

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Climate Change and Energy

*Industry Research and Development Act 1986*

*Industry Research and Development (Diesel Exhaust Fluid Emergency Stockpile 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.

Under subsection 33(6) of the IR&D Act, the Minister for Industry and Science has delegated the Minister's power under subsection 33(1) to prescribe the Diesel Exhaust Fluid Emergency Stockpile Program (the Program), to the Minister or Ministers with responsibility for administering the *Fuel Security Act 2021*.

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 (Diesel Exhaust Fluid Emergency Stockpile Program) Instrument 2022 (the Legislative Instrument) is to prescribe the Program. The funding for the Program has been secured through the Department of Climate Change, Energy, the Environment and Water 2022-23 Budget. The Program is part of a package of measures, which provides \$49.5 million in total funding, to deliver the Australian Government's commitment to secure the supply of Diesel Exhaust Fluid (DEF). As part of this package, the Program will establish an emergency stockpile of 7,500 tonnes of Technical Grade Urea (TGU) which is the main ingredient DEF. The strategic stockpile will ensure that Government can support the market through release of TGU, by sale of all or part of the

stockpile, if a supply shortage occurs. A release, by sale, of TGU from the stockpile could help prevent a supply crisis like that experienced in December 2021 by increasing supply in the market.

The Program provides funding for the Commonwealth to engage a successful tenderer, or successful tenderers, to undertake the procurement of the emergency TGU stockpile which will be owned by the Commonwealth. The successful tenderer, or successful tenderers, will procure, transport, store, and manage the emergency stockpile of TGU as directed by the Commonwealth. The Commonwealth will sell all or part of the emergency stockpile if a supply shortage occurs.

Funding authorised by this Legislative Instrument comes from Program 1.3: Supporting reliable, secure and affordable energy, Outcome 1, as set out in the Portfolio Budget Statements October 2022-23, Budget Related Paper No. 1.3, Climate Change, Energy, the Environment and Water Portfolio (<https://www.dceew.gov.au/sites/default/files/documents/dceew-2022-23-pbs.PDF>) at page 39.

The Program will be delivered by the Department of Climate Change, Energy, the Environment and Water (the Department). The Program is a limited tender procurement administered by the Department in accordance with the Commonwealth Procurement Rules (<https://www.finance.gov.au/government/procurement/commonwealth-procurement-rules>), subject to any applicable exemptions. The *Government Procurement (Judicial Review) Act 2018* (the Act) does not apply to this procurement because it is not a covered procurement within the meaning of section 5 of the Act.

Procurement decisions relating to the selection of a successful tenderer, or successful tenderers will be made by the Program Delegate who is the Head of Division with responsibility for administering the Program.

Procurement decisions, once made, will be final and not subject to merits review. The Program involves the allocation of finite resources between successful tenderers. Merits review would not provide an effective remedy to a party aggrieved by a decision because a successful application for review by one tenderer would require a reduction in funding to successful tenderers. Further, remaking a procurement decision after entry into contractual arrangements with successful tenderers is legally complex, impractical, and would either significantly delay or prevent entirely the procurement of the TGU. In the event of a national shortage of DEF, this has the potential to cause economic and social harm. This approach is consistent with the Administrative Review Council's guidance document on which decisions should be subject to merit review (<https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>) (e.g., see paragraphs 4.11 – 4.15).

The Legislative Instrument specifies that the legislative powers in respect of which the Instrument is made are the following:

**Executive power (section 61 of the Constitution) and express incidental power (section 51(xxxix) of the Constitution), including the nationhood aspect**

The express incidental power in paragraph 51(xxxix) of the Constitution empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested in the Parliament, the executive or the courts by the Constitution. That paragraph, together with section 61 of the Constitution supports activities that are peculiarly adapted to the government of a nation and cannot be carried out for the benefit of the nation otherwise than by the Commonwealth.

In that regard, funding authorised by the Legislative Instrument will allow the Commonwealth to build a TGU emergency stockpile and provide an immediate, time-limited response to mitigate the risks associated with a DEF supply shortage, in the event that industry wide stocks are depleted.

DEF is essential for the operation of modern diesel engines fitted with selective catalytic conversion systems. Without DEF these vehicles cannot run. DEF reduces noxious emissions that are harmful to human health and the environment. The majority of Australia's DEF consumption is in the long-haul road trucking fleet. A shortage would disrupt Australia's national DEF supply once industry stocks were exhausted.

This would have significant and widespread economic and social impacts for Australians. It would impact on transport and logistics services nationwide. A DEF shortage would also impact industries such as agriculture and mining which operate equipment reliant on DEF.

The Program will enable the continuation of transport and logistic services in the event of an industry DEF shortage, facilitating the ongoing supply of food, fuel, medical supplies and other goods across Australia. This will allow the Commonwealth to avoid a crisis of national significance and contribute to Australia's strategic liquid fuel security and food security.

