

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Resources

Industry Research and Development Act 1986

*Industry Research and Development (Critical Minerals Development 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 Commonwealth entity, or by their delegate (under section 36).

The purpose of the *Industry Research and Development (Critical Minerals Development Program) Instrument 2022* (the Legislative Instrument) is to prescribe the Critical Minerals Development Program (the Program). The funding for the Program has been secured through the Department of Industry, Science and Resources (the Department) 2022-2023 Budget. The Program will provide up to \$50 million to help early and mid-stage critical minerals projects, aligning with the Government's objectives, overcome technical and market barriers. The Government may implement future iterations of the Program as required.

Key areas of priority for the Government include growing Australia's critical minerals resource knowledge base and moving into downstream processing, in order to contribute to growing global demand for critical minerals.

The purpose of the Program is to build alternative, competitive and reliable end-to-end critical minerals supply chains with Australia's allies and partners. The Program will help Australian critical minerals projects contribute to emerging supply chains, by lowering the risk associated with critical development activities. The Program will help projects progress towards offtake qualification (where the product is demonstrated to be suitably advanced to then facilitate purchasing agreements with customers) and securing debt finance.

The intended outcomes of the Program are to have a greater number of projects finance ready and increased investment in critical minerals supply chains, in order to build alternative, competitive and reliable end-to-end critical minerals supply chains with Australia's allies and partners.

Funding is available to successful companies to undertake eligible project activities. Eligible project activities can include but are not limited to: technical assessments, flowsheet design, constructing pilot plant and demonstration processing plants, and undertaking Front End Engineering and Design studies.

Funding authorised by this Legislative Instrument comes from Program 1.3, Outcome 1, as set out in the *Portfolio Budget Statements 2022-23, Budget Related Paper No. 1.9, Industry, Science, Energy and Resources Portfolio* (<https://www.industry.gov.au/sites/default/files/2022-03/2022-23-department-of-industry-science-energy-and-resources-pbs.pdf>) at page 44.

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

The Program is a merits based grants program. Grants will be 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>). The Legislative Instrument provides the eligibility criterion that applicants are constitutional corporations. Further eligibility and merit criteria will be outlined in the Program guidelines.

Spending decisions will be made by the Minister for Resources (the Minister), taking into account the recommendations of the Assessment Committee, who assess applications against the merit criteria.

Grants will be a minimum of \$1 million up to a maximum of \$30 million. The grant amount may be up to half of eligible project costs. No eligible project costs can be funded from other Commonwealth Grants; and State, Territory or local government cannot be lead applicants. Applications will be assessed against the eligibility criteria and merit criteria set out in the Program guidelines in two stages. Applications will first be assessed by AusIndustry against the eligibility criteria. An Assessment Committee, established by the Department, will then consider eligible applications against the merit criteria. This will include comparing the

applications and scoring each application out of 100. The Assessment Committee will comprise representatives from the Australian Government. The Assessment Committee may seek input from a panel of independent experts and/or technical advisors to inform their assessments, including the Critical Minerals Independent Advisory Panel.

The Program involves the allocation of finite resources between competing applicants and therefore falls within the category of decisions that would not usually be subject to merits review according to paragraph 4.11 of the Administrative Review Council guide, *What decisions should be subject to merits review?* available at <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>. 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.

Both successful and unsuccessful applicants will be informed in writing. Unsuccessful applicants have an opportunity to discuss the outcome with the Department, and may be provided an opportunity to submit a new application for the same or similar project in future funding rounds.

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 section 51(xx) of the Constitution (the corporations power).

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’(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.

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 corporations in the conduct of their ordinary activities (conducting critical minerals projects). 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.

Further details of the Legislative Instrument are set out at **Attachment A**.

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 (Office of Best Practice Regulation reference number 44548).

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at **Attachment B**.

Details of the *Industry Research and Development (Critical Minerals Development Program) Instrument 2022*

Section 1 – Name of Instrument

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

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 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.

Australia seeks to work with partners to build competitive and reliable critical minerals supply chains. The Program provides grants to help early and mid-stage critical minerals projects of strategic significance to overcome technical and market barriers. The Program will support projects through vulnerable points in the development process.

The Program supports the Government's objectives of growing Australia's critical minerals resource knowledge base and moving into downstream processing, in order to build alternative, competitive and reliable end-to-end critical minerals supply chains with Australia's allies and partners.

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.

Statement of Compatibility with Human Rights

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

*Industry Research and Development (Critical Minerals Development 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

Australia seeks to work with partners to build competitive and reliable critical minerals supply chains. The Critical Minerals Development Program (the Program) will look to provide sufficient, bespoke and targeted support for early and mid-stage critical minerals projects that will help Australia achieve its objectives in the critical minerals sector.

This Program of support for early and mid-stage projects would be time-limited. As more critical minerals projects come online the private sector, particularly financial and equity markets, will become more comfortable taking a view on the risk attached to critical mineral projects. This would be a sign of success: that we are making progress in overcoming the geopolitical and market obstacles holding back Australia's critical minerals sector. Australian Intellectual Property and expertise will also grow, developing the skills pool and investor confidence so critical to the sustainability of an industry. Australia will become integrated into emerging supply chains and markets, making entry by new participants easier.

The *Industry Research and Development (Critical Minerals Development Program) Instrument 2022* (the Legislative Instrument) provides legislative authority for grants designed to help early and mid-stage projects, consistent with the Government's critical minerals policy agenda, overcome technical and market barriers.

Human rights implications

The Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Madeleine King MP
Minister for Resources