergency and/or flood emergencies primarily, as well as COVID-19.

Spending decisions under the Program involve the allocation of finite resources between certain service providers, the Delivery Partners, who are specially positioned to deliver business advice services for the Program through existing contracts with EP. Merits review would not be able to provide an effective remedy to a party aggrieved by a decision, because a successful application for review by one service provider would require a reduction in funding to other service providers, and it would cause significant delays in channelling funds into service provision. Accordingly, external merits review will not apply to spending decisions of the Program Delegate.

Provision of business advice services under the Program is demand-driven, meaning all applications that satisfy the Program's eligibility criteria will receive business advice services, up to the limit of available business facilitator capacity. Applications will be assessed by AusIndustry against the eligibility criteria set out at <https://www.business.gov.au/Grants-and-Programs/Strengthening-Business>. The Program Delegate will not allow applications if there are insufficient Program funds or Program business facilitators available across relevant financial years for the Program. Both successful and unsuccessful applicants will be informed in writing. Unsuccessful applicants will also receive guidance on other measures that might be available to support them.

Awarding of business advisory services under the Program involves the allocation of finite resources among eligible applicants. The overturning of decisions on whether to provide applicants with business advisory services would affect the allocation of business facilitator capacity made to other parties. Accordingly, external merits review will not apply to decisions to award business advisory services to applicants under the Program.

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 Instrument is made is 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 funding under the Program prescribed by the Legislative Instrument. The funding conferred by the Program will be directed to assisting those corporations in the conduct of their ordinary activities, being the provision of business advisory services. The Program will impose terms and conditions on those corporations under an arrangement in accordance with section 35 of the IR&D Act, in relation to receipt of funding 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.

Background

From 2020, the bushfire emergency, COVID-19 and flood emergencies have necessitated a number of policies focused on supporting small-to-medium-sized business in affected communities. This Program is one of those. This Program expands on the Strengthening Business—Business Advice for Recovery and Resilience Program that was introduced in 2019-20.

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 Department has consulted with the Attorney-General's Department, the National Recovery and Resilience Agency, the Department of Education, Skills and Employment, the Department of Infrastructure, Transport, Regional Development and Communications, the Department of the Treasury, and local, state and territory governments on this Legislative Instrument.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (OBPR reference number 26029).

Details of the *Industry Research and Development (Strengthening Business Program) Instrument 2022*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Strengthening Business Program) Instrument 2022*.

Section 2 – Commencement

Item 1 in the table at subsection 2(1) provides that sections 1-7 of the Legislative Instrument commence on the day after registration on the Federal Register of Legislation.

Item 2 in the table provides that section 8 commences on the later of 1 July 2022 and the day after the Instrument is registered. This is to ensure that the Program's Delivery Partners can continue to receive funding and conduct activities under the existing Program, without any change in the legislative instrument by which the existing Program is prescribed, until that funding ends on 30 June 2022.

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 Strengthening Business Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides funding for business facilitators to provide expert business advice to small-to-medium-sized businesses affected by the 2019-20 bushfire emergency, flooding events or impacts of the coronavirus known as COVID-19.

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 makes provision in relation to eligibility criteria relating to the Program for the purposes of subsection 33(4) of the IR&D Act. It provides that the eligibility criteria include that the providers of business advice services under the Program, being the Program's Delivery Partners, must be foreign, trading or financial corporations to which paragraph 51(xx) of the Constitution applies.

Section 8 – Repeal

This section repeals the *Industry Research and Development (Strengthening Business—Business Advice for Recovery and Resilience Program) Instrument 2020* (previous instrument). The previous instrument has to date prescribed the Strengthening Business—Business Advice for Recovery and Resilience Program (that is, the existing Program) for the purposes of section 33 of the IR&D Act. It is intended that the previous instrument remain in force until 30 June 2022, and be replaced by the Legislative Instrument from 1 July 2022. See also item 2 in the table at subsection 2(1) of the Legislative 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 (Strengthening Business Program) Instrument 2022

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 purpose of the Legislative Instrument is to prescribe the Strengthening Business Program (the Program). The Program provides funding for business facilitators to provide expert business advice to small-to-medium-sized businesses affected by the 2019-20 Black Summer bushfire emergency, COVID-19 or flood emergencies.

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