**Trade and commerce power (paragraph 51(i) of the Constitution)**

The trade and commerce power (paragraph 51(i) of the Constitution) empowers the Parliament to make laws with respect to 'trade and commerce with other countries and among the States'.

In that regard, the Program prescribed by the Legislative Instrument will promote, protect and facilitate trade and commerce among the States by ensuring there is sufficient TGU and DEF in Australia to enable interstate transport and logistic services to continue in circumstances where there is an international disruption of supply. This will protect, support and enable many interstate trade and commerce activities; for example, the purchase and supply of food, fuel, medical supplies and other goods.

## **Territories power (section 122 of the Constitution)**

The territories power (section 122 of the Constitution) empowers the Parliament to ‘make laws for the government of any territory’.

In that regard, the Program prescribed by the Legislative Instrument will be supported by the territories power to the extent the DEF or TGU stock is procured, managed and/or sold in a territory (for example the Northern Territory or the Australian Capital Territory).

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 and the Department of Industry, Science and Resources have been consulted on this specific Legislative Instrument.

Consultation has occurred with the industry through regular Supplier Working Group meetings that bring together key figures in the DEF industry. Consultation has also occurred within Government, bringing together key agencies through Interdepartmental Committee (IDC) meetings. Agencies that attended the IDC meetings include:

- Australian Competition & Consumer Commission ;
- Australian Trade and Investment Commission;
- Department of Climate Change, Energy, the Environment and Water ;
- Department of Foreign Affairs and Trade;
- Department of Industry, Science, and Resources;
- Department of Finance;
- Department of Infrastructure, Transport, Regional Development, Communications and the Arts;
- Department of Prime Minister and Cabinet;
- Department of the Treasury; and
- the National Heavy Vehicle Regulator

As the Program has undergone extensive consultation, it was considered unnecessary to undertake additional consultation in relation to the specific instrument.

## **Regulatory Impact**

It is estimated that the regulatory burden is likely to be minor (Office of Best Practice Regulation reference number OBPR22-02802).

**Details of the *Industry Research and Development (Diesel Exhaust Fluid Emergency Stockpile Program) Instrument 2022***

**Section 1 – Name of Instrument**

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Diesel Exhaust Fluid Emergency Stockpile 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 *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 Diesel Exhaust Fluid Emergency Stockpile Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides funding for the Commonwealth to engage a successful tenderer, or successful tenderers, to procure an emergency stockpile of TGU in order to minimise the economic and societal harm that would result from any disruption in the domestic supply of DEF. The service provider, or service providers, will procure, store, manage and release, by sale of all or part of the stockpile, the emergency stockpile of TGU as directed by the Commonwealth.

**Section 6 – Other constitutional bases of this instrument**

This section provides that, in addition to its effect apart from this section, the Legislative Instrument also has the effect it would have if references to procuring, managing and selling were expressly confined to:

- procuring, managing and selling in order to facilitate trade or commerce between Australia and places outside Australia, trade and commerce among the States, or trade and commerce within a Territory, between a State and a Territory or between two Territories; and
- procuring, managing and selling within the limits of a Territory.

## **Section 7 – 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: trade and commerce with other countries, and among the States (paragraph 51(i) of the Constitution); enterprises and activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation (paragraph 51(xxxix) and section 61 of the Constitution); and the government of a Territory (section 122 of the Constitution).

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**.

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

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

*Industry Research and Development (Diesel Exhaust Fluid Emergency Stockpile 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 *Industry Research and Development (Diesel Exhaust Fluid Emergency Stockpile Program) Instrument 2022* (the Legislative Instrument) is to prescribe the Diesel Exhaust Fluid Emergency Stockpile Program (the Program). The Program provides funding to support the Australian Government's commitment to procure an emergency stockpile of Technical Grade Urea (TGU) in order to minimise the economic and societal harm that would result from any disruption in the domestic supply of Diesel Exhaust Fluid (DEF). Funding will be available for a successful tenderer, or successful tenderers, to procure, transport, store, and manage the emergency stockpile of TGU as directed by the Commonwealth. The Commonwealth will sell all or part of the emergency stockpile if a supply shortage occurs.

### **Human rights implications**

This Legislative Instrument engages the right to an adequate standard of living.

The Legislative Instruments supports the establishment of an emergency stockpile of TGU, which is a key component in DEF. DEF is necessary to ensure that continuation of the domestic supply chain, including in the transport of foods and goods across Australia.

Article 11 of the International Convention on Economic, Social and Cultural Rights recognises the right to an adequate standard of living which provides that all peoples should have access to adequate foods, clothing and housing, and to the continuous improvement of living conditions. The Program prescribed by this Legislative Instrument promotes the right to an adequate standard of living as it will prevent disruptions to the domestic supply chain, ensuring that Australians have ongoing access to nutritious foods and clothing.

### **Conclusion**

This Legislative Instrument is compatible with human rights as it has a positive effect on human rights.

**The Hon Chris Bowen MP**  
**Minister for Climate Change and Energy